No. 25-306

IN THE

Supreme Court of the United States

THOMAS F. SPELLISSY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a private contractor who holds no formal government position and lacks inherent governmental responsibility, can be convicted of conspiracy to commit honest services fraud under 18 U.S.C. §§ 1346 and 371, based on a bribery theory rejected by the trial court and without any agreement to perform an "official act."

PARTIES TO THE PROCEEDING

Petitioner: Thomas Spellissy is a Defendant-Appellant in the 11th Circuit.

Respondent: United States of America

Un-indicted Co-conspirator in the District Court is Mr. William E. Burke.

STATEMENT OF RELATED CASES

United States vs Thomas Spellissy and Strategic Defense International, Inc. CASE NO: 8:05-cr-475-T-27TGW, Middle District of Florida, Tampa Division. August 14, 2006.

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- The decision of the Eleventh Circuit Court of Appeals is reported at Appendix A, p. 1a dated June 25, 2025.

- The decision of the District Court is reported at Appendix B, p. 6a dated September 6, 2024.

JURISDICTION

The judgment of the Eleventh Circuit was entered on June 25, 2025. The Eleventh Circuit declined to grant Petitioner's writ of error coram nobis, citing the "law of the case" doctrine. This petition is filed within 90 days of that denial, pursuant to Supreme Court Rule 13.

The District Court denied the Writ of Error Coram Nobis on September 6, 2024.

For purposes of the Supreme Court Rule 14.1 (g) (ii) the Court of first instance had federal jurisdiction un 28 U.S.C. § 1331.

The Supreme Court had jurisdiction to review this case pursuant to 18 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 18 U.S.C. § 1346: Defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

- 18 U.S.C. § 371: Criminalizes conspiracy to commit any offense against the United States or to defraud the United States.

STATEMENT OF THE CASE

Introduction:

Petitioner, a private consultant, was charged with conspiracy to commit honest services fraud under 18 U.S.C. §§ 1346 and 371. The alleged conspiracy involved his company, Strategic Defense International, and a private contractor who, like Petitioner, held no formal government position and lacked inherent governmental responsibility. The government did not allege, and the trial court did not find, that either party agreed to perform an "official act" as defined in *McDonnell v. United States*, 579 U.S. — (2016) nor did it present evidence of bribery or kickbacks as required by *Skilling v. United States*, 561 U.S. 358 (2010).

Petitioner was acquitted of bribery by the district court, which found no evidence of a bribe, kickback, or agreement to perform an "official act." The Eleventh Circuit affirmed the conspiracy conviction based on a bribery theory that had been rejected by the trial court. The appellate court's reliance on the "law of the case" doctrine to uphold this conviction conflicts with this Court's precedents and undermines basic principles of due process.

This decision conflicts with:

- *Skilling v. United States*, which limits § 1346 to bribery and kickback schemes;

- *McDonnell v. United States*, which defines an "official act" as a formal exercise of governmental power;

- *Percoco v. United States*, 598 US _ (2023) which rejects fiduciary duties based solely on informal influence and that a private citizen cannot be accountable for honest services fraud if he is not a decision-maker.

Neither Petitioner nor the alleged unindicted co-conspirator were public officials, held formal government positions, or agreed to perform any official act in exchange for payment. The Eleventh Circuit's refusal to correct its error represents a dangerous expansion of federal criminal liability.

The issuance of contracts, and the evaluation of proposals is clearly cited as an inherently governmental function in Public Law and Federal Acquisition Regulations. Inherently governmental functions, by law, must be performed by U.S. Government officials, not contractors. Burke was employed by a private company, he could not have been an official representative of the government in any contractual actions with the government. He was not a Federal Government employee as the above paragraph states.

lf the alleged conspiracy involved a Foreign Comparative Test (FCT) and Defense Acquisition Challenge (DAC) proposal, such proposals are written by Government Program Managers, not contractor employees such as Burke. The proposals are evaluated internally by each Service (which includes SOCOM) and

then submitted to and evaluated by OSD. Only if OSD approves a proposal is the proposal sent to Congress for funding. If Congress approves the proposal, the proposal becomes a project, and solicitations are sent out to the public. Since Burke was a contractor employee, he could only serve as an advisor, assisting government PMs with proposals as stated in his plea agreement and his testimony at trial. Therefore, Burke could not provide preferential treatment with projects since the decision process on project issuance and proposal evaluation is an inherently governmental function restricted to government officials only, not contractors retained by the government as advisors. The laws and regulations that provide the description of inherently government functions are as follows:

1. Federal Activities Inventory Reform (FAIR) Act of 1998: provides primary statutory definitions for inherently governmental functions.

2. Office of Management and Budget (OMB) Circular 4-76: provides policy-oriented definitions of inherently governmental functions.

3. Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, which adopts the FAIR Act and defines and describes inherently government functions. OFPP is the Presidents senior most advisory body on acquisition policy. OFPP is part of OMB.

4. Most critical of all, The Federal Acquisition Regulation (FAR), which governs the

> federal government's acquisition policies and procedures. The FAR is codified in U.S. law. FAR Part 7.503 is the part dedicated to inherently governmental functions. FAR Part 7.503(c)(12) and 7.503(d) clearly define the inherently governmental functions and the rules associated with such functions." This regulation part alone should reveal why the statement in the introduction of the indictment, A.5., is incorrect. The laws and regulations above clearly prove that Burke, a contractor to SOCOM, could not be considered a representative of the U.S. Government, the DOD, or SOCOM, for issuance of contracts, participation in source selection procedures, participation in ratings of proposals, or any other role that resulted in the issuance of a contract to Spellissy. Burke would be considered as an advisor only to the government officials.

This case is an ideal vehicle for resolving confusion among the lower courts regarding the scope of honest services fraud and conspiracy liability under §§ 1346 and 371.

REASONS FOR GRANTING THE PETITION

Conflict with Supreme Court Precedent

The Eleventh Circuit's decision conflicts with *Skilling*, *McDonnell*, and *Percoco*, which collectively limit honest services fraud to bribery and kickback schemes involving formal governmental authority and fiduciary duties to the public.

National Importance

Expanding honest services fraud to private consultants and contractors without formal government roles risks criminalizing routine interactions and undermines constitutional protection.

Need for Clarification

Lower courts are divided on what constitutes a fiduciary duty and an "official act" in public-private relationships. This case offers another clean vehicle to resolve that confusion.

Petitioner's petition based on *Percoco* was affirmed by the 11th Circuit Court of Appeals based on a falsehood that Petitioner bribed Mr. William Burke who was a private person working for a private contractor at the United States Special Operations Command. The 11th Circuit based its affirmation on information that is not true. This without question is plain error and judicial error. When this Court corrects the error in the record with the fact that Spellissy didn't bribe or agree to bribe Mr. Burke (Appendix C, p. 10a) then Spellissy is factually innocent of the Conspiracy Count because according to the 11th Circuit in order to commit the conspiracy crime of honest services wire fraud there had to be an agreement to commit bribery as the 11th Circuit stated. The 11th Circuit memorialized in its recent opinion,

> "Rather, Spellissy's indictment alleged – and the district court correctly found – that William E. Burke, a private contractor employee to whom Spellissy made illegal payments and

> who was an employee of a private contractor assigned to a division of the United States Special Operations Command, was a public official, acting on behalf of the Department of Defense. See United States v. Spellissy, 710 F. App'x 392, 393 (11th Cir. 2017) (unpublished); United States v. Spellissy, 243 F. App'x 550, 550–51 (11th Cir. 2007) (unpublished). Thus, the district court's instruction – that the definition of public official "includes an employee of a private corporation who acts for or on behalf of the federal government pursuant to a contract" – was in line with the traditional agency theory that Percoco expressly acknowledged as valid. 598 U.S. at 329–30. Further, the district court's instruction that public officials "owe a duty to the public to act in the public's best interest," and if an official "makes his decision based on [his] own personal interests – such as accepting a bribe – the official has defrauded the public of the official's honest services," also conformed with the Supreme Court's reasoning that agents of the government have a duty to provide honest services. Id. So, unlike in Percoco, Spellissy's jury instructions did not violate his due process rights by being too vague. Id"

