

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.

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**DEFENDANTS THOMAS SPELLISSY AND STRATEGIC DEFENSE  
INTERNATIONAL, INC.'S JOINT MOTION FOR NEW TRIAL BASED ON  
PROSECUTORIAL MISCONDUCT, INEFFECTIVE ASSISTANCE OF COUNSEL AND  
NEW EVIDENCE.**

Defendants Thomas Spellissy and Strategic Defense International, Inc. (hereinafter jointly referred to as "Defendants") through their respective undersigned counsel, hereby jointly move for a new trial under 28 USC § 2255 on the basis of evidence of prosecutorial misconduct, a violation of Defendants' Constitutional Rights under the Fifth and Fourteenth Amendments and/or ineffective assistance of counsel, a violation of the Sixth Amendment or on the basis of new evidence in accordance with Federal Rule Criminal Procedure 33. Defendant Spellissy voluntarily surrendered into custody on December 27, 2007 at Federal Detention Center (FDC), Miami. Defendant Spellissy is reporting to a FDC contrary to the Court's order for him to serve his sentence in a Federal Camp.

**MEMORANDUM OF LAW**

**28 USC § 2255. Federal custody; remedies on motion attacking sentence**

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the

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sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain -

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”

“**Federal Rule of Criminal Procedure 16** governs discovery and inspection of evidence in federal criminal cases. The Notes of the Advisory Committee to the 1974 Amendments expressly said that in revising Rule 16 “to give greater discovery to both the prosecution and the defense,” the committee had “decided not to codify the Brady Rule.” However, the committee explained, “the requirement that the government disclose documents and tangible objects ‘material to the preparation of his defense’ underscores the importance of disclosure of evidence favorable to the defendant.

Rule 16 entitles the defendant to receive, upon request, the following information:

- Statements made by the defendant;
- The defendant’s prior criminal record;
- Documents and tangible objects within the government’s possession that are material to the preparation of the defendant’s defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant”;
- Reports of examinations and tests that are material to the preparation of the defense; and

- Written summaries of expert testimony that the government intends to use during its case-in-chief at trial.

Rule 16 also imposes on the government a continuing duty to disclose additional evidence or material subject to discovery under the rule, if the government discovers such information prior to or **during the trial.**”

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 this motion there is newly discovered evidence. This motion is submitted in a timely manner pursuant to the Rules of Criminal Procedure Rule 33 (b) (1).

In the instant case, the Court should vacate the judgment against the Defendants based on prosecutorial misconduct and/or ineffective assistance of counsel and/or new evidence and grant a new trial.

## **ARGUMENTS**

The government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." Strickler v. Greene, 527 U.S. 263, 281 (1999) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

**1. The first part of this motion substantiates Prosecutorial Misconduct throughout Defendants’ legal due process.** Defendants’ right to receive fair hearings and trial has been adversely affected by prejudicial action, suppression of evidence, manipulation, deception, lies, omissions of the truth, witness tampering, coercion, and perjury.

**a. Start of the Investigation.** The instant case started when the Commanding General, United States Special Operations Command (USSOCOM) received a complaint from Major General (Retired) C. A. “Clyde” Hennies. (Dkt 33-2) The complaint was about Strategic Defense International, Inc (SDI) winning a competitive contract at Picatinny Arsenal. (Dkt 109, page 220) The USSOCOM Inspector General (IG), Defense Criminal Investigative Service (DCIS) and the Assistant United States Attorney (AUSA) never checked on the validity of the complainant or Hennies’ relationship with General Bryan “Doug” Brown, Commanding General, USSOCOM (Dkt 109, page 233).

Question: Never looked into the complainer was?

Colonel Rupp: No. We don't look at the complaint. That's not part of our process.

It is now undisputed that, the initial complaint by Hennies that started the investigation was false. No evidence was ever presented by Hennies or the government that Defendant Spellissy was buying bunker defeat munitions (BDMs) from the Norwegians and Swedes when he was on active duty because USSOCOM does not procure BDMs. The Army and Marine Corps procure BDMs from Talley Defense Systems, USA (Exhibit 13, Spellissy Affidavit). The complaint further states Spellissy was working for foreign governments (Dkt 33-2). There is no evidence by Hennies or the government that Defendant Spellissy was working for a foreign government because Defendants never worked or had discussions to work for a foreign government. The initial complaint was centered on Strategic Defense International, Inc. winning a contract, therefore, the complaint should have been filed to the General Accounting Office (GAO), not USSOCOM, pursuant to 31 U.S.C. § 3553 and Federal Acquisition Regulation 33.104. The lead investigative agent, Special Agent Robert Calvert, whom according to his sworn affidavit worked for DCIS for twenty (20) years, knew the proper procedures for contract disputes (Calvert's Affidavit, page 2). The United States Special Operations Command has its own Acquisition Directorate and they also should have been able to advise the IG and the DCIS that the complaint should have been filed with the GAO. At trial Dr. Uhler, USSOCOM Acquisition Executive, cited an example of a USSOCOM losing contractor filing their complaint to the GAO not to Dr. Uhler or General Brown (Dkt 111, page 705). This is also evidence that Dr. Uhler knew the proper procedure on where to process and whom was responsible to investigate a contractual complaint. This initial lack of due diligence by investigators started the prejudicial bias against the defendants throughout the case.

Allowing Major General (Ret) Hennies, a competitor to Defendants, to use the federal system and its investigators to go after Defendant Spellissy when there is no evidence of a crime is prosecutorial misconduct by the USSOCOM General Inspector agents and the DCIS agent for taking a contractual complaint and spinning and manipulating it into a criminal complaint.

Colonel Kruelski, United States Special Operations Command IG presented significant false information to the DCIS, to the Federal Bureau of Investigation (FBI) and the AUSA. The Court stated,

"This false statement must necessarily be redacted according to Franks in determining whether the affidavit otherwise established probable cause".

"According to Colonel Kruelskie, his investigation to date has revealed that

Spellissy was instrumental in having SOCOM submit a request to the Department of Defense to the House of Representatives, Committee on Appropriations, for approval of purchasing a 70mm rocket warhead under the Foreign Comparative Testing (FCT) program from the Nordic Ammunition Company (NAMMO), Raufoss, Norway. Colonel Kruelskie provided a copy of a letter prepared by the PEOSP, dated May 12, 2004, and submitted to the Deputy Under Secretary of Defense, listing tile 70mm rocket warhead as the second highest priority of SOCOM's for FCT approval" (Dkt 44-1, page 6).

This false information became the justification for a search warrant. AUSA O'Neill and Special Agent Calvert blindly accepted information that was blatantly false from the United States Special Operations Inspector General agents and used this information to initiate the investigation and eventually prosecute an innocent man. This false information presented by the prosecution caused confusion to the Magistrate Judge, the District Judge and Defendants' Trial Counsel.

As the investigation progressed and it became obvious that Colonel (Retired) Spellissy had done everything correctly in accordance with the Procurement Integrity Act and had not violated Title 18 US Code § 207 (a) and (b), and § 208 (b). AUSA O'Neill in collusion with Special Agent Calvert, Colonel Kruelski and others developed a theory that Spellissy had orchestrated a bribery scheme with a low level government private contractor with no decision authority, Mr. William Burke.

**b. The Affidavit for a Search Warrant.** The affidavit states,

"The purpose of this affidavit is to set out facts sufficient to support the issuance of a search warrant based upon a finding that probable cause exists to believe that Spellissy, or an officer of the business entity described below, committed violations of the Title 18, U.S.C. § 207 (a) and (b) or § 208 (a)" (Dkt 44 & Calvert's Affidavit, page 2).

As the Court knows, these are post retirement conflict of interest laws for former government employees of the Executive Branch. AUSA O' Neill became involved with the investigation of the instant case before March 9, 2005 (Exhibit 1, March 9, 2005 DCIS Report). Government documents reveal according to AUSA O'Neill and Agent Calvert, Defendant Spellissy was being investigated for the following allegations;

"(1) representing a foreign interest, through his company Strategic Defense International, Inc. (SDI), in order to influence the awarding of future government

contracts to Nordic Ammunition Company (NAMMO), Norway; (2) influencing the awarding of a contract to SDI by Picatinny Arsenal; and (3) directing the awarding of a contract by SOCOM to SDI for consulting while on active duty (Exhibit 1, March 9, 2005 DCIS Report).

On April 13, 2005 AUSA O'Neill in concert with DCIS, Special Agent Calvert, Lead Investigator, obtained a search warrant for Defendant Spellissy's home for the above mentioned purpose. The search was conducted on April 13, 2005. After the search, according to DCIS document, dated May 4, 2005 Defendant Spellissy was only being investigated concerning the allegation that he was representing a foreign interest before and subsequent to his retirement (Exhibit 2, DCIS Letter to USSOCOM).

Representing a foreign interest implies that Defendant Spellissy would be working for a foreign government. This allegation would be in violation of 18 U.S.C. § 219 not a violation of 18 U.S.C. §§ 207 (a) and (b) or § 208 (a). In 37 U.S.C. § 908 Congress authorizes the Secretary of State and the Secretary of the appropriate military department to approve work for a foreign government. Representing any interest while on active duty would have been an 18 U.S.C. § 205 or a Procurement Integrity Act, 42 U.S.C. § 423 violation. There is no mention in the investigators document, Exhibit 1, of Defendant Spellissy being investigated for post government employment conflict of interest violations, 18 U.S.C. §§ 207 (a) and (b) or § 208 (a).

There is no evidence that SDI was awarded the Picatinny contract. How can you have an investigation based on a contract award when there was no contract award? There is no evidence that USSOCOM awarded a contract to SDI when Spellissy was on active duty. Defendant Spellissy was hired by Sverdrup Technology (Dkt 109, Government's Trial Exhibit 3h, Sverdrup Contract). Sverdrup not Defendants worked with the Government to amend the Sverdrup contract USZA22-02-D1114 to obtain additional funding for Defendant Spellissy to travel to represent the Government in Sweden, Norway and Germany (Exhibit 3, April 15, 2005 DCIS Report). However, AUSA O'Neill, Special Agent Calvert and Colonel Kruelski already knew this before they obtained a search warrant. Stan Highsmith, Deputy PEO SP told the USSOCOM IG on December 10, 2004,

"Spellissy was hired to represent our office and to introduce Don Jones to various entities in Europe ..... I question why USSOCOM would want to use Col Spellissy as a consultant through a Picatinny Contract when he is already available under a local Sverdrup arrangement" (From Dkt 38, - now Exhibit 4, Highsmith Statement).

AUSA O'Neill, Special Agent Calvert and Colonel Kruelski also had Don Jones' (Program Manager for Ammunition, USSOCOM) email. This email, dated November 24, 2004, states

“. . . is justified given the in-depth technical knowledge and understanding of SOF operational requirements needed for meetings, at up to CEO level, with representatives from Saab Bofors Dynamics (Sweden), and the Nordic Ammunition Company (NAMMO) (Norway). The individual will provide programmatic, evaluation, advisory, and technical assistance for discussion of current and future weapons, munitions and energy armament systems in support of the U.S. Special Operations Command (USSOCOM), Program Executive Office for Special Programs (PEO-SP). Individual's expertise is especially vital given the absence at these meetings of the PEO and Deputy PEO (both are unavailable due to other commitments)” (Dkt 38).

In Dkt 38 there is a copy of the contract agreement between Thomas F. Spellissy and Sverdrup, dated October 18, 2004. It specifically states on page 3 of the contract,

“This agreement shall remain in force for the time of performance as specified in Article V of this agreement unless: d. Failure of Consultant to comply with the Organizational Conflict of Interest provision of the USSOCOM ALMBOS Contract USZA22-02-D-0014.”

Defendant Spellissy was a USSOCOM Contractor. This contract authorized him a green contractor badge giving him unlimited access to USSOCOM. This was approved by Deputy, Special Programs Stan Highsmith. If it was not approved by the government, Defendant Spellissy would have not been able to gain access to USSOCOM and work on the USSOCOM contract. The government was well aware of this four months before a search warrant was approved by the Magistrate Judge.

Therefore, according to the Government's own documents, the Government launched an investigation against Defendant Spellissy for alleged violations of 18, U.S.C. §§ 207 (a) and (b) or § 208 (a) with the specific knowledge that Spellissy could not have violated those statutes. The AUSA already knew that Defendant Spellissy did not violate §§ 207 (a) and (b) or § 208 (a) before the search warrant was issued. However, Agent Calvert under the responsibility of the AUSA obtained a search warrant alleging violations of those statutes. The search warrant affidavit was a ruse an excuse to get into Defendants Spellissy's house. They knew exactly what they were doing. According to the Government's own internal documents the purpose of the affidavit should have

been to set out facts sufficient to support the issuance of a search warrant based upon a finding that probable cause exists to believe that Spellissy, or an officer of the business entity described below, committed violations of the Title 18 U.S.C. § 219 and or 18 U.S.C. § 205 but since they couldn't make a sufficient affidavit for those alleged violations they fabricated data and left out essential data and sought a search warrant based on §§ 207 (a) and (b) or § 208 (a).

Paragraph 11 of Agent Calvert's affidavit stated,

"Your 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."

Defendants were never given this tape and this statement is contradictory to the evidence presented in Dkt 38. Colonel Rupp appeared as a government witness at trial and this tape was not turned over as part of discovery per Rule 16.

Defendants are mystified how the AUSA and law enforcement agents can investigate and prosecute with this type of strategy. This was all tolerated, manipulated, coordinated and executed in concert by AUSA O'Neill and his DCIS and SOCOM agents. The manipulation and misuse of laws, the omissions of facts, and the reckless disregard for the truth are all substantiated evidence of prosecutorial misconduct that had a significant adverse prejudicial impact on the Defendants legal due process.

**c. Defendants Motion to Suppress (Franks) Hearing.** The purpose of the Franks Hearing was to determine if there was probable cause that Defendant Spellissy had violated 18 USC § 207 (a), (b) and § 208 (a). The Court found probable cause for a § 207 (a) violation because the Court inferred that Defendant Spellissy attended a 70mm Bunker Buster Warhead meeting in Norway (when in fact he didn't). The government presented no evidence that Spellissy attended the meeting.

The Court already stated that Special Agent Robert Calvert misled the Federal Magistrate Judge through omissions of fact and reckless disregard for the truth when writing and briefing his sworn affidavit concerning alleged violations of restrictions on post active duty employment (Dkt 44-1). As this Court already knows this was investigated and dropped because nothing Defendant Spellissy had done was done without permission from his superiors at USSOCOM and he did not violate any laws.

The prosecutorial misconduct did not go unnoticed during the Franks Hearing. In Judge James Whittlemore's Order on the Appellant's Motion to Suppress, the District Court Judge accurately stated that:

"When a search warrant affidavit contains, as Calvert's affidavit does, intentional misrepresentations and statements made in reckless disregard for the truth, and omits material facts critical to probable cause, the question is whether, after deleting the misstatements and including the material omissions, the affidavit is sufficient to establish probable cause." (Dkt 44)

The District Judge verbally reprimanded the AUSA O'Neill at the Franks hearing for the conduct of his federal law enforcement agent by stating,

"And this witness [Calvert] misrepresented what it said in his affidavit. The statue says what it says. I don't understand. I don't understand how the government can attempt to defend misrepresentations either false or made with total disregard for the truth. You can't just shut your eyes, as this man apparently did, and mislead the Magistrate Judge. The 4<sup>th</sup> Amendment means more than that. " (Emphasis added)

**"I'm troubled about it and you should be [O'Neill], too."** (Dkt 44)

However, this statement fell on deaf ears. No action by AUSA O'Neill was taken against Special Agent Calvert's unethical and illegal behavior. This is because we now know that AUSA O'Neill played a key role in Agent Calvert's actions pertaining to the search warrant. According to the government's own document, Agent Calvert states

"AUSA O'Neill requested that he be kept current on the investigation and the draft affidavit for the search warrant" (Exhibit 1, March 9, 2005 DCIS Report).

Also, at this hearing the defense trial counsel was initially confused as was the court. The defense thought that the search warrant was based on Defendant Spellissy being on active duty and that he was accused of violating the Procurement Integrity Act (Dkt 21 & Dkt 22, paragraph 3). The court was just as confused about the timeline of when Defendant Spellissy had given up procurement authority and when he actually retired from active duty. The AUSA informed the court several times that the search warrant was based on alleged violations of 18 US Code § 207 (a), (b) and § 208 (a).

