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

Alexandria Division

UNITED STATES OF AMERICA,	)	
vs.	)	**Case No. 1:10-cr-00485-LMB**
JEFFREY ALEXANDER STERLING,	)	
Defendant.	)	

OPPOSITION OF DEFENDANT JEFFREY A. STERLING TO GOVERNMENT'S MOTION FOR CLARIFICATION AND RECONSIDERATION

COMES NOW Jeffrey A. Sterling, by counsel, and for his Opposition to the Government's Motion for Clarification and Reconsideration (Docket No. 162), states as follows:

1. Legal Standard.

Motions for Reconsideration are disfavored as a matter of law. The fact that a party disagrees with the Court's ruling is not a proper basis for reconsideration. Reconsideration should be entertained only when there is an intervening change in controlling law, a need to account for new evidence, or to correct a clear error. Hutchison v. Staton, 994 F. 2d. 1076, 1081 (4th Cir. 1993). The instant motion, though styled in part as seeking clarification, is simply a motion for reconsideration which should be denied because there has been no change in the law, no new evidence and no claim of clear error. While the Government may seek to appeal this Order as it has indicated it might,[1] the

[1] The defendant does not concede that the Order that is the subject of this Motion is

Court's Order is clear that it did not order Mr. Risen to testify regarding any matters other than what he had already agreed to testify about while giving due consideration to the First Amendment. The Government is now obviously seeking to shape the record on appeal by asking the Court to deny again a newly larded but twice-denied request that Mr. Risen testify. That desire, while perhaps tactical, does not provide a proper basis for reconsideration.

The matters raised in this Motion for Clarification and Reconsideration, as supplemented several times over, reflect an effort to obtain Mr. Risen's assumed testimony in areas of inquiry that fit into two distinct categories. Those areas of inquiry are: (1) evidence the Government believes it will need for rebuttal; or (2) evidence the Government now admits it always needed to meet its burden of proving fundamental elements of the charges that the Government now readily admits it cannot prove in the absence of Mr. Risen's imagined testimony. The first is speculative because the defense of the case has not begun and will not until the Government rests. The second is futile as Mr. Risen's position as to what he will or will not testify to has remained the same since 2003 and the Government has never had any reason to believe or proper basis to claim at any time that this evidence would be available for this trial no matter what the Court does with this Motion.

2. **There is No Factual Predicate for a Motion in Limine**.

The defendant's original Opposition to the Government's Motion to Admit Testimony of James Risen (Docket No. 113) focused on the absurdity of the Government moving to admit the testimony of a witness whose testimony was not known to the moving party. Here, the Government dramatically expands upon the unknown areas of inquiry as if adding new areas of testimony that it

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appealable.

cannot proffer adds gravitas to the motion. It does the opposite. Every time the Government appeals to this Court seeking to admit some new or additional subject matter of Mr. Risen's proposed testimony, the Court should be reminded how little evidence the Government really has in this case. The fact is Mr. Risen has never testified or been interviewed by the FBI or the CIA and has never told the Government anything about the sources[2] for his book State of War. The defense certainly has not been given any FBI 302s, proffer agreements or grand jury testimony from Mr. Risen. It is, therefore, entirely inappropriate and misleading for the Government to claim to know what Mr. Risen's testimony would be much less to presume that it would implicate Mr. Sterling. While it is crystal clear that the Government believes - after an 8 year investigation - that Mr. Sterling was at least one of the sources for State of War, the Government admits now publicly that it has no direct evidence that Mr. Sterling ever told Mr. Risen anything about Classified Program No. 1. The Government even repeatedly cites to a letter that Mr. Sterling apparently wrote in 2004, which when read in the context of this case is entirely exculpatory, but twists the content of the letter to fit its theory of the case. It has admitted in another motion that it cannot even prove that Mr. Sterling had possession of a letter central to Chapter 9 of State of War much less where he was when it is alleged Mr. Risen received the letter.[3] Because Mr. Risen has said consistently since 2003 that he will not identify his sources, the Government is simply left with a mystery that it admits it cannot solve without Mr. Risen's testimony. The Government was in this exact same position when it sought and

[2] The Government, in its Motion asserts that Mr. Risen's sources were "CIA officers involved in the operation" (Motion for Clarification p.2).

[3] Human Asset No. 1 was, according to State of War, the last person who possessed a copy of that letter. Being consistent, the Government claims that exploring that issue with Human Asset No. 1 requires Mr. Risen's, not the Asset's testimony.

obtained an Indictment in this case.

To try and fill this long-standing evidentiary void, the Government hangs its hat on the fact that Mr. Risen and Mr. Sterling supposedly spoke for five minutes over seven calls on the telephone in 2003 while admitting candidly that there is no direct evidence of what they discussed. (Motion for Clarification p. 13-14) The Government now admits that its case is entirely speculative even as to venue. It admits that it has "no direct evidence, other than Risen's testimony, that establishes where the substantive disclosures of classified information occurred" (Motion for Clarification p. 14) and now seeks to use F.R.E. 404(b) evidence to prove venue. In short, the Government is so fixated on compelling Mr. Risen's testimony - or perhaps jailing him - that it is willing to concede that its case is weak and that it needs Mr. Risen (to whom it has never spoken) to come to the rescue.

The Government posits many other areas of testimony where it alleges that Mr. Risen's phantom testimony would fill gaping holes in the Government's case. Almost each of them involves "rebutting" evidence that the defense has not introduced and may never introduce. It seems that every time the defense follows an investigative lead, or asks for a subpoena from the Court, the Government comes up with a new area of inquiry for Mr. Risen and supplements its requests for evidence from Mr. Risen. Take the issue of Ms. Vicki Divoll raised in the Government's latest Supplement to the Government's Motion for Clarification. (Docket No. 174) The defense was given discovery that stated unequivocally that Ms. Divