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

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	No. 1:10cr485 (LMB)
JEFFREY ALEXANDER STERLING,	)	
	)	
Defendant.	)	
	)	

SUPPLEMENT TO THE GOVERNMENT'S
MOTION FOR CLARIFICATION AND RECONSIDERATION

The United States of America, by and through its attorneys, hereby supplements its Motion for Clarification and Reconsideration of the Court's Memorandum Opinion and Order of July 29, 2011 (Dkt. No. 162) ("Motion"). The government files this supplement to bring to the Court's attention developments since the filing of its Motion that have strengthened the government's argument that it has a compelling interest in Mr. Risen's eyewitness testimony because it is necessary or critical to the case, and because there are no alternative means from which the government can obtain the same evidence.

First, it is now obvious that the defendant plans to point the finger at as many other individuals as possible, in a scattershot effort to manufacture reasonable doubt as to the identity of the individual who leaked national defense information to Mr. Risen. Prior to the hearing on the government's CIPA Section 6(a) and 6(c) motion on August 30, 2011, the defendant asserted that a likely defense at trial would be that individuals other than the defendant were responsible for the charged crimes. *See* Dkt. 160 at 2. On August 31, 2011, one day after the CIPA hearing, the defendant filed a Section 5(a) notice. *See* Dkt. 171. It is clear that the defendant intends to

rely on classified documents to suggest that any individual who possessed any information about Classified Program No. 1 may have been Mr. Risen's source.

Of course, some of these individuals' knowledge of Classified Program No. 1 ended before – or began after – the specific events at issue occurred. Some of these individuals never had a reason to know many of the details that appear in Mr. Risen's book. And some of these individuals have never spoken to Mr. Risen. Nonetheless, the defense has decided to point the finger at all of them. And as a result, the government will be forced to prove a negative, over and over again, that each of these individuals was not the leaker. This will be a time-consuming and laborious process that will threaten to confuse the issues, mislead the jury, and distort the truth-seeking function of the trial. In addition, the government may be forced to rely on more and more classified information and witnesses at a public trial. The Court has a duty to protect classified information from unnecessary disclosure that weighs heavily against requiring the government to put on a circumstantial case in this fashion. Thus, Mr. Risen's testimony is now, more than ever, necessary or critical, "given that the defendant points the finger elsewhere" and in all directions. *See* Motion at 11.

Second, the defendant is using the Court's decision to shield Mr. Risen from testifying as a sword to falsely attack the character and reputation of congressional staffers, most prominently Ms. Vicki Divoll, a staffer to whom the defendant spoke about Classified Program No. 1 at the Senate Select Committee on Intelligence (the "SSCI") in 2003. In the defendant's Reply to the Government's Opposition to his Motion for Issuance of Rule 17(c) Subpoenas, the defendant claimed that "a decision was made by the SSCI to terminate Ms. Divoll's employment with the Senate because she breached SSCI confidentiality rules by providing information to Mr. Risen."

Dkt. 168 at 3. The media repeated and amplified this accusation.[1] But this is a false charge – and the defendant knows that it is false. The defendant's decision to falsely accuse and smear the innocent is patently exposed by the following:

- In a meeting attended both by the prosecutors assigned to this case and defense counsel, the SSCI's legal representative represented to defense counsel that Ms. Divoll's personnel file did not reflect a charge of disclosing classified information to anyone;

- The "witness" cited by the defendant as having knowledge of Ms. Divoll's termination did not work for SSCI, did not have first-hand knowledge of the leak in question or internal SSCI personnel matters, never claimed to have such first-hand knowledge, and is now deceased;

- The article for which the defendant asserts that Ms. Divoll was Mr. Risen's source had nothing to do with the defendant, the defendant's decision to go to SSCI, or Classified Program No. 1, but rather concerned unclassified information about an unrelated, pending legislative matter;

- An individual who did not work at the SSCI told the FBI that either she or another staffer who worked at the same committee (again, not the SSCI) was in fact Mr. Risen's source for this information appearing in the article;

- Since January 2011, the defendant has been in possession of phone records from Ms. Divoll's (and Mr. Don Stone's) home and office extensions at the SSCI for 2003 that reflect no contact whatsoever with Mr. Risen, a notable fact that stands in stark contrast to the defendant; and,

- Ms. Divoll's attorney has publicly asserted that "If Mr. Risen were to give truthful testimony about these matters, he would confirm that he has not met, does not know, and has never communicated with Ms. Divoll."[2]

Unfortunately, then, this appears to be the beginning of a campaign by the defendant to tar anyone with any limited knowledge of Classified Program No. 1 – even, in Ms. Divoll's case, the

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[1] *See* Dan Rivoli, *Ex-CIA Official Blames Senate Attorney in Leak Case*, Law 360 (August 31, 2011) *at* http://www.law360.com/articles/268852.

[2] *See* supra note 1.

very limited knowledge that the defendant himself provided to her in a brief meeting – by falsely accusing them of committing a serious federal crime. The character and reputations of these individuals, like Ms. Divoll, will be unfairly and publicly smeared, with no way for the government to definitively exclude them from being the leaker at trial without testimony from the one witness who can do so. This is another reason why the government has a compelling interest in Mr. Risen's testimony, even limited testimony that would identify who was *not* his source for Chapter Nine.[3] *See* Motion at 7.

Third, the defendant is seeking to offer expert testimony regarding Mr. Risen's writing style. *See* Exhibit A. This expert notice further highlights that the defense in this case will be that the defendant did not commit the crime, but rather that multiple other individuals with access to Classified Program No. 1 provided information to Mr. Risen, and that, in any case, it is impossible to determine what each source told him. The defendant's expert notice further underscores why the government has a compelling interest in requiring Mr. Risen to testify – at a minimum – about each specific piece of information in Chapter Nine, the number of sources Mr. Risen had for each piece of information, and the significance, if any, of the style in which he reported each piece of information. Only Mr. Risen can testify as to the meaning of his use of quotation marks, his use of the third person, his use of the term "case officer" and other matters of significance. The defense's expert notice is nothing more than speculation.

[3] The same concerns also apply to another relevant witness who will be unavailable at trial. On Tuesday, the government will file under seal, as Exhibit B to this supplement, the Declaration of Special Agent Ashley K. Hunt, which will contain additional information concerning this witness.

Fourth, the Court is now seeking additional briefing relating to the government's venue evidence. The government has, of course, argued that Mr. Risen's testimony is necessary and critical to prove venue for certain counts. *See* Motion at 13-14. After the hearing on August 30, 2011, the Court ordered the government to submit briefing on the admissibility of certain trial exhibits which the government proposes to offer in part to prove venue. *See* Order (Dkt. 172). While the admission of these exhibits remains subject to this briefing, it is self-evident that, should the Court view the government's venue evidence as weak, then its proof contains a "hole[] that [can] only be filled with Risen's testimony." Memorandum Opinion (Dkt. 148) at 28. Moreover, as the government explained in its Motion, Risen's testimony on venue need not reveal anything about his source, but would only establish that when Risen received at least some of the information relating to Classified Program No. 1, Mr. Risen was located in the Eastern District of Virginia. *See* Motion at 14.

Fifth, the testimony of the "former intelligence official" referenced in the Court's Opinion has changed. The former official will now only say that on one occasion, Mr. Risen spoke with him about the defendant and stated that the defendant had complained about not being sufficiently recognized for his role in Classified Program No. 1 and in his recruitment of a human asset relating to Classified Program No. 1, and that on a separate occasion, Mr. Risen asked him generic questions about whether the CIA would engage in general activity similar to Classified Program No. 1. This former official, however, cannot say that Mr. Risen linked the second conversation with the defendant, although both conversations occurred within several months of each other. The former official termed his grand jury testimony, which linked the two conversations together, as a mistake on his part. In addition, the former official further modified

his testimony to say that although Mr. Risen had acknowledged visiting the defendant in his hometown, Mr. Risen's trip to see the defendant was not the main purpose of his travel, but rather a side trip.

The testimony of this former official had been cited by the Court as providing "exactly what the government seeks to obtain from its subpoena [to Mr. Risen]: an admission that Sterling was Risen's source for the classified information in Chapter Nine." Memorandum Opinion (Dkt. 148) at 24. The former official's testimony will not now provide such a direct admission, further underscoring the government's contention that for the reasons discuss in its Motion, Mr. Risen is the only source for the information the government seeks to present to the jury.

WHEREFORE, the government respectfully requests that the Court grant its Motion for Clarification and Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 2nd, 2011, I electronically filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to the following:

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