One of the clearest indicators of the AUSA O'Neill's bad faith, dishonesty, and recklessness is the fact that he approved Special Agent Calvert to get a search warrant based on a § 207 violation when, by the his own admission, the effective date by which to measure 18 U.S.C. § 207 violations was going forward from the effective date of the Defendants actual retirement on December 31, 2004. Mr. O'Neill states,

“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'Neil states,

“Assuming arguendo that the statement was false, the inevitable question is why would the affiant make a misrepresentation concerning defendant's status as the PEO-SP. For purposes of the affidavit, defendant's status as PEO-SP from July 31, 2004 through December 31, 2004, is simply immaterial. As Title 18, United States Code, Sections 207 and 208 are abundantly clear, those statutes are applicable to all employees of the executive branch of the United States. The provisions of the statutes affecting restrictions on said employees run from the date of the termination of government service. In defendant's case, the operative date is December 31, 2004. It does not matter at all what his position was on that date. Therefore, there simply would be no reason for the affiant falsely to state that defendant continued on as PEO-SP until his retirement date of December 31, 2004.” (Dkt 41, page 12)

The third time, Mr. O'Neil states,

“The government's position is that it's immaterial that he was no longer the PEO-SP because § 207 and § 208, which are the statues that they were looking for evidence to determine whether or not there had been a criminal violation implicates your year or two years, it wouldn't be from the time he finished PEO-SP, but from the time of his retirement, which is unequivocally December 31<sup>st</sup>, 2004. (Dkt 121, page 120)

Therefore, according to the AUSA's own admission (three times), any violation of § 207 could have only occurred after the date the Defendant actually retired from the military on December 31, 2004. Yet, Special Agent Calvert in collusion with AUSA O'Neill presented the Magistrate Judge with an affidavit that alleged a violation of § 207 had occurred on the Norway trip (that USSOCOM hired Spellissy for, he had permission to work from his former government superiors, he had secured ethics letters and he didn't even attend the 70mm program meeting) the Defendant took at the beginning of December in support of USSOCOM Program Manager, Mr. Don Jones, weeks before the effective measuring date for a § 207 and § 208 violation began. Therefore, probable cause could not have possibly existed for any § 207 and § 208 violation that occurred before the December 31, 2004 date. The proper and ethical position that the AUSA should have taken was to admit that he was wrong in obtaining a search warrant for an alleged § 207 and § 208 violations, which would have caused the Court to conclude that no probable cause existed to search Defendant's house before the trial.

Also, at the end of the Franks Hearing (Dkt 44, page 144) AUSA O'Neill states,

"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."

This statement is made to give the Court and the Defendants the impression that the AUSA and Special Agent Calvert were working quickly with a sense of urgency to stop criminal activity to get the warrant, when in reality according to their own documents (Exhibit 1, March 9, 2005 DCIS Report) they had a least five (5) weeks to properly investigate and prepare an affidavit to obtain a search warrant and that he himself, O'Neill, was involved in the process. AUSA O'Neill is a lawyer. They had plenty of time to make a few phone calls and verify the information they had before they went to the Magistrate Judge to get the search warrant. The AUSA's statement to the Court is nothing less than a deliberate prejudicial remark made to mislead the District Court into believing that Agent Calvert was acting faithfully by himself under a time constraint and criminal activity had to be urgently stopped.

There was so much confusion as to the purpose and contents of the affidavit, the testimony by government officials and the prosecutors comments that the District Court erred in its conclusion that probable cause existed.

The Court stated,

“Based on the facts in Calvert's affidavit, there was probable cause to believe that when Spellissy represented NAMMO during the meeting concerning the 70mm rocket warhead with the government in Norway, he had reason to know that the 70 mm rocket warhead listed in Dr. Uhler's procurement letter was a NAMMO product and that it had been a matter under his official responsibility as PEO-SP during May 2004, contrary to the prohibitions in 18 U.S.C. § 207(a). Accordingly, it is ORDERED AND ADJUDGED that Defendants' Motion to Suppress Results of Search (Dkt 21) is DENIED (Dkt 44-1, page 12-13).

On December 21, 2007 Defendants' counsel interviewed Mr. Don Jones, former Program Manager for Ammunition, USSOCOM (Exhibit 12, Jones' Sworn Testimony). Jones had been unavailable for interview or to be called as a witness for the Franks Hearing and trial because he was deployed to Iraq (Exhibit 11, Email from LTC Weir, USSOCOM Lawyer to Defendants' Trial Counsel). Mr. Jones confirmed he was in Iraq from March 2006 to August 2006. (Exhibit 12, page 43, line 14) Mr. Jones' testimony is new evidence. Mr. Jones was on Defendants' witness list request to USSOCOM (Exhibit 11) and he was not available and his testimony had not been taken until December 21, 2007 which is after trial, the Defendants used due diligence to discover the evidence; the newly discovered evidence is material to issues before the court; the evidence is not merely cumulative or impeaching; the evidence is material; and a new trial will produce a new result.

Mr. Jones testified that Defendant Spellissy was not at the meeting when the 70mm warhead discussions took place (Exhibit 12, page 30, line 23).

Question: Specifically, there was a meeting where --- first of all, do you know that the 70mm warhead is produced by NAMMO?

Jones: Yes

Question: Were you aware that Colonel Spellissy was not sitting in the meeting with NAMMO and yourself while that particular weapon was being discussed.

Jones: I remember before we started meetings with NAMMO, Colonel Spellissy had said something to the effect that during the discussions with NAMMO, I am not a government – I'm not acting for the government or something to that effect, if I remember correctly. Then when it came time for the meetings with NAMMO, he made it a point to leave.

Question: Was Tom Spellissy present during any presentations of the 70mm warhead?

Jones: No. There were no demos. (Exhibit 12, page 33, line 10)

Question: I'm going to read you a quote that, I believe, was by a judge in a case recently. I want you to pay attention to this. This is in an order by a judge in Colonel Spellissy's case.

Jones: Okay

Question: "Based on the facts in Calvert's affidavit, there was probable cause to believe that when Spellissy represented NAMMO during the meeting concerning the 70mm rocket warhead with the government in Norway, he had reason to know that the 70 mm rocket warhead listed in Dr. Uhler's procurement letter was a NAMMO product and that it had been a matter under his official responsibility as PEO-SP during May 2004, contrary to the prohibitions in 18 U.S.C. § 207(a)." The quote I just read to you says that he was present during the meeting in Norway. Would you say that statement is false?

Jones: To the best of my memory, Colonel Spellissy left before that particular meeting started.

Also, Mr. James Rooney, the former President of Nordic Ammunition Company, Inc USA (NAMMO Inc) and President of Rooney Group International, Inc (RGI) had recently (November, 2007) come forward and submitted an affidavit pertaining to the 70mm meeting between Mr. Jones and the Program Manager of NAMMO, Norway. Mr. Rooney was in Norway and attended the 70mm program meeting. Defendants were a consultant to Rooney Group International, Inc. Mr. Rooney clearly states that Defendant Spellissy was not present for the 70mm program meeting because of conflicts of interest issues. He also states that Special Agent Calvert nor the Assistant United States Attorney, Mr. Robert O'Neill never contacted him to discuss the 70mm program meeting in Norway (Dkt 149, See Exhibit A, Rooney Affidavit).

Mr. Jones' and Mr. Rooney's testimonies unequivocally proves that there was no probable cause for Special Agent Calvert to search Defendant Spellissy's residence for a Title 18, U.S.C. § 207 (a) and (b) or § 208 (a) violation. No one testified at the Franks

hearing that Defendant Spellissy was actually present during the 70mm program meeting. The Court inferred from the testimony and Calvert's affidavit that Defendant Spellissy was present at the meeting when NAMMO's 70mm program warheads were discussed, when in fact he was not. The Court erred by failing to recognize this material fact and that error is clear error, therefore the Court can not substantiate its findings for probable cause with the information provided now by Mr. Jones and Mr. Rooney to the Court.

**d. Not turning over all evidence to the defense before the trial.** At Defendant's trial, Burke testified that he gave investigators a copy of his and Defendants initial work agreement – "general services agreement" (Dkt 109, page 359-360). No evidence 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 given to the government is required to be disclosed to the defense. Brady v. Maryland, 373 U.S. 83, 87-88 (1963). Why didn't the Defense get this agreement as part of Discovery or per Jencks Act, 18 U.S.C §3500? At the trial, immediately after Burke made the above statement, AUSA O'Neill showed Burke a July 2005 contract document between Defendants and Burke knowing that this is not the document that his witness is referring to. Burke explains that there are two separate signed agreements (Dkt 109, page 361). This is substantiated fact that the AUSA and his agents kept evidence from the Defendants. This agreement defines the agreement that Defendants had with Burke.

