

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

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

THOMAS SPELLISSY

and

STRATEGIC DEFENSE INTERNATIONAL, INC.

**Defendants Motion to Strike the Government's Response in Opposition to
Defendants Joint Motion for a New Trial Based on New Evidence**

The purpose of this Motion is to Strike the Government's Response in Opposition to Defendant's Joint Motion for New Trial Based on New Evidence.

The Court should evaluate the Defendants' allegations in the Motion for a New Trial in a light most favorable to the Defendants, unless the Government provides a factual basis to conclude, as a matter of law, that a new trial is not permitted. The Government failed to properly oppose many key aspects of the Defendants' Motion for a New Trial, and those unopposed allegations should be deemed admitted for the purposes of whether the Court should grant a new trial. This includes the undisclosed new evidence, which changes the analysis of all of the underlying facts of this case.

Defendants provided sworn affidavits and Government documents to fully support both of their filed Motions with Addendums. The Government, however, either failed to or could not oppose Defendants Motions with a factual predicate. Additionally, more than ten (10) days had expired before the Government responded with their unsupported opposition. None of the Government allegations are based on a properly authenticated factual predicate, and therefore, the Government's submission is not reliable argument. As such, it is subject to this Motion to Strike.

Due to the failure to properly oppose the Defendants' Motions, the Court could conclude that the Government has admitted (1) that they accept that Defendant Spellissy's 8th Amendment rights were violated by cruel and unusual punishment by the Government, (2) that the Government agrees that Spellissy's 5th Amendment, and Double Jeopardy Clause rights were violated when he received multiple punishments for the same offense, and (3) that the Government also admits that the Defendants were unjustly convicted of conspiracy. In any event, the Defendants submit the following response to

the Government's four opposition statements:

Burke Found Guilty of Perjury: The Government knew or should have known before the trial in the instant case that their key witness, Burke, did not believe his own sworn plea agreement. After all, the Government threatened Burke with severe penalties if he did not submit to their plea agreement, and Burke indicated that he agreed to the plea agreement only under duress due to the Government's coercion. In fact, there is evidence that Burke told the Government prior to the trial that he would recant his plea agreement testimony if they called him as a witness in the instant case.

As a consequence, when the Government called Burke as their own witness, they should have been precluded from using the plea agreement to impeach him. Although the Federal Rules of Evidence allow the impeachment of a party's own witness, this should only occur (1) if the witness changes his testimony as a surprise to the party conducting the direct examination, (2) if the document used for impeachment does not improperly bias the Jury against another party, and (3) if the impeachment is material to the case. The Government, in reality, planned to use Burke as an opportunity to create unjust bias against Spellissy and SDI during Burke's direct examination through the use of the plea agreement and the drama the confrontation with Burke caused in front of the Jury. In other words, Spellissy and SDI were improperly and unjustly tainted in the eyes of the Jury by the impeachment of Burke.

Burke testified at least twice after the Defendants' trial that he did not conspire with Defendants. He gave un-contradicted testimony to support this. To conclude that the plea deal is the truth is ridiculous. In the instant case, the AUSA did not call Special Agent Calvert to testify against Burke's claims of coercion and threatening his family because Calvert is dishonest, unethical and nothing less than a liar as the Court previously ruled. The Government stated in its response to the Defendants' Motion for New Trial, "The subsequent perjury conviction confirms that Mr. Burke lied when he testified that he had not been bribed," however the Government is being disingenuous because the weight of the evidence is that Burke committed perjury by signing the plea agreement in the first place. Furthermore, the bribery conviction was dismissed by the Court, which makes the Government's response less than logical. The Government should not be allowed to argue at Burke's perjury trial that the Government doesn't care which statement is the truth (i.e., Burke's plea or his trial testimony), but then argue in the instant case that Burke's testimony is not the truth. It is also very concerning that the AUSA prosecuted Burke for perjury, but failed to prosecute one of their own (i.e., Special Agent Calvert).

The plea agreement is a perjured document, not the live testimony at trial by Burke. As a consequence, the Government knew (or should have known) that it would be placed in the unethical position of putting on an impeachment based on perjured testimony in front of the Jury if it became necessary to impeach Burke at the trial of Defendants. There is no way that the Government ethically should have called Burke, their star witness, to testify. This same document (i.e., the perjured plea agreement) was really used to bias and unjustly implicate the Defendants and poison the Jury.

The unethical use of Burke's impeachment should, by itself, provide a basis for a new trial. If the Government believes that its case against Spellissy and SDI is strong enough to result in a conviction without the improper use of Burke's plea agreement, then the Government really should not have any serious opposition to a new trial. The Defendants, however, respond to the remainder of the Government's points as follows.

Witness Tampering: It is without question that Captain John Tutterow and at least one other military officer tampered with Defendants' witness, Sergeant First Class Landers. The Assistant United States Attorney (AUSA) admits that he was part of the witness tampering. The AUSA had no legal authority to interfere with Sergeant Landers', who was under subpoena of this court or interfere with Landers' legal representative at Fort Bragg concerning the execution of the subpoena without the knowledge of the court.

Federal Rules of Criminal Procedure, Rule 17, Subpoena, (2) Quashing or Modifying the Subpoena, states "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

According to Rule 17, the court may quash or modify the subpoena not the United States Army acting in concert with the AUSA which was unknown to us until we received the Government's response. If the AUSA was aware of issues surrounding the subpoena it should have been brought to the attention of the Federal Circuit Judge, especially after Judge Whittemore had already warned the Government about interfering with witnesses when defendants were preparing for the Franks Hearing. The Court should compare Tutterow's letter to what the AUSA is saying because Tutterow's letter contradicts what the AUSA is alleging.

The Tutterow letter tells Defendants trial lawyer that he hopes he can resolve the issue without involving the US Attorney [Tampa]. However, the AUSA states in the Government's response that he was in contact with Tutterow (May 2nd, 2006) upon receipt of the subpoena for Sergeant Landers. This is the day before the letter was written. If the AUSA knew of the letter and talked to Tutterow, then, why would Tutterow want to work with the trial lawyers without involving the AUSA? The reason is because Tutterow wanted to know what the Defendants were going to ask Sergeant Landers so that Tutterow could then report it back to the AUSA or USSOCOM lawyers. The Government wanted knowledge of Defendants attorney client privileged work product. The Government alleges that the letter was faxed to Defendants' attorney. The Government offered no proof of this. Defendants filed a sworn affidavit contradicting the Government's position on this, no fax was received. Although the Government alleges that the AUSA spoke with an unnamed previous defense attorney, even if true, it does not excuse the AUSA's conduct in not following the law, Rule 17. Once again the Government is changing the underlying facts of this case.

This unethical behavior by the Government is persistent throughout the whole case. It is plainly the Government's fault for ordering Sergeant Landers not to appear as a

witness for a criminal trial. By the way, the Government had no issue with Colonel Rupp appearing as a Government witness.

Defendant Spellissy Was On Active Duty: Defendants could not be any clearer in their motions. The United States Army, which is part of the Government, has determined through undisclosed evidence that Colonel Spellissy was on active duty when the conspiracy was born. At Sentencing the Government's position was that there was an alleged agreement, that agreement was not carried out and there were no damages to the Government. Respectfully, the AUSA should disclose what the Army has found. Also, the Government knows that if Colonel Spellissy was on active duty when the alleged conspiracy was born, then this fact changes the analysis all of the underlying facts for the whole case. This is complete injustice. Title 10, Armed Forces, Subtitle A, General Military Law, Part II, Personnel, Chapter 47, Uniform Code Of Military Justice is the cited legal authority for active duty personnel.

Polygraph Test: Defendant Spellissy cooperated with the Government during the case. FBI Special Agent Tim Gorman confirmed this during his testimony at the trial. Spellissy wasn't offered a Polygraph because the Government is not interested in the truth, specifically with what is stated in Defendants Notice for Non-Opposition. The Government fears an acquitted Spellissy. This case is nothing less than an all out effort to convict an innocent man. The AUSA states "Clearly, a polygraph test could have been taken at any time before the commencement of the trial by exercising due diligence." Then why didn't the AUSA or his agents offer the polygraph to Defendant Spellissy? The answer is because they are not interested in finding out the truth.

Conclusion

Defendants request that all previously filed motions be granted. A new trial will correct a serious miscarriage of justice.

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 1st day of November, 2007.

/s/ John F. McGuire
John F. McGuire, Esquire
FL Bar # 000401
McGuire Law Offices
1173 N.E. Cleveland Street
Clearwater, Florida 33755
Phone (727) 446-7659
Fax (727) 446-0905

/s/Sean P. Cox
Sean P. Cox, Esquire
Florida Bar # 053155
McGuire Law Offices
1173 N.E. Cleveland Street
Clearwater, FL 33755
Phone (727) 446-7659
Fax (727) 446-0905