Although Petitioner was indicted and convicted on five counts, the District Court previously granted his post-trial motion for judgment of acquittal as to Counts Two and Three, which alleged that Defendant committed bribery, and granted a new trial on Counts Four and Five, which alleged substantive honest service wire fraud offenses. The government did not pursue a new trial.

Thus, the only remaining count of conviction is Count One, an alleged conspiracy to defraud the United States and commit bribery or wire fraud. Trial Dkt. 85 (judgment on Count One for Petitioner Spellissy); The conspiracy wire fraud charge to obtain property or money was redacted from the jury instructions at the Charge Conference. Trial Dkt 111 p. 734-738.

Mr. Willaim Burke was an alleged un-indicted co-conspirator who was a private citizen working for a private contractor who had a contract with the Department of Defense. At the trial, it was evident that William Burke was working on side jobs conducting technical research for various consultants. (Trial Dkt 113, p. 58). One of his part time jobs was working for Petitioner's company, Strategic Defense International, Inc (SDI). In his work for SDI the government had issue with Burke recommending another private contractor outside the government to hire Petitioner as a consultant, Government Trial Exhibit 28, Trial Dkt 111 p. 803 and discussion at the Judgment Notwithstanding the Verdict (JNOV) hearing. Initially the government summed this recommendation as an official action. As the evidence in this case showed, the alleged un-indicted co-conspirator did not have any decision authority and no evidence was presented that he had influenced or pressured a decision or had agreed to influence or pressure a public official on a specific "official act" or was going to influence any decision maker on any specific matter pending concerning any decision with USSOCOM that would ultimately benefit Petitioner. As evident from the trial, Petitioner Spellissy did not have any matter pending at USSOCOM in 2004-2005 acquisition cycle, see Petitioner's Trial Exhibit 36 and Government Exhibits 3A-3M. Also, government witness, Mr. Pettigrew

testified at trial that Mr. Burke could not make decisions, only recommendations. (Trial Dkt 111, p. 676). Last, SOCOM's recommendations for the 2004 year were sent to the Office of the Secretary of Defense (OSD) in May of 2004 before Petitioner retired from the government. See Gov't Exhibit 42 and Dr. Uhler's letter to OSD from the Motion to Suppress Hearing. Dr. Uhler's recommendation to the OSD was signed in May, 2004. (Trial Dkt 121 p.114).

Procedural History of this Case

The following summary addresses the pertinent procedural history of this case:

> Count One is an 18 U.S.C. § 371 conspiracy charge alleging the following objectives: 1) to "defraud the United States" (no statute cited); and 2) to "commit offenses against the United States," including bribery (18 U.S.C. § 201(b)(1)), wire fraud (18 U.S.C. § 1343), and honest-services fraud (18 U.S.C. § 1346) (Trial Dkt. 1 at 1-6). The traditional wire fraud charge (18 U.S.C. § 1343) to obtain money or property charge was redacted from the jury instructions at the Charge Conference. Trial Dkt 111 p. 734-738.

The jury instructions for Count One read:

> [W]ith regard to the alleged conspiracy, the indictment charges that the Defendants conspired to bribe a public official *and* to commit wire fraud. It is charged, in other words, that they conspired to commit *two* separate, substantive crimes or offenses.

> In such a case it is not necessary for the Government to prove that the Defendants under consideration willfully conspired to commit *both* of those substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Petitioners willfully conspired with someone to commit *one* of those offenses, but, in that event, in order to return a verdict of guilty, you must unanimously agree upon *which* of the two offenses the Petitioner conspired to commit.[1]

(Trial Dkt. 58 at 11) (emphasis in original).