"[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 criterion of materiality is met only if 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.").

In *Martinez v. United States* at 763 F.2d 1297, page 1312 the 11<sup>th</sup> Circuit discusses the different standards between a judgment of acquittal and a new trial, and significantly recites that on a motion for judgment of acquittal, the court assumes the truth of evidence offered by the prosecution. This translates that Burke's testimony be assumed true as well as other evidence in the case in support of the government's position. Given this, how can the Defendants have a fair trial if all the true evidence is not brought into the court? You can't. Burke said he had a copy of the original agreement and gave it to a law enforcement agent. This agreement is key evidence that is missing. The AUSA failed to give Defendants a copy of this agreement in accordance with Rule 16. This evidence would show that the agreement between Defendants and Burke had been legal and there were no conflicts of interest violations. It would also show that there was no commission schedules agreed to, there were no agreements for payment "down the road." Last, this agreement would substantiate that there is no conspiracy to defraud the government. This document is critical and would support Burke's un-contradicted testimony that Spellissy never asked him to do anything illegal. This agreement would negate any inference a jury could have for the emails in Government's Trial Exhibits 10 and 12. The outcome of the trial and or the Judgment Notwithstanding the Verdict (JNOV) hearing would have been favorable to the Defendants on the remaining conspiracy charge.

**e. At Defendants' Trial.** AUSA O'Neill gave false argument in his closing rebuttal statement to the jury when he said,

"The insinuation that somehow the government continues to be intimidating to Mr. Burke or to the defense or this conspiracy of how this investigation started, what were it not for a search warrant, there would be no case.

Did you hear from Lou Hennies, whoever he might be? Did you hear from General Brown, who ever he might be?" (Dkt 111, pages 863-864)

Mr. O'Neill knows exactly who Lou Hennies and General Brown are. On Defendants Motion to Compel, the AUSA gave Defendants' defense team and the Court a copy of Lou Hennies' emails that started the investigation (Dkt 33-2). Dkt 33-2 is a government

document. AUSA O'Neill is telling the jury that the persons in this document are irrelevant. This is very misleading to the jury. The Defendants' cross examination of Government's witness; Colonel Rupp was all about Hennies (Dkt 109). AUSA O'Neill's statement to the Jury is improper shifting of the burden of proof to the Defendants. O'Neill is telling the Jury that it is the Defendants burden to prove Hennies was behind this case when in fact the defense doesn't have to prove anything. This tactic used by Mr. O'Neill is out right deceptive and is a blatant misrepresentation of fact that further misled the jury and made the trial unfair.

AUSA O'Neill also said in his rebuttal closing statement,

"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 also misleading the jury. The AUSA never told the Jury in his opening statement that Burke was going "south and changes his statements to everybody" (Dkt 109, page 187). In his opening statement, Mr. O'Neill never discussed the January 13, 2006 meeting (Defendants' Trial Exhibit 36) he had with Mr. Burke and his attorney, Mr. Hernandez. In the meeting notes, Mr. Burke tells Mr. O'Neill that he was unaware that he was a public official and was subject to restrictions, he voluntarily terminated his business relationship with Spellissy in December, 2004 before he became aware of the investigation. Mr. Burke also made it known to the AUSA that SOCOM government officials – and not Burke - determined the priority of proposals (Defendant's Trial Exhibit 36). Burke also told the AUSA that he did not have decision authority on any SOCOM acquisitions or contracting action (Dkt 111, page 627). AUSA O'Neill gave the impression to the Jury and the Court on direct and re-direct examination that he was hearing all of this for the first time when Mr. Burke gave his un-contradicted and un-impeached testimony. The un-impeached testimony is when Burke denied that a conspiracy existed. Conspiracy is silent in his plea deal (Government's Trial Exhibit 41). No one else at the trial testified about a conspiracy.

Another statement by AUSA O'Neill to the jury 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).

Again this is a false and misleading statement by AUSA O'Neill in front of the jury. Mr. O'Neill knows for a fact that the investigation began in early December, 2004 (Dkt 33-2). The initial investigation was about the award of the Picatinny Arsenal contract (Dkt 109, page 217). Mr. Burke was not aware of any investigation until February, 2005. Mr. Burke did receive two checks after the investigation was initiated, the first in January, 2005 and the second in July, 2005. Burke was informed some time in late July, 2005 that he was a target of a bribery scheme. Again, Mr. O'Neill has cleverly manipulated the facts in front of the jury. This is prejudicial.

Again the AUSA's says in his rebuttal closing statement to the Jury,

"One of those rules is what makes the whole intimidation of witnesses just absurd. Each time we deal with someone, we have to deal with their attorney. The law prohibits Agent Gorman from speaking to anybody unless their attorney's there when they're targets like this, or a defendant" (Dkt 111, page 868).

This is a false and misleading statement because Agent Calvert and Gorman interviewed Burke on May 10, 2005 without his attorney present (Defendants' Trial Exhibit 3A). At that meeting the agents already knew that Burke had worked for SDI in November and December, 2004.

Agents Calvert and Gorman also interviewed Defendant Spellissy on April 13, 2005 without Spellissy having an attorney present (Exhibit 5, April 13, 2005 DCIS Report). The document is being submitted as evidence to prove that Mr. O'Neill's statement to the jury is false. The document is not totally accurate. Defendant Spellissy redacted what he believes to be mistakes or misquotes.

AUSA O'Neill again made a false statement to the Jury during his closing argument when he said,

"there was no evidence of any work done by Burke for SDI" (Dkt 111, pages 798, lines 15-25 and page 799 lines 1-4).

Government's Trial Exhibit 29 is evidence to contrary to the AUSA's statement. In fact, this evidence demonstrated that SDI paid Burke for actual work, which directly contradicted the Government's allegations of bribery. The statement by Mr. O'Neill is prejudicial.

28 U.S.C. § 530B is a statute for ethical standards for attorneys for the Government. Mr. O'Neill gave his personal opinion in front of the jury when he started calling Co-Defendant Burke a liar. This prejudiced the Defendants. O'Neill stated during his closing rebuttal,

“A liar is a liar. And whether someone is lying to save their soul or their hide, they are still lying. And once you are a liar, you can not trust that person. And for Mr. Burke to have said what he said in this courtroom, he must have lied repeatedly before the other judge. Or as I said before, he told lies here and told the truth before others” (Dkt 111, pages 865-866).

In the instant case Burke is a Co-Defendant. Where the character and credibility of the defendant are at issue and the evidence allows the inference that the defendant has been less than truthful, the prosecutor does not err in closing argument by referring to the defendant as a liar. United States v. Catalfo, 64 F.3d 1070 (7th Cir.1995).

It is highly improper for a prosecutor to call a defendant a liar. United States v. Rodriguez-De Jesus, 202 F.3d 482, 485 (1st Cir. 2000)

Mr. O'Neill should be well aware of term “vouching” – giving your opinion on credibility is unethical. United States v. Garcia-Guizar, 160 F.3d 511 (9th Cir. 1998)

At the trial, AUSA O'Neill had FBI Agent Tim Gorman sit at the table with him. This gave the jury the impression that the FBI was the lead investigating agency when in fact they were not. DCIS was the lead investigating law enforcement agency. It is also interesting on how the AUSA had at least six agents sitting behind him at trial. There is no doubt that they sat there to intimidate the jury and have a prejudicial environment against the Defendants. The Court gave those government employees a verbal admonishment when they displayed sophomoric behavior in front of the Jury during opening statements (Dkt 109, page 208).

This Court should also know that Burke was sentenced on January 25<sup>th</sup>, 2006. This is two weeks after the January 13, 2006 meeting (Exhibit 6, DCIS Document January 25, 2006). This DCIS document is evidence that the AUSA was well aware that Burke was going “south” on the Government's theory that there was a bribery scheme and he sentenced him anyway because it was the AUSA's deceitful tactic to knowingly impeach Burke in front of the jury and get the plea deal into evidence to cause the jury to have prejudicial judgment against the Defendants. This is an unethical tactic used by the AUSA.

