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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	Criminal No. 1:10CR485
	)	
	)	
	)	Hon. Leonie M. Brinkema
v.	)	
	)	
JEFFREY ALEXANDER STERLING	)	
	)	
Defendant.	)	

JEFFREY STERLING'S MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION TO DISMISS BASED ON SELECTIVE PROSECUTION OR, IN THE ALTERNATIVE, TO TAKE DISCOVERY RELATED TO SELECTIVE PROSECUTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Based on substantial new information recently made public, Defendant Jeffrey Sterling respectfully moves the Court to reconsider its Order dated October 18, 2011 denying Mr. Sterling's Motion to Dismiss Based on Selective Prosecution or, in the Alternative, to Take Discovery Related to Selective Prosecution.

ARGUMENT

Mr. Sterling, an African-American man who publicly sued the CIA for race discrimination, was the target of a criminal leak investigation for seven years, from 2003 through 2010, and has been under indictment since December 2010 for charges including violations of the Espionage Act. Shortly before his originally scheduled trial in 2011, the government disclosed in discovery that a higher ranking CIA official had engaged in a far greater breach of her secrecy obligations than that alleged against Mr. Sterling, repeatedly lied about it, caused demonstrable harm to national security, and was never criminally prosecuted. Mr. Sterling

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moved to dismiss the case against him based on selective prosecution. The Court denied the motion, and denied the alternative relief of permitting discovery related to this issue, holding that a single instance of failure to prosecute another was not sufficiently egregious to warrant such relief.

Last month, the Senate Select Committee on Intelligence issued its unclassified report on the CIA's Detention and Interrogation Program ("Report"). This Report revealed a lengthy pattern of leaks of classified information by the CIA in the same time frame as the conduct allegedly engaged in by Mr. Sterling. None of these other instances has been criminally prosecuted. In light of this new information demonstrating that the non-prosecution of other alleged leaks was not merely a single instance, but in fact part of a pattern of the government failing to prosecute other leaks by CIA personnel while simultaneously pursuing the criminal investigation and prosecution of Mr. Sterling, Mr. Sterling seeks reconsideration of his motion to dismiss for selective prosecution. At a minimum, the Court should permit Mr. Sterling to take discovery related to his selective prosecution motion.[1]

[1] Mr. Sterling recognizes that his motion comes on the eve of trial and that there is not sufficient time for him to conduct discovery in advance of trial. The timing of this motion is not a matter of choice by Mr. Sterling. It was only in December 2014 that information about a longstanding pattern of unprosecuted CIA leaks became public. Accordingly, Mr. Sterling could not have made this motion sooner. However, recognizing that his trial date is set (and has already been delayed three years, not by him, but by the government's interlocutory appeal), Mr. Sterling notes that the Court need not continue the trial date in order to afford Mr. Sterling discovery on his selective prosecution claim. The Court could hold the motion to dismiss in abeyance, grant the motion to take discovery, and allow the case to proceed to trial as scheduled. Should Mr. Sterling be acquitted, the motion will become moot. Should Mr. Sterling be convicted, the discovery could proceed and, after Mr. Sterling supplements his motion to dismiss based on discovery obtained, the Court could rule on the motion to dismiss post-trial.

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A. The Court Previously Denied Mr. Sterling's Motion to Dismiss Based On Selective Prosecution When the Record Contained Evidence of Only One Similarly Situated Individual Who Was Not Prosecuted for the Disclosure of Classified Information.

On October 11, 2011, Mr. Sterling moved to dismiss the charges against him based on selective prosecution, or, in the alternative, to take discovery related to selective prosecution. *See* Motion to Dismiss [DE 254]. Mr. Sterling's Motion was based on discovery provided by the government on October 3, 2011 that demonstrated that a similarly situated individual who had disclosed classified national defense information to several national journalists, including James Risen, in the same time frame as the alleged disclosure made by Mr. Sterling, had not been prosecuted. *Id.* at 1-2. The leaks were made by a CIA employee, , and "caused actual demonstrable harm to national security of the very sort that the Government in this case merely speculates may have occurred as a result of the publication of Chapter 9 of State of War." *Id.* at 3. Ms. M lied repeatedly in multiple interviews about the leaks and her contacts with journalists. *Id.* Yet, the government took no criminal action against Ms. M . *Id.* In contrast, the government has pursued a decade-long investigation and prosecution of Mr. Sterling, an African-American man who publicly sued the CIA for race discrimination. *Id.*

Mr. Sterling's Motion highlighted Ms. M 's conduct, which by any measure was far more egregious than that alleged against Mr. Sterling. Ms. M held a supervisory position with the CIA; she was an . *Id.* at 4. In 2005, the Washington Post published an article by Dana Priest that disclosed Top Secret classified information. *Id.* at 3-4. The government began an extensive investigation into the source for the article. *Id.* at 4. In the course of its investigation, it interviewed Ms. M four times and polygraphed her twice. *Id.* Throughout these interviews and polygraphs, Ms. M made

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several false statements and denials, but eventually admitted that she had discussed Top Secret information with several journalists, including Mr. Risen. *Id.* at 5.