The jury instructions further state that the alleged conspiracy in Count One, in addition to involving the commission of offenses against the United States – namely bribery and wire fraud – also charged conspiracy to defraud the United States. Dkt. 58 at 12. The instructions then provided the elements of bribery under 18 U.S.C. §201(b) (1). *Id.* at 14-15. Finally, the instructions turned to the fraud allegations, stating: "Title 18, United States Code, Sections 1343 and 1346, make it a federal crime or offense for anyone to use interstate wire communications facilities in carrying out a scheme to fraudulently deprive another of an intangible right of honest services." *Id.* at 16. This Court instructed the jury that the first element of the offense is "[t]hat the Petitioners knowingly devised or participated in a scheme to fraudulently deprive the public of the intangible right of honest services . . . ." *Id.*

1. Despite this instruction, the verdict form (Dkt 62) did not provide for such a distinction.

A "conspiracy" is an agreement by two or more people to commit an unlawful act. In other words, it is a kind of "partnership" in criminal purposes in which each member of a conspiracy becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the Government to prove that all the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type agreement; or that the members planned together all of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy is the making of the agreement itself (followed by the commission of any overt act) it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

> First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;
>
> Second: That the Defendants, knowing the unlawful purpose of the plan and willfully joined in it;
>
> Third: That one of conspirators during the existence of the conspiracy knowingly

committed at least one of the methods (or overt acts) as described in the indictment; and

Fourth: That such "overt act" was committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one that may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may be a conspirator without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators. If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan and willfully joined in the plan on at least one occasion, that's sufficient for you to find the Defendant guilty. But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. A person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

The term "public official" means . . . an officer or employee or person acting on behalf of the United States, or any department, agency or branch of Government thereof:

A "public official" need not be an employee of the federal government. A person who acts for or on behalf of the federal government pursuant to a contract or other

business relationship can be a "public official," just as a government employee can be a "public official." The term "public official" thus includes an employee of a private corporation who acts for or on behalf of the federal government pursuant to a contract.

This definition includes private individuals who occupy a position of public trust with official federal responsibilities, that is, possessing some degree of official responsibility for carrying out a federal program or policy.

To be considered a public official, an individual need not be the final decision maker as to a federal program or policy. It it sufficient that the individual is in a position of providing information and making recommendations to decision makers as long as the individual's input is given sufficient weight to influence the outcome of the decision at issue.

The term "official act" means any decision or action to any question, matter, cause, suit, proceeding of controversy which is brought before a public official for a decision or to be acted upon.

To "deprive another of the intangible right of honest services" means to violate, or to cause a public official to violate, the employee's or agent's duty to provide honest services to the employer.

Public officials and public employees inherently owe a duty to the public to act in the public's best interests. If, instead, the official acts or makes his decision based on the official's own personal interests – such as accepting a bribe – the official had defrauded the public of the official's

honest services even though the public agency involved may not suffer any monetary loss in the transaction. [This instruction states that there had to be a bribe to violate honest services fraud.]

Under the law, every agent or employee representing or working for someone else . . . the employer – has a duty (called a fiduciary duty) to act honestly and faithfully in all his or her dealings with the employer, and to transact business in the best interests of the employer, including a duty to make full and fair disclosure to the employer of any personal interest or profit the employee expects to derive or had derived from any transaction in which he or she participates in the course of the employment. [This instruction is clearly a conflict of interest instruction and does not state the alleged offense needs to be against the United States.]

In this case, the Government's primary witness, an alleged un-indicted co-conspirator testified at trial, the District Court summed up his testimony:

> "Simply put, the Government's primary witness, William Burke, testified unequivocally that he never conspired with Defendants to commit any type of fraud, never did anything illegal and was never bribed in return for preferential treatment of any of the Defendants' consulting clients. Notwithstanding that Burke entered a guilty plea pursuant to a written plea agreement in which he stipulated to facts in support of the charges, Burke essentially disavowed his guilty plea and those underlying facts, explaining to the jury that he pled guilty simply to avoid

going to prison. With respect to the $4500.00 the Government contends was a bribe paid by Defendants to Burke, Burke explained that he performed more than 45 hours of services for Defendants for which he invoiced Defendants at the rate of $100.00 per hour. Burke invoiced Defendants for those services (Government's Exhibits 4B and 4C) and received IRS 1099 forms from Defendants. Burke adamantly maintained without any contradictory evidence presented by the Government that he actually performed those services and was paid only for those services. Applying Rule 29 standards, the Court, "assumes the truth of the evidence offered by the prosecution," to wit, Burke's testimony that he performed legitimate services and was paid at the rate of $100.00 per hour for 45 hours. *United States v. Martinez*, 763 F.2d at 1312. The Government offered no evidence to the contrary and accordingly, there was no evidence on which a reasonable jury could have concluded that the $4500.00 represented a bribe paid to Burke in exchange for preferential treatment of Defendants' consulting clients.

In sum, the Government presented no evidence that Defendants "directly or indirectly gave or offered or promised something of value" to Burke and that the Defendants "did so knowingly and corruptly, with intent to influence an official act or to influence such public official (Burke) to allow or make opportunity with the commission of a fraud on the United States." (See Jury Instructions, Dkt

> 58 at p. 14). Moreover, to the extent Burke's guilty plea and the facts he stipulated to in his plea agreement constituted a prior inconsistent statement supporting the bribery allegations, those prior inconsistent statements cannot suffice to support a conviction as to Defendants Spellissy and Strategic Defense International, Inc." (Trial Dkt 72 p. 2). (Appendix C, p. 13a)

The District Court further stated,

> "The only credible testimony from Bill Burke is that he denied the criminal conspiracy, denied bribery." Trial Dkt 113 p.14.

The Government's witness, a government supervisor, two levels up from the alleged un-indicted co-conspirator, Mr. Pettigrew testified that he could not find where Mr. Burke influenced the proposal process on behalf of the Defendant. (Trial Dkt 111, p.680).

Government's next witness, Dr. Uhler, the USSOCOM Acquisition Executive, the decision maker on all USSOCOM proposals, programs and contracts testified:

> Question: Did you have any dealings with Mr. Burke while he worked at SOCOM?
>
> Dr. Uhler: Very infrequently. Usually just to say hello and that type of thing.
>
> Question: Now, to your knowledge, did Mr. Burke have a role in the FCT process?

Dr. Uhler: Yes he did.

Question: And what was that?

A: He did a lot of work that had to do with compiling information, putting it in the appropriate format, coordinating meetings, briefing the information up the chain, going to meetings up in Washington, meeting with his counterparts in other military departments, also, to compare proposals and coordinate across the department.

(Trial Dkt 111, p.700-701).

Question: As for you personally, did you personally ever seek Bill Burke's opinion on a project or proposal?

Dr. Uhler: I did not.

Question: Did you personally ask Bill Burke for his opinion as to the ranking of proposals?

Dr. Uhler: I did not.

Question: Did you personally – so then the answer would be that you personally never relied on Bill Burke's personal opinion in the course of your work?

Dr. Uhler: I did not.

(Trial Dkt 114 at 33).

The jury issued general verdicts on Count One, finding Defendant and his company Strategic Defense International guilty of "the offense of conspiracy to defraud the United States and to commit offenses against the United States, in violation of 18 U.S.C. § 371." (Dkts 62 & 63). The Government adhered to the honest-services fraud theory in the subsequent hearing on the post-trial motions. It is clear that the Government, the Defendants, and the District Court focused on the issue of the sufficiency of evidence to prove a conspiracy to commit honest-services wire fraud, and no other theory of fraud, or bribery, to sustain the guilty verdicts on Count One.

In response to the District Court's request to summarize how the emails in evidence support the charge in Count One, the Government asserted that this evidence "[s]hows that Mr. Burke is not giving his honest services and providing his honest services to his employer, that being Centel, and through Centel, SOCOM [Special Operations Command], but instead, he's doing it on behalf of Mr. Spellissy. And we have the payments to prove that, Your Honor. That in a nutshell is the government's theory on the conspiracy to defraud the United States." Trial Dkt. 113 at 39-40.

The Court and the Government later engaged in the following colloquy:

> THE COURT: The question in this case, I think with respect to Burke, is even if he didn't get permission to do what he was doing, that is, performing $4500 worth of work for Spellissy, it has to be a fraud and, that is, that the government would have to have been deprived fraudulently of Burke's honest services. What's the evidence of that?

MR. O'NEILL: I think you could see it – once again, Your Honor, I hate to belabor the same point, but in these emails, he talks consistently about providing support for Mr. Spellissy on these projects, projects specifically with SOCOM in which he says he's going to – you know, such as Government's Exhibit 12, SDI is the door to SOCOM, FCT and SOCOM SP.

Mr. Burke is saying this. He doesn't anticipate the government will be seeing his emails. He doesn't anticipate that the government will have these in their possession. He's talking about working for Mr. Spellissy on matters affecting SOCOM while he's an employee of Cental working for SOCOM. That on its face is a fraud, Your Honor. That on its face is a deprivation of honest services.

I mean, if you look at number 28, Government's Exhibit 28, where he recommends SDI, if no other documents shows he is no longer working with the best interest of the United States Government but, instead, working with the best interest of SDI because he's being compensated by SDI.

It's clear from these e-mails throughout them, Your Honor, he's looking for a job. He said that in his testimony. He wants Mr. Spellissy to hire him, and he's doing his best to placate his future employer.

Trial Dkt. 113 at 48-49.

The government also stated in its closing argument to the jury:

> "He [Burke] had no problem highly recommending Tom Spellissy to another defense contractor, no problem what so ever."

(Trial Dkt 111 at 803).

At the conclusion of the JNOV hearing, this Court found that the emails were sufficient to allow a reasonable jury to find a conspiracy to "deprive the United States of the honest services of Bill Burke, that is, [wire] fraud." (Dkt 113 at 60). In its subsequent written order, the court ruled as to Count One that the defendants "agreed to commit the offense of [wire] fraud, that is, deprive the United States of the intangible right of Williams Burke's honest services." (Trial Dkt. 72 at 2.)

Reviewing the emails exchanged by Burke and Spellissy, this Court reasoned that "[t]hese emails evidence an agreement to engage in a business, which the jury found and could reasonably find would have deprived the United States of the honest services of Bill Burke, that is, mail fraud." Trial Dkt. 113 at 60. However, this Court continued,

> With respect to Counts Two and Three, the bribery counts, the government acknowledges, as I think is laudable, that the jury was required to infer certain things in order to connect the payment to Bill Burke to any preferential treatment of an SDI contractor or client. . . .

> With respect to Counts Two and Three, that is, indeed, problematic because Bill Burke testified unequivocally that he worked for the $4500 invoiced and received a 1099, and there was no fraud or preferential treatment involved. He simply performed services and was paid for it.
>
> There's no direct evidence to the contrary. The emails say what they say. We have invoices, we have a discussion about preparing the invoices, we have a public transmission of a check and a pubic transmission of a 1099.
>
> What's lacking in the government's presentation of the case and what supports my finding that no reasonable juror could have found proof beyond a reasonable doubt as to Counts Two and Three is the connection . . . between the rendering of those services and the payment for those services and any preferential treatment.
>
> The government has no evidence that Mr. Burke did not perform the services he described. If I assume the truth of the evidence the government presented, . . . , then that was a payment for services rendered, not for the purpose of influencing Bill Burke or giving preferential treatment on behalf of an SDI client.

Id. at 60-62.