AUSA O'Neill 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. AUSA O'Neill was so concerned about losing Burke as his key witness that he filed a motion for a downward departure of Burke's sentence based on substantial assistance on January 5, 2006. (Exhibit 7, Motion in Case 8:05-CR-395-T-24MAP U.S. v Burke). In fact, there is additional evidence in the instant case 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 (Dkt 111 page 627 and Defendants' Trial Exhibit 36). Also, as an ethical standard, prosecutors should not knowingly offer false evidence or fail to seek the withdrawal of such evidence upon discovery of its falsity. The rationale for prohibiting the presentation of false testimony by the prosecution is apparent. As the Supreme Court has held on a number of occasions, it is "clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio, 405 U.S. at 153.

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 prejudicial bias against Spellissy and SDI during Burke's re-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, Defendants were improperly and unjustly tainted in the eyes of the Jury by the impeachment of Burke. It is interesting to note that Burke, himself, never truly made the statements found within his plea agreement; the statements were actually made by the Government and adopted by Burke at the plea hearing when he was read the plea agreement's contents and asked if he agreed to its substance.

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” (Dkt 137, page 5).

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 Defendants were acquitted of the bribery conviction 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 prejudicial that the AUSA O’Neill prosecuted Burke for perjury, but failed to prosecute one of their own (i.e., Special Agent Calvert).

There can be no question that Burke’s plea agreement is a perjured document, not his live testimony at trial. As a consequence, AUSA O’Neill knew (or should have known) that it would be placed in the unethical position of deliberately 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 AUSA 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 District Court Judge instructed the jury that the plea agreement was not to be considered as evidence of the Defendant’s guilt; it was only to be considered in judging the credibility of Burke’s testimony (Doc 111, Pg 646, Lines 4-14). Then, during closing arguments, the AUSA emphasized Burke’s guilty plea several times with what could only be viewed as a strenuous effort to convince the jury not to believe the version of Burke who showed up at trial professing both his, and the Defendant’s, innocence and to, instead, disregard every single thing Burke ever said because he lacked credibility (Doc 111, Pages, 790-804). But the emails were hopelessly tied to Burke.

Therefore, the question becomes: Where, as here, the Government’s case hinges upon a prior inconsistent statement to establish the elements of the offense that a defendant is charged with, how is a defendant **not prejudiced** by the prior statement when he never had an opportunity to cross exam the witness against him at the time the statement was made? In other words, a defendant can cross examine a witness that the Government calls against him on the day of his trial, but if that witness testifies favorably for the defendant at trial, the defendant will never have the opportunity to cross examine that same

witness on the day that the witness actually testified against him at that witness' plea hearing.

Government witness Jim Pettigrew testified at the trial that there was no evidence of preferential treatment as a result of USSOCOM's investigation (Dkt 111, page 680). During cross-examination, Pettigrew was asked the question, if Burke was a GS (Government Service) employee or military member? He answered,

“Burke was a public official. He was not a GS employee. He was not a military member.” (Dkt 111)

No one asked Pettigrew if Burke was a public official. The answer came out like it was rehearsed or he was instructed to make that statement. It was prejudicial against the Defendants for Pettigrew to state something that he wasn't asked. No other witness made a statement that they considered Burke to be public official. Defendants now submit sworn testimony from two Sentel employees who work at USSOCOM who state that they do not categorize themselves or Bill Burke as a public official (Exhibit 8, Snellgrove statement, page 10)

Question: In your capacity here did you consider yourself to be a public official?  
Snellgrove: No

and (Exhibit 9, Santa Lucia, page 6).

Question: And was he a public official or was he a private party?  
Santa Lucia: He was a private contractor. Same as I am.

Both of these Sentel Employees contradict Mr. Pettigrew's statement that Bill Burke is a public official. Defendants conclude that Pettigrew gave a false statement in front of the jury.

We previously discussed the new evidence provided by Mr. Don Jones. In Jones' sworn testimony he corroborates Captain Huss' testimony that Jacobs Sverdrup was paid \$9600 for Colonel Spellissy's consulting services for the trip to Europe (Exhibit 12, page 27, line 2).

Jones testified,

“the contract was approved and I was told to execute the mission” (Exhibit 12, page 27, line 10).

Jones was asked (Exhibit 12, page 29, line 14),

Question: While you were on this trip with Colonel Spellissy, do you recall him being instrumental in basically, saving the United States Government two million dollars?

Jones: Yes. Let's say a benefit to the government of two million dollars, approximately, yes.

Jones was asked (Exhibit 12, page 64, line 25)

Question: How did your job as Program Manger for Ammunition terminate or end?

Jones: Because of my support for the contract with SDI for Sverdrup for the Europe trip, my employment at SOCOM was terminated.

Question: Because of your support of Colonel Spellissy?

Jones: Support of the contract, yes.

Question: To have him go with you and save two million dollars for the U.S. Government?

Jones: Yes. A program that was important to the troops in the field and I know that because I had been in Iraq the month before talking to them.

Question: So who made the decision to terminate your position because of your support of the contract with SDI and Colonel Spellissy.

Jones: That would be the Chief of Staff of SOCOM.

(Exhibit 12, page 67, line 4)

Question: How were you informed of this termination of your position?

Jones: I was told by Dr. Uhler.

Jones: Based on IG findings for my support for the contract, my employment at SOCOM was terminated (Exhibit 12, page 69, line 1).

Mr. Jones has Colonel Spellissy with him on the trip to Europe that was approved by his chain of command and the United States Special Operations Contracting Office. The cost to the government was \$9,600.00 and Spellissy is credited of saving the government two (2) million dollars. Jones is fired for executing a directed mission approved by his superiors. This evidence is nothing less than a bias by the Chief of Staff, Brigadier General Flynn and Dr. Uhler to adversely affect Colonel Spellissy's business. This information was never disclosed to Defendants as part of the investigation. Jones clearly states that it was a result of the IG investigation. This is favorable information for Defendants. This evidence substantiates Dr. Uhler's prejudicial actions against Defendants. During this same timeframe that Defendants are working with the United States Government on a priority for the troops in combat and saving \$2 Million dollars, Defendants are allegedly conspiring to defraud the government by hindering Burke's honest services. This is illogical. The only clear interpretations of these facts are that Dr. Uhler and Brigadier General Flynn were supporting Major General (Ret) Hennies to put Defendants out of business. Without question the jury and the Court needed to hear this information. They did not because it was not disclosed until now. The government also misled the Defendants because in Exhibit 11, LTC Weir states that Don Jones is unavailable because he is in Iraq. He does not state that he no longer works at SOCOM because he was fired as a result of this case.

Government witness Dr. Uhler testified in a sworn statement to Defendants legal counsel and USSOCOM JAG Officer, Lieutenant Colonel Steven Weir less than a month before the trial that Defendant Spellissy was hired back by SOCOM as a paid contractor.

Question. Did there come a time that SOCOM hired Colonel Spellissy after his ----after August and before January?

Uhler. There was.

Question. And he was paid for it.

Uhler. He was.

(Exhibit 10, Uhler statement, page 17). However at the trial, he does not say what he said less than 30 days ago. At trial, Defense Counsel cross exams Dr. Uhler,

Question. So at some point after he [Spellissy] left SOCOM, he was hired back by SOCOM as a contractor?

Uhler. That may be. I am not sure.

Question. Now, Dr. Uhler, did there come a time, though, after he was on terminal leave, so that would be after July 31<sup>st</sup>, 2004----there came a time when SOCOM itself hire Tom Spellissy back; didn't they?

Uhler. That's what I am told.

Question. Okay, And he billed SOCOM for the time that he spent there?

Uhler. I am not sure.

(Dkt 111, pages 717-718) This government witness is giving false testimony. He is deliberately trying to give the jury the impression that Defendant Spellissy was not a SOCOM contractor.

This is taken from Jones' testimony (Exhibit 12, page 56, line 18)

Question: Let me ask this. This is what I'm trying to get at. Tom Spellissy had a company called SDI. Worked through Jacobs and you used him to help you on this trip to Norway, correct?

Jones: I used his services, yes.

Question: And he had a classified clearance and he had access and the certain badge to have access on base, correct?

Jones: Yes

Question: And Bill Burke did not have the same access then Colonel Spellissy, is that correct?

Jones: I couldn't tell you for sure, but Bill Burke did not have – to the best of my knowledge, Bill Burke did not have the same level of access as Colonel Spellissy.

It is undisputed that Defendant Spellissy was a USSOCOM Defense Contractor

(Defendants' Trial Exhibit 7 and Government's Trial Exhibit 3h, Sverdurp Technology Contract). According to Government's Trial Exhibit 3h, Defendant Spellissy was hired as a contractor to support United States Special Operation Command, Special Programs and this was approved by Deputy, Special Programs, Mr. Stan Highsmith. Dr. Uhler does not want the jury to know that Defendant Spellissy was on a contract with USSOCOM, just as Bill Burke was because the jury would have realized that Burke couldn't do anything for Spellissy that Spellissy couldn't do himself. According to the trial evidence Burke and Spellissy had the same access and contractual relationship to USSOCOM. Mr. O'Neill gave false argument in his closing statement when he stated,

"He's (Spellissy) not on the inside anymore. He needs someone, and that's William Burke" (Dkt 111, page 798, line 3).

Spellissy was on a contract to provide technical expertise to his former office, PEO SP and had the exact same badge as Burke for access to USSOCOM and Jones testifies that he believes Spellissy had greater access than Burke. The Court knows that Spellissy had all appropriate ethic opinions and had permission by Dr. Uhler to work as a defense contractor. The Court is also aware that when Spellissy was performing his contractual duties, he let his USSOCOM colleagues know where there were conflicts of interest (Dkt 44 and Exhibit 12).

Furthermore, "a conviction obtained through use of false evidence, known to be such by representatives of the government," violates due process. Napue, 360 U.S. at 269. The same is true when the government, "although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* Once again, the rule applies even if the false evidence goes only to the credibility of the witness, *id.*, and notwithstanding the good or bad faith of the prosecution. Giglio v. United States, 405 U.S. 150, 154 (1972).

As stated previously in this motion, Martinez v. United States at 763 F.2d 1297, page 1312 the 11<sup>th</sup> Circuit discusses the different standards between a judgment of acquittal and a new trial, and significantly recites that on a motion for judgment of acquittal, the court assumes the truth of evidence offered by the prosecution. This translates that these other two government witnesses' testimony be assumed true as well as other evidence in the case in support of the government's position. Given this, how can the Defendants have a fair trial if the government witnesses aren't telling the truth? You can not. These false statements had adverse impact on the jury and Defendants Rule 29 motion at the end of the Government's case. It is not likely to have a judgment of acquittal if the government witnesses are not telling the truth.

If Dr. Uhler would have told the truth that Defendant Spellissy was a USSOCOM

contractor on contract just as Burke was then the Jury would have seen Defendant Spellissy in a different light or manner. The District Court, having presided over so many conspiracy cases understands that unless you have an insider, you're always on the outside looking in and trying to determine intent. The Jury and the Court at the JNOV hearing must have concluded that Spellissy was on the outside and Burke was inside as an essential finding to find Defendants guilty of conspiracy. Obviously, both were inside. What would the jury think if both were inside? It would give different meaning or as a minimum different inferences as to the meaning of some of those emails. How do you differentiate the between the email meanings under the different permutations that actually existed? Are Defendants discussing with Burke a proposal for legitimate full time employment? Are Defendants and Burke discussing business as two government contractors? You simply can not conclude the meaning or intent of those emails unless one of the alleged co-conspirators testifies.

Under 18 U.S.C. § 371, the Government must show that the Defendant knowingly and voluntarily participated in the conspiracy. U.S. v. Brenson, 104 F. 3d 1267 (11th Cir. 1997); U.S. v. Suba, 132 F. 3d 662 (11th Cir. 1998); U.S. v. Hanson, 262 F.3d 1217 (11th Cir. 2001). While on the stand, William Burke repeatedly testified that he did not enter into a conspiracy with the Defendant. He repeatedly testified that he never felt as if he did anything illegal. The only evidence that, according to the District Court Judge, indicated otherwise was Burke's prior plea agreement and the previously discussed emails. But, in his rulings, the judge disregarded Burke altogether and hung his analysis squarely upon the emails, which by themselves, he found were sufficient to establish the conspiracy. Now would the District Court have the same conclusion knowing that Defendant Spellissy was also on an USSOCOM contract that was known to all the Acquisition Officials up to and including the Acquisition Executive, Dr. Uhler? The fact that Spellissy was also on the inside and had daily access to the inside gives Defendants argument during the Franks Hearing, trial, JNOV and Appeal much more substance. The analysis without question now requires Burke, in some way, to establish the context for the emails in order to show that an agreement had been reached, so too was Burke necessary to establish that the Defendant had knowledge of, and participated in, a conspiracy.

Burke was, undeniably, the most critical witness to the Government's case because as part of the alleged bilateral conspiracy, he was to establish the Defendants' knowledge of the conspiracy by admitting to his own. Since a conspiracy takes two to tango, the Government was relying on Burke to firmly establish his participation in the conspiracy so that the Defendants participation, through implication, would also be established. There is little doubt that had the Government believed that the charges against the Defendant could have been established by the emails alone, they never would have

called Burke to the stand in the first place.

The Eleventh Circuit has previously reversed conspiracy convictions on significantly stronger showings of knowing participation than this case presents. In U.S. v. Sarro, 742 F.2d 1286 (11th Cir. 1984), the defendant was shown to have known about the existence of the conspiracy, was present when overt acts were committed, and fled when the police came to the scene. Nevertheless, knowledge, presence, and flight, without proof that the defendant knowingly agreed to participate in the conspiracy, were not sufficient to support the conviction.

In this case, the evidence in the record does not indicate that the Defendants knowingly and voluntarily entered into a conspiracy. In fact, the Government's star witness testified on the stand otherwise and completely explained the innocuous meaning of all the emails introduced into evidence at trial. But even disregarding this testimony, as the District Judge did in his findings, there was no basis upon which a reasonable juror could have concluded, based upon the emails alone, that the Defendant knowingly participated in a conspiracy given that Defendants were also USSOCOM private contractors with unlimited access to the Command. Dr. Uhler's false testimony adversely impacted Defendants Constitution right for a fair trial.

**f. Selective Prosecution.** In the instant case, the AUSA prosecuted William Burke for perjury while allowing Special Agent Calvert of the Department of Defense Criminal Investigative Service (DCIS) to avoid prosecution for his falsehoods in the testimony to the Magistrate Judge related to the issuance of a search warrant for Spellissy's home. (Dkt 44-1) The failure to prosecute Special Agent Calvert for his perjury is inexcusable and adds prejudicial opinion and appearance towards the Defendants.

The AUSA also tolerated Special Agent Calvert's threats and coercion of a witness, Mr. Burke, to get him to testify against Defendant Spellissy. Mr. Burke was portrayed by the government as the star witness against Defendant Spellissy. However, at the trial, Mr. Burke gave un-contradicted and unimpeachable testimony that federal law enforcement agents lied to him threatened him and coerced him into signing a plea agreement. Mr. Burke told the truth on the witness stand during Spellissy's trial, contradicting his plea agreement. Burke also gave un-impeached testimony when he said that Agent Calvert told him [Burke] that SDI was an illegal company (Dkts 110 and 111). This without question was prejudicial against Defendants. Calvert knew that SDI was a legal company. (Dkt 38) This statement is absolutely false. This false information was used to lure Burke into a plea deal. It is the plea deal that led to Defendants' indictment and findings of guilt at the trial. Agent Calvert was not prosecuted for this witness

tampering. This is immoral, unethical and illegal. Special Agent Calvert was allowed to retire and now works for the Florida Department of Law Enforcement. Threatening, badgering or tampering with a witness is sufficient to establish prosecutorial misconduct.

**g. The Indictment of Spellissy and SDI fails to establish a proper legal predicate for a conviction under 18 U.S.C. § 371 because the Indictment for the charge under § 371 is purposely and integrally intertwined with the dismissed charges of bribery.**

The sole remaining conviction occurs from conspiracy charges that derive from 18 USC § 371. The verdicts against the defendants for all other counts, including bribery of a so-called “public official” pursuant to 18 U.S.C. § 201, were overturned by the Court.

As a matter of law, therefore, the charges on the sole remaining conspiracy count were not supported by the proper proof. 18 U.S.C. §371 states,

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”

18 U.S.C. §371 (2007). This statute contains two prongs. First, the defendants must conspire to “commit any offense against the United States”, or to “defraud the United States.” Second, at least one of the defendants must “do any act to effect the object of the conspiracy”. With the Court’s post-trial dismissal of all other counts, it is impossible as a matter of law for Spellissy, SDI and Burke to have committed “any act to effect the object of the conspiracy” because these defendants were not proven to have conspired to have committed “any offense against the United States”, or to “defraud the United States”.

Furthermore, the Government’s case was fatally weakened by the dismissal of charges and verdicts related to the alleged bribery of a so-called “public official”; i.e., Burke.<sup>1</sup> The definition of “public official” such as that found in 18 U.S.C. § 201 now provides absolutely no guidance for this situation because the bribery verdict was dismissed. In the absence of an underlying crime related to the sole remaining conspiracy verdict, Defendants argue that this Court should not extend the definition of “commit [ting] any offense against the United States” pursuant to 18 U.S.C. §371, to include a dismissed

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<sup>1</sup> Spellissy and SDI argue that Burke was not and could not be a “public official” because he did not have sufficient authority to make any decisions on behalf of the Government.

charge that these defendants allegedly bribed Burke, a civilian contractor who has no decision-making authority to act on behalf of the government. Tanner v. United States, 483 U.S. 107, 129 – 132 (1987) (wherein the United States Supreme Court held that ambiguity in the interpretation of § 371 should be construed in favor of the defendants – the Tanner Court stated, “...the government, in arguing that § 371 covers conspiracies to defraud those acting on behalf of the United States, asks this Court to expand the reach of a criminal provision by reading new language into it. This we cannot do.”).<sup>2</sup>

**h. Witness Tampering by the Government.** Defendants remind the Court that Witness Tampering by the Government has been consistent throughout the instant case. The fact that Burke was threatened into signing a plea deal by him being threatened by Agent Calvert is witness tampering. The government presented no evidence to refute the statements made by Burke at trial. When AUSA O’Neill became aware of this misconduct by his agent, he did nothing to correct it. Defendants again, raise concern that AUSA O’Neill had no legal authority to interfere with Sergeant Landers’ subpoena. Defendants did not seek Mr. O’Neill’s assistance with the subpoena. Mr. O’Neill clearly interfered with a defense witness and this is prosecutorial misconduct.

### **Summary of the Prosecutorial Misconduct Argument**

The Court can clearly recognize that the AUSA presented a case based on matters that, as a matter of law, he should not base his case on. There is no evidence of a bribe and the emails are all circumstantially vague. The AUSA and his agents overstepped the bounds of that propriety and fairness which should characterize the conduct of such officers in the prosecution of a criminal offense is clearly shown by the record. The AUSA was guilty of misstating the facts in his direct and cross-examination of William Burke; of trying to put into the mouth of Burke things which he had not said; in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said (the plea deal) and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with the witness (O’Neill knew before the trial that he would impeach Burke); and, in general, of conducting himself in an indecorous and improper manner.

The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.

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<sup>2</sup> The Court has already expressed concerns about the Government's tactics in obtaining the search warrant (Dkt 44-1) and the indictment at trial (Dkt 111, page 735).

The AUSA is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffers. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The Court said that the case against Spellissy was not strong. In the instant case against Spellissy, who was convicted only of conspiracy through circumstantial evidence and not of any substantive offense it may properly be characterized as weak.

In the above mentioned circumstances prejudice to the cause of the accused is so highly probable that the Court should not be justified in assuming its nonexistence. If the case against Spellissy had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached. Moreover, we have not here a case where the misconduct of the prosecuting attorney and his agents were slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Berger v. United States, 295 U.S. 78 (1935)

At the Judgment Notwithstanding the Verdict (JNOV) Hearing the Court recognized that this case had due process issues. On page 55 of the hearing transcript the court states,

“It was not a particularly good case or strong case from the get-go. The order that I entered before the trial is indicative of the manner in which this case arose.

Of course, that has nothing to do with the jury’s verdict. The evidence of that order was kept out appropriately, but it may very well underscore, because there was testimony that Mr. Burke was told by at least one witness that Mr. Spellissy’s business was illegal, when it was clearly not.”

On page 56 the court goes on to say,

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“The reason I mention that testimony of Burke, that is, that Mr. Calvert told him he believed SDI was illegal because it was started when Spellissy was on active duty; Mr. Calvert was just plain wrong. But that may very well have – well, it may very well explain Mr. Burke’s subsequent guilty plea and the waffling that we all observed during the course of the trial.”

The Berger Court, explaining neither the source nor the scope of this special duty imposed on prosecutors, reversed the defendant’s conviction because the government’s evidence was weak and “the prosecuting attorney’s argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.” Although the Court never identified which of the defendant’s rights the government violated, its references to the “fairness” of the proceeding, resulting from the prosecutor’s prejudicial statements, appeared to invoke the due process protection of the Fifth Amendment. Asserting that the special duty of prosecutors derives from the Due Process Clause, however, does not illuminate what that duty entails. Berger made clear that the prosecutor must pursue the case “with earnestness and vigor . . . .” There can only be a constitutional violation, therefore, when the prosecutor has not sought justice, but prosecuting vigorously is part of doing justice. If prosecutors “do justice” in order to ensure due process, they must still prosecute a case vigorously or they will not ensure that justice is done. If due process only means that the prosecutor may not violate a defendant’s other rights, then it does nothing more than reiterate the ethical duty of every attorney. Thus, raising the prosecutorial standard to a constitutional level does not resolve the conflict between the prosecutor’s duty to vigorously represent the government and the admonition to “do justice.” Much like both the ethical mandate to “do justice” and the Berger court’s analysis of due process, consideration of whether an act constitutes “prosecutorial misconduct” does not help define the scope of the prosecutor’s duty beyond the requirement that the government not violate any of the defendant’s constitutional or statutory rights. Claiming that the government engaged in misconduct is easy because due process and the prosecutor’s special duty apply at every stage in the criminal process.

Unethical behavior or improper methods by the prosecutor may result in a mistrial or a reversal of a conviction where the methods “so infect the trial with unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 181 (1986).

In sum, we have shown in the instant case there has been Courtroom misconduct by law enforcement agents, false testimony by Pettigrew and Uhler and false statements by the AUSA in his closing arguments. Defendants have shown that the AUSA or law enforcement has failed to provide or disclose exculpatory evidence and that law enforcement threatened and tampered with the government’s key witness, William Burke. Defendants have also shown substantiated evidence that there is some sort of

bias toward, or having a vendetta against the defendant resulting in selective or vindictive prosecution. The Court can clearly understand that this was an all out effort to convict Defendants of anything. This case went from an alleged contract violation, to representing a foreign government, to post retirement conflict of interest violations, back to representing a foreign government to bribery. The Defendants, the Government and the Court recognized several times throughout the trial that the trial was concentrated on bribery and only bribery. There is no one piece of evidence that anyone can reasonably conclude that there was a conspiracy, especially after recognizing all the inconsistencies and confusion that the government purposely caused throughout this case.

In the instant case the deceit, manipulations, lies, and malfeasance by the AUSA, Special Agent Calvert and the USSOCOM Inspector General agents is more than we can imagine. Especially, 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.

In a case, such as this, in which the Government's case in chief is riddled with confusion and disarray, it simply is not justice when a criminal defendant is placed at the substantial risk of being convicted. "The [trial] court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice." United States v. Patterson, 41 F.3d 577, 579 (10th Cir. 1994) (quoting Fed. R. Crim. P. 33).

## **2. The second part of this motion substantiates ineffective assistance of trial counsel (IAC).**

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the U.S. Constitution. See, McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). This constitutional guarantee attaches to both retained and appointed counsel. Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980).

In 1984 the U.S. Supreme Court established a two-prong test to be used by the lower courts in evaluating ineffective assistance claims: a criminal defendant must prove that counsel's performance was "deficient" because it fell below an objective standard of reasonableness; and that this deficient performance so prejudiced the defendant that the resulting conviction is unreliable or fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687 (1984).

**a. Preparation for Defendants Motion to Suppress (Franks) Hearing.** Trial Counsel thought that the purpose of the affidavit was to conduct a search of Defendant Spellissy's home based on a violation of the Procurement Integrity Act, 41 USC § 423 (Dkt 21). Yet, nowhere in the affidavit is there any reference to that statute. The stated purpose of the affidavit, it is clear that the affiant was seeking a search warrant in order to obtain evidence that defendants had violated Title 18, United States Code, Sections 207(a) and (b) and 208(a) (Dkt 22, page 5). Trial counsel's preparation for a Procurement Integrity Act violation instead of an 18 USC § 207(a) and (b) and § 208(a) is significant error. If trial Counsel had prepared for a hearing based on the actual stated purpose, Defendants would have been able to legally suppress the evidence.