As a result, Ms. M was terminated from her employment with the CIA. *Id.* She was not, however, criminally prosecuted for her actions. *Id.*

Plainly, Ms. M 's disclosures to Mr. Risen were of a more serious and extensive nature than the disclosure the government alleges Mr. Sterling made. While the government has speculated that the disclosures to Mr. Risen "could have harmed national security," it has demonstrated no actual harm.

Beyond the disclosures to Mr. Risen, Ms. M 's conduct in general was considerably more egregious than Mr. Sterling's alleged conduct. Ms. M had numerous unauthorized contacts with Mr. Risen and several other national journalists over a period of years, providing classified information to more than one of them. *Id.* at 7. Mr. Sterling is alleged to have provided information to only one journalist about a single program. Ms. M also repeatedly lied about her disclosures, while Mr. Sterling is alleged to have done so once. *Id.* Mr. Sterling, who sued the CIA for race discrimination, was criminally prosecuted.

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Ms. M was not. *Id.* In the face of these facts, Mr. Sterling argued, he was entitled to dismissal of the charges against him or, at a minimum, discovery from the government. *Id.*

On October 12, 2011, the government filed its Opposition to Mr. Sterling's Motion to Dismiss. *See* Opposition [DE 265]. The government argued that Mr. Sterling's evidence that Ms. M was not prosecuted was insufficient to overcome the presumption of prosecutorial regularity because she made statements admitting to the disclosures under threat of loss of employment, thus rendering them inadmissible under *Garrity v. New Jersey*, 385 U.S. 493 (1967) and foreclosing any potential prosecution. *Id.* at 1. As a result, Ms. M and Mr. Sterling were not "similarly situated." *Id.* at 4.

Mr. Sterling filed his reply to the government's opposition on October 13, 2011. *See* Reply [DE 266]. Mr. Sterling pointed out that, while the government may not have been able to use Ms. M 's admissions in a criminal case against her, this does not explain why she was not prosecuted. *Id.* at 2. Clearly, Mr. Sterling has made no admissions, yet the government has pursued a prosecution against him, proceeding to trial on a purely circumstantial case. *Id.*

The Court denied Mr. Sterling's Motion during a CIPA hearing on October 13, 2011. The Court stated that it did not find "that one instance like this is sufficiently egregious[.]" *See* Oct. 13, 2011 Hearing Tr. at 56.

B. New Evidence Has Emerged of Several Similarly Situated Individuals Who Were Not Prosecuted for Divulging Classified Information to the Media.

Since the Court's 2011 ruling, significant factual findings have been made public that the CIA regularly leaked classified information to the press, and, yet, not a single individual was ever prosecuted for any of those leaks. On December 3, 2014, the Senate Select Committee on Intelligence issued its unclassified Report. *See* Excerpts of Report, attached as Ex.1. The Report concluded:

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> The CIA's Office of Public Affairs and senior CIA officials coordinated to share classified information on the CIA's Detention and Interrogation Program to select members of the media to counter public criticism, shape public opinion, and avoid potential congressional action to restrict the CIA's detention and interrogation authorities and budget. These disclosures occurred when the program was a classified covert action program, and before the CIA had briefed the full Committee membership on the program.

Id. at Findings and Conclusions, 8. "When the journalists to whom the CIA had provided background information published classified information, the CIA did not, as a matter of policy, submit crimes reports." *Id.* at Executive Summary, Sec. IV, 401.

The Report provides several details on the extent of these classified leaks. For example, classified information was contained in Ronald Kessler's 2003 book *The CIA at War*. Yet, the CIA "never opened an investigation related to [the book], despite the inclusion of classified information, in part because 'OPA provided assistance with the book.'" *Id.* Senior Deputy General Counsel John Rizzo wrote that CIA cooperation with Kessler had been "blessed" by the CIA director. *Id.*

In another instance, CIA officers and the House Permanent Select Committee on Intelligence raised concerns about an article by Douglas Jehl in the March 6, 2005 edition of the *New York Times* that contained significant classified information. *Id.* The article was based on information provided by OPA. *Id.* No criminal prosecutions were brought.[2]

The purpose of this pattern of leaks was for the CIA to provide inaccurate claims about the effectiveness of the CIA's interrogations. *Id.* at 401-02. The CIA wanted to promote itself to shape public and congressional opinion. *Id.* at 402. According to the Report, there was no official CIA policy approving these leaks. In April 2005, "a CIA officer expressed concerns in

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[2] In early 2007, the CIA again provided classified information to Ronald Kessler on another book. *Id.* at 406. Again, no criminal prosecutions ensued.