The District Court also granted the defendants' Fed. R. Crim. P. 33 motions for new trial as to Counts Four and

Five, the substantive wire fraud counts. Dkt. 113 at 64. The government conceded that, although the payments of $3,000 and $1,500 were for invoiced services that Burke provided SDI, the government's allegations were that the payments were bribes nonetheless. *Id.* at 65. Yet, this Court reasoned, the problem is that, in so alleging, the government simply returned to the bribe allegations of Counts Two and Three, which were already subject to judgments of acquittal. *Id.* According to the District Court,

> And, of course, the bribery allegations and to the extent the mail fraud counts rely on these same payments, there are just too many inferences upon inferences drawn for a theory, the government's theory, based on the emails, but without supporting testimony.

Id. at 66.

The District Court reasoned further,

> It's not enough simply to have proved to the jury that Mr. Burke was in a conflict of interest. That can be an illegal conflict of interest or a perfectly legal conflict of interest, meaning no criminal culpability.
>
> The bottom line remains that there's unequivocal, unimpeached testimony that he performed services and was paid for those services with no connection to any preferential treatment, influence, or result.
>
> So while there may be sufficient evidence to support the conspiracy verdict, as well as to

> deny a new trial on conspiracy, there is the potential for a serious miscarriage of justice to let these verdicts on bribery and mail fraud stand.

Id. at 66-67 (emphasis added).

Last, this court concluded in its order, Trial Dkt 233 p. 5, "As Burke's testimony was not contradicted, this Court found, notwithstanding the jury's verdict, that the Government presented no evidence that demonstrated that "Defendants 'directly or indirectly offered or promised something of value' to Burke . . . with intent to influence an official act or to influence [Burke] . . . " (Appendix C, p. 13a)."

The District Court also stated,

> "It may not have been intended by you (Petitioner) to violate the law, but he (Burke) was in a position of conflict. And an employee who is in a position of conflict with a competing entity (Sentel vs Strategic Defense International) has not only a conflict of interest, but that presents that intangible right of the jeopardy put in jeopardy the intangible right of honest services.
>
> And that's where this case begin and that's where it ended . . .
>
> The evidence is that's where it ended. The rest of it as you explained is nothing more than – as far as the evidence that was presented, payment for services rendered, but not bribery." Trial Dkt 114 p.84

ARGUMENT

In this case, it is without question that William Burke was a private citizen, hired after his military retirement by a private contractor to work on a contract to provide services to the Office of the Secretary of Defense at the United States Special Operations Command. The evidence at trial is clear that Burke didn't have any decision authority and allegedly had the ability to offer recommendations to his government supervisor (who did not testify at trial). Since the JNOV hearing the government has without question defended the judgment that Spellissy (and his company) had conspired with Mr. Burke to commit "honest services wire fraud." The facts of the case are clear, there was no bribe and the 11th Circuit affirmed the conviction based on information that is not true. This is legal error, also known as an error of law. Without question the 11th Circuit Court made a mistake which affects the outcome of Defendant's Coram Nobis petition because a legal standard has been applied to a finding that is not true. In *Murray v. Carrier*, 477 U.S. 478, 495, 496 (1986), the Supreme Court ruled that the concept of "fundamental miscarriage of justice" applies to those cases in which the defendant was probably actually innocent. In this case the 11th Circuit reasoned that a bribe took place when it didn't. There is no evidence of a quid pro quo and there were no illegal payments. Because there is no bribe (an agreement to pay for an official act followed by an overt act) then Mr. Burke cannot be considered a public official.

Accordingly, the petition should be granted because there is no honest services wire fraud unless there was bribe and Mr. Burke owed a fiduciary to the public,

therefore the conduct of which Petitioner was convicted in Count One is not criminal.

CONCLUSION

For these reasons, the order and opinion denying Petitioner's writ of error coram nobis should be reversed, and the petition granted. There was no bribe or an agreement to bribe a public official to perform an official act therefore there cannot be honest services wire fraud.

Respectfully submitted,

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