Much of the Franks hearing centered on a meeting on or about 1-2 December, 2004 in Norway concerning a 70mm Bunker Buster Warhead. If Counsel would have been prepared to argue 18 USC § 207 (a), (b) and § 208 (a) violations they would have realized that the provisions of the statutes affecting restrictions on said employees run from the date of the termination of government service. In Defendant Spellissy's case, the operative date is December 31, 2004 (Dkt 41, page 12). Counsel failed to make it known to the Court that the meeting in Norway could have not been used for a probable cause justification because the restrictions for 18 USC § 207 (a), (b) and § 208 (a) violations were not in effect at the time. Also since the Court made a determination that probable cause existed for a § 207 (a) violation because Defendant Spellissy attended the meeting (Dkt 44-1, page 12-13), Counsel should have objected and immediately responded to the District Judge to this finding because Defendant Spellissy did not attend this meeting (Dkt 149). Although Mr. Jones was not available because of deployment to Iraq, Mr. Rooney was available. Trial counsel failed to properly investigate and call essential witnesses at the Franks Hearing. Defendant Spellissy could have been called to testify that he was not at the meeting, however, trial counsel chose not to call him to the stand.

**b. At Defendants' Trial.** At Defendant's trial, Burke says he gave investigators a copy of his and Defendants initial work agreement – "general services agreement". (Dkt 109, page 359-360) This statement was un-contradicted. Trial Counsel failed to demand the AUSA to give them a copy of this agreement as required by Brady v. Maryland, 373 U.S. 83, 87-88 (1963) and Jencks Act, 18 U.S.C §3500. This initial work agreement defines a legitimate and legal agreement that Defendants had with Burke. This evidence would show that Defendants never asked Burke to do anything illegal just as Burke repeatedly testified to. Spellissy does not have a copy of the agreement because all of his records were seized by law enforcement agents.

Trial counsel failed to properly cross examine government witnesses, Uhler and

Pettigrew.

Government witness Jim Pettigrew testified at the trial that there was no evidence of preferential treatment as a result of USSOCOM's investigation. (Dkt 111, page 680) During cross-examination, Pettigrew was asked the question, if Burke was a GS (Government Service) employee or military member? He answered, "Burke was a public official. He was not a GS employee. He was not a military member." No one asked Pettigrew if Burke was a public official. Trial counsel failed to object to this statement. The answer came out like it was rehearsed or he was instructed to make that statement. It was prejudicial against the Defendants for Pettigrew to state something that he wasn't asked. No other witness made a statement that they considered Burke to be public official. Trial counsel had available to them sworn testimony from two Sentel employees who work at USSOCOM who state that they do not categorize themselves or Bill Burke as a public official (Exhibit 8, Snellgrove statement, see page 10) and (Exhibit 9, Santa Lucia, see page 6). Both of these Sentel Employees contradict Mr. Pettigrew's statement that Bill Burke is a public official. Trial counsel failed to make this known to the jury that that Pettigrew gave a false statement.

Trial counsel also knew that Government witness Dr. Uhler testified in a sworn statement to them less than a month before the trial that Defendant Spellissy was hired back by SOCOM as a paid contractor.

Question. Did there come a time that SOCOM hired Colonel Spellissy after his --after August and before January?

Answer. There was.

Question. And he was paid for it.

Answer. He was.

(Exhibit 10, Uhler statement, page 17). However at the trial, he does not say what he said less than 30 days ago. At trial, Defense Counsel cross exams Dr. Uhler,

Question. So at some point after he [Spellissy] left SOCOM, he was hired back by SOCOM as a contractor?

Answer. That may be. I am not sure.

Question. Now, Dr. Uhler, did there come a time, though, after he was on

terminal leave, so that would be after July 31<sup>st</sup>, 2004----there came a time when SOCOM itself hire Tom Spellissy back; didn't they?

Answer. That's what I am told.

Question. Okay, And he billed SOCOM for the time that he spent there?

Answer. I am not sure.

(Dkt 111, pages 717-718) This government witness gave false testimony. He deliberately gave the jury the impression that Defendant Spellissy was not a USSOCOM contractor. Trial counsel failed to make this point to the jury and they had the evidence to prove that Spellissy was a legitimate USSOCOM contractor (Defendants' Trial Exhibit 7 and Government's Trial Exhibit 3h, Sverdurp Technology Contract). This was another significant error that contributed to IAC. The fact that Defendants' were Defense contractors with the same access to USSOCOM as Burke would have provided the jury with a different fundamental basis for analysis. As a minimum, trial counsel should have impeached this witness for giving false testimony.

Trial Counsel was ineffective because they did not put up a defense at trial after the government rested its case and the Court denied Motions for Rule 29 and Rule 33. Trial counsel made next to no effort to challenge the government's case. (Dkt 111)

Trial Counsel performed no meaningful pretrial investigation such as they did for the Franks Hearing. Trial Counsel never talked to or interviewed Major General (Ret) Lou Hennies, General Doug Brown and Major Eric Glenn (Burke's immediate government supervisor). Counsel never compelled the government to give them a copy of Burke's contract with the government. None of these key witnesses were called to testify. Trial counsel never put Special Agent Calvert on the witness stand for trial. Counsel made no effort to corroborate Burke's testimony. They never put Burke's co-workers from Sentel on the witness stand to verify Burke's testimony. Trial counsel had sworn testimony from these co-workers that would have collaborated Burke's testimony. Trial Counsel never put a contracting officer or Program Manager on the witness stand to verify the acquisition process, Burke's authorities and role as well as Defendant Spellissy's as a USSOCOM contractor. As a result of little defense preparation and no strategy, Defendants were found guilty of all five (5) counts by the jury and later acquitted by the Court on the two (2) bribery counts and granted a new trial on the two (2) wire fraud counts (Dkt 62,63). The absence of this preparation left the defense with no opportunity to raise legal issues surrounding this case at trial such as Burke's status as a public official, Agent Calvert telling Burke that SDI is an illegal corporation, Agent Calvert making accusations and threats to Burke without his attorney present, the

relationship between Brown and Hennies, Burke's authority at USSOCOM and Defendant Spellissy's role as a USSOCOM contractor, and where and under what authority a contract protest should be filed.

Trial Counsel prepared Defendant Spellissy for the trial and never called him to the witness stand to testify that there was no conspiracy. (Exhibit 13, Spellissy Affidavit)

Trial Counsel never asked Defendant Spellissy to take a polygraph test and submit it to the court before the trial. This is lack of due diligence. Spellissy did pass a polygraph test after the trial (Dkt 146, page 5).

Trial Counsel made no attempt to get the original agreement between Defendants and Burke from the government (Dkt 109, page 359-360).

Trial Counsel subpoenaed defense witnesses just a week before the trial and failed to raise legal issues when key witnesses such as Sergeant First Class Jack Landers did not show up for the trial (Dkt 146, page 3).

Trial Counsel did not object to the government introducing Burke's plea agreement when the AUSA impeached his key witness. (Dkt 110, page 570) This plea agreement prejudiced the Defendants and poisoned the jury.

Trial Counsel did not object to the AUSA's closing arguments when he gave misleading and false information to the jury (Dkt 111, page 863-868).

**c. At Sentencing.** Trial Counsel showed up at the sentencing hearing unprepared. They had told Defendant Spellissy that he would not be sentenced because the government had filed an appeal. The District Judge decided to have the sentencing anyway and counsel did not object. Also, counsel for SDI was not present; Mr. Brown had to leave to go to another hearing. Counsel did not have any witnesses present and did not have a copy of the final pre-sentencing report when the judge started asking questions. (Exhibit 13, Spellissy Affidavit)

**d. Summary.** There is no doubt that trial counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the Defendants showed that the deficient performance prejudiced the defense. Counsel's errors were so serious as it deprived the Defendants of a fair trial, a trial whose result is reliable.

Defendants request the Court grant this motion or in the alternative grant an evidentiary hearing.

The undersigned Counsel continues to appear Pro Bono.

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 27th day of December, 2007.

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