

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

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

THOMAS SPELLISSY

and

STRATEGIC DEFENSE INTERNATIONAL, INC.

**DEFENDANTS THOMAS SPELLISSY AND STRATEGIC DEFENSE
INTERNATIONAL, INC.'S JOINT MOTION FOR NEW TRIAL BASED ON NEW
EVIDENCE.**

Defendants Thomas Spellissy and Strategic Defense International, Inc. (hereinafter jointly referred to as "Spellissy") through their respective undersigned counsel, hereby jointly move for a new trial under Fed.R.Crim.P. 33 on the basis of new evidence that has a direct impact on the justice of this case. Defendants contend that this new evidence should result in a new trial of all non-dismissed charges, including the conspiracy charge recently reviewed by the 11th Circuit.

MEMORANDUM OF LAW

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

Defendants by and through their undersigned counsel have a good faith basis for this motion and as grounds therefore state that (1) the new evidence was discovered after trial; (2) the Defendants used due diligence to discover the evidence; (3) the newly discovered evidence is material to issues before the court; (4) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) a new trial will

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produce a new result.

ARGUMENT for Newly Discovered Evidence not available before or at Trial

1. Witness Tampering by the Government.

The actions of the Government's correspondence sent to Defendant's Counsel (See Exhibit A, Correspondence from the United States Army Special Operations Command) resulted in a key Defense witness not being present for the Spellissy trial.

An unknown senior military officer knowingly persuaded or ordered Sergeant First Class Landers, 75th Ranger Regiment not to honor the subpoena which is part of the legal process, summoning him to appear as a witness at Defendants trial, an official proceeding.

The correspondence refusing to let Sergeant Landers appear for the Defendants, was sent from the United States Army Special Operations Command, Fort Bragg, NC, a three star headquarters, dated 3 May, 2006 mailed by first class, received by Defendant's Counsel office on 11 May, 2006 and not seen by Mr. Doherty, Spellissy's lawyer, until 15 May, 2006, three days after the trial. The correspondence attached as Exhibit A is newly discovered evidence.

Sergeant Landers would have testified that Mr. Burke was a low level, non-decision making support contractor in a position that could not benefit the Defendants. The absence of Sergeant Landers at the trial resulted in the Defendants not testifying. Not having Sergeant Landers available to testify infringed on the Defendants ability to testify because the Defendants testimony would have been at risk due to not having any other corroborated testimony. It was not in the best interest for the Defendants to have Sergeant Landers arrested and transported to Tampa to testify or otherwise force a favorable witness to testify. This government action of preventing Sergeant Landers to testify for the Defense is a violation of the Defendants constitutional rights and legal due process. This action by the government is without question a deliberate interference to the Defendant's legal ability to mount a defense for the alleged crimes that were charged. What better witness - an enlisted man with no political agenda to speak the truth about the acquisition process, Burke and Defendants.

Our post trial investigation as a result of the newly discovered evidence revealed that Sergeant Landers is again willing to testify at an evidentiary hearing. We also learned that he timely received the subpoena to attend the trial on 9 May, 2006 and he was prepared to drive from Fort Benning, GA to Tampa, FL. In addition Defendants learned

that Sergeant Landers informed his immediate commanding officer on what he was going to testify and he gave him permission to do so. According to Sergeant Landers, some “unknown” higher ranking officer from a higher headquarters told his immediate supervisors to have Sergeant Landers to “stand down” until he received further orders from the U.S. Army.

The Defendant’s position is that Landers’ and Spellissy’s testimonies would have corroborated Burke’s testimony that no bribery or conspiracy existed. Their testimony with Burke’s un-contradicted testimony along with the fact that no one ever testified against the Defendants would have, as a matter of law, created a situation where no direct evidence of bribery or conspiracy existed.

Although not new evidence but not known to the court is that the government had sent Don Jones, USSOCOM’s Ammunition Program Manager to Iraq and made him unavailable for the Franks Hearing and the trial. Jones would have testified that Defendant Spellissy attended the meeting in Norway as a U.S. government consultant to him. He could also testify that Defendant Spellissy did not violate any conflict of interest laws, specifically 18 USC § 207 and § 208. Defendant Spellissy has not heard from or seen Don Jones since March 2005. This exacerbates the difficulty for the Defendants to use their Constitutional Rights to properly defend themselves. This has been a persistent pattern by the government in this case.

Also, Spellissy was denied the opportunity to prove that Burke was not a “public official”, by calling their witnesses, which would, as a matter of law, prevent the Government from proving the charges against Spellissy. Defendants’ Counsel had sworn testimony from the interviews at SOCOM by two Sentel employees who also acknowledged that they were not public officials and Colonel Spellissy’s former government secretary acknowledged that Burke was not a public official. This is the same belief that Burke (and Spellissy) was under. The Defendants are still mystified about why a civilian contractor could be deemed to be a “public official”. It is obvious now that all work done by Mr. Burke for Spellissy had no conflict of interest with his scope of work for Sentel Corporation. Given that this is true when and how was he going to use his job at Sentel to give dishonest service to the Government? Spellissy was also a government contractor with similar access and authority as Burke. Sergeant Landers would have testified that Mr. Burke is not a public official.

Indeed, the Government’s overly broad definition of Burke as a “public official” certainly does not comport to any similar cases presided over by the Court. For instance, in the case of United States v. Evans, Case No. 8:00-CR-75-T-30-TGW (M.D.Fla. 2001) (Moody, J.), the Court examined a situation where a “public official” was an actual employee of the government agency involved in the alleged bribery. In the instant case, however, Burke is merely an employee of a civilian contractor who performs contractual

(rather than fiduciary) duties for the Government. As a matter of law, Burke is not a "public official" pursuant to 18 U.S.C. § 201.

2. Burke found guilty of perjury.

William Burke was threatened into pleading guilty to one count of bribery in Federal Court in October 2005. This plea was then used to indict Defendants in November, 2005. Mr Burke was threatened and intimidated by Special Agent Robert Calvert of the Department of Defense Criminal Investigative Service. This is the very same Agent who violated his integrity and abused his authority by "presenting an affidavit with misstatements of fact, statements made in reckless disregard for the truth and omissions of favorable, material facts" to a Magistrate Judge to obtain a search warrant to search the Defendants house.

The actions of Special Agent Robert Calvert are unconscionable. Mr. Burke gave uncontradicted testimony when he accused Agent Calvert of using threats to gain evidence against Spellissy, which eventually led to his perjury. Agent Calvert manipulated the U.S. District Court by obtaining a search warrant for Spellissy's home by deliberately misleading the Magistrate Judge via omissions and misrepresentations of fact. It is clear that Calvert is dishonest and acted with disregard for the truth

Finally, the plea was then used by the government to impeach Mr. Burke's testimony during the trial of Spellissy. Mr. Burke truthfully testified at Spellissy's trial that he and Spellissy did not do anything wrong. He further testified that he felt pressured into making the plea agreement because he was threatened. The plea was entered into evidence at the Defendant's trial by the government as a prior inconsistent statement by Mr. Burke under oath. The plea was introduced into evidence by the Assistant U.S. Attorney and the jury used this evidence to find Spellissy guilty of the alleged crimes. This use of the prior inconsistent statement unfairly and unjustly biased the Jury against the Defendants at their trial.

Mr. Burke was subsequently charged with perjury and found guilty of perjury in January, 2007 by the Middle District of Florida in Federal Court. This finding of guilt should, as a matter of law, result in the court vacating the judgment against the Defendants and grant a new trial for the conspiracy charge. Also, if this information was available at Spellissy's trial, the jury instruction concerning Burke's testimony would have been different and resulting in probably producing a favorable result to Spellissy.

Burke testified that he agreed to the plea agreement because of enormous pressure brought on him by the Government. Burke testified, that he was told by the agents it

was a bribe. He also testified that he never said it was a bribe. Burke stated that he was threatened by an agent who stated that they know where he and his family lived. This tactic in this context is nothing less than a direct threat against the lives of his family.

Burke has testified two times under oath at trial that no crime was planned and or committed. His testimony under oath at his perjury trial and the fact that he was found guilty of perjury is new evidence that was unavailable to Defendants for their defense.

This court should know that Federal District Judge James Moody stated at Burke's Perjury sentencing that he was harder than anyone in this courthouse on people who don't tell the truth. Judge Moody declined to send Burke to jail after the Assistant U.S. Attorney recommended Burke spend between 33 and 41 months in prison. Moody called the proposed sentence an "unreasonable punishment" and also questioned the guilty verdict, although he did not overturn it. Judge Moody stated if Burke's false statement trial had been a non-jury proceeding, he would have found him not guilty. Moody stated that he also failed to see the "great conspiracy." While Burke's accounts varied, the "underlying facts" in each didn't change."

In conclusion a new trial should be granted due to the perjury conviction. The Court should allow Defendant's counsel to examine the complete investigative file in the Burke case, including the Government's memoranda related to Burke's interrogation, plea agreement, and the conduct of the Burke/Spellissy investigation.

3. Polygraph Test. Several federal circuit courts have recognized that polygraph evidence has advanced in reliability as the technology evolved and will admit stipulated results into evidence. *United States v. Piccinonna*, 885 F. 2d 1529 (11th Cir.1989) (en banc). Noting tremendous advances in polygraph instrumentation and technique, the 11th Circuit became the first in the federal system to prescribe an approach to allow the admission of polygraph testimony. In *Piccinonna*, the 11th Circuit outlined two instances where polygraph evidence may be admitted at trial. *Id.* at 1536. First, polygraph evidence is admissible when both parties stipulate in advance as to the circumstances of the test and the scope of its admissibility. *Id.* Second, polygraph evidence may be admitted to impeach or corroborate the testimony of a witness at trial. In addition, the admissibility of corroboration or impeachment testimony is governed by the Federal Rules of Evidence. Evidence that a witness pass a polygraph examination, used to corroborate that witness' in-court testimony, would not be admissible under Rule 608 unless and until the credibility of that witness has been attacked.

On May 17, 2007, Tom Spellissy volunteered to take a polygraph test. The test was administered by an independent agent, Bruce Hoffman and Associates, Inc. Spellissy

passed the test. (See exhibit B, Polygraph Results) The polygraph test consisted of three parts:

a. Pre-Polygraph Interview.

Tom Spellissy stated “Mr. Burke assisted his company [i.e., SDI] in doing research and he paid Mr. Bill Burke a total of \$4,500.00.” Spellissy also stated that “he has been accused of paying Mr. Burke that money, so Mr. Burke would give his company preferential treatment in obtaining contracts. That was not true. He has also been accused of planning with Bill Burke to defraud the United States Government, which is not true.”

b. Polygraph examination.

A standard Zone of Comparison polygraph examination was conducted. The examination consisted of three charts and a Stem Test. The relevant questions that were asked with answers in bold are as follows:

- I. Regarding your statements, do you intend to answer each question truthfully? **YES**
- II. Did you bribe Bill Burke in order to receive any preferential treatment for your clients at SDI? **NO**
- III. Other than a Christmas card, have you had any contact with Bill Burke since October, 2004? **NO**
- IV. Did you plan with Bill Burke to defraud the United States Government? **NO**

c. Opinion of the Examiner.

A Lafayette Computerized Polygraph LX-4000 was used for this examination. The examination was visually and numerically scored. Both showed no deception.

Summary of the Argument

The law provides a mechanism to correct an injustice. That mechanism is found specifically in Rule 33. The only reason for the legal creation for these rules is because the legal system recognizes that sometimes the system can get it wrong the first time.

The injustice in the instant case requires a correction. The purpose of this motion is, in its purest form, to convince this Court to grant a new trial because a serious miscarriage of justice occurred in the first trial and the new evidence described above can correct this injustice. The real question though appears to be whether these Defendants deserve the opportunity for a new trial. The answer is a resounding, "Yes", based on the manifestly unjust behavior used by the Government.

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

The undersigned Counsel is appearing Pro Bono.

CONCLUSION

According to Eleventh Circuit authority, this new evidence provides that Defendants Thomas Spellissy and SDI, Inc. are entitled to a new trial, on the basis of new evidence.

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 26th day of September, 2007.

s/Sean P. Cox

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