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an email to several CIA attorneys about the CIA releasing classified information to the media[.]" *Id.* at 403. The email did not receive a response. Following a meeting of the National Security Council Principals Committee in that same month, personnel at the CIA's Bin Ladin unit (codenamed the ALEC Station) informed the Counterterrorism Center's Legal division that scheduled interviews with NBC News should not go forward. *Id.* at 403-04. Nonetheless, in June 2005, *Dateline NBC* aired a program that included on-the-record quotes from those interviews as well as quotes from "top American intelligence officials." *Id.* at 404. The program and *Dateline NBC*'s associated online articles included classified information about the capture and interrogation of CIA detainees. *Id.*

The CIA took measures to protect itself as the source of the leaked classified information. Again following the April 2005 National Security Council Principals Committee meeting, CIA attorneys cautioned against attributing the off-the-record disclosures to the CIA itself. *Id.* at 404. One attorney wrote that the leaks "'should be attributed to an 'official knowledgeable' about the program (or some similar obfuscation), but should not be attributed to a CIA or intelligence official.'" *Id.* Among its concerns was the inherent hypocrisy of its position on leaking classified information: in late 2005, when Douglas Jehl again obtained classified information, the chief of the ALEC Station wondered "whether cooperation with Jehl would be 'undercutting our complaint against [other] leakers'" but nonetheless suggested informing Jehl of examples of CIA "detainee exploitation success." *Id.* at 405-06.

These media leaks had real consequences. In September 2006, David Johnston of the *New York Times* published an article containing classified information and citing officials "closely tied to intelligence agencies." *Id.* at 406. Following the article's publication, the Counterterrorism Center reported that it resulted in questions to the CIA from a particular

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country, and the Center "assessed that '[d]isclosures of this nature could adversely [have an] impact on future joint CT operations with . . . [redacted] partners.'" *Id.* Following publication of the Johnston article, Senior Deputy General Counsel John Rizzo sent an e-mail to his colleagues urging them to "determine whether OPA cooperated with the article '[b]efore we get DOJ or FBI too cranked up on this." *Id.* at 406 n. 2288. The subject line of that email was "Re: Fw: Request for Crimes Report on NYT and Time Magazine Leaks on Interrogation Activities [REDACTED]." *Id.* Despite the detrimental impact of the leaks, there are "no indications that the CIA filed a crimes report in connection with the article." *Id.*

As with Ms. M , the individuals responsible for these leaks are similarly situated to Mr. Sterling. They are CIA employees who disclosed classified information to prominent national journalists. Allegedly, Mr. Sterling disclosed information to Mr. Risen between 2003 and 2005. The leaks outlined above occurred in the same time frame. And, again, the conduct described in the Report is far more egregious than that alleged against Mr. Sterling. The disclosures occurred on numerous occasions and had demonstrable consequences for the CIA. Any apparent "approval" of the disclosures by certain elements within the CIA is irrelevant, as the disclosures still amount to criminal behavior. Yet, the Report contains no evidence of any DOJ investigation into the source of the leaks or any criminal prosecution related to them.

Mr. Sterling again stands in stark contrast to Ms. M and the many similarly situated individuals described in the Report as the one individual who publicly sued the CIA for race discrimination and was thereafter extensively investigated and criminally prosecuted for revealing classified information. With this new evidence, Mr. Sterling has surely met the evidentiary threshold set forth in *United States v. Armstrong*. *See* 517 U.S. 456 (1996) (the presumption of regularity that supports prosecutorial decisions can be rebutted by a credible

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showing of different treatment of similarly situated persons). Mr. Sterling is entitled to dismissal of all the charges against him, or, at the very least, to take discovery on his apparent selective prosecution.

CONCLUSION

For the foregoing reasons, Mr. Sterling respectfully requests that the Court grant his Motion for Reconsideration and dismiss the charges against him. In the alternative, he asks the Court to provide him the opportunity to take discovery related to his motion to dismiss based on selective prosecution.

Dated: January 2, 2015

Respectfully submitted,

JEFFREY A. STERLING

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January, 2015, I delivered an original of the foregoing Motion for Reconsideration Defendant's Motion to Dismiss Based on Selective Prosecution or, in the Alternative, to Take Discovery Related to Selective Prosecution and Memorandum of Law in Support Thereof to the CISO as directed by the Classified Information Protective Order issued in this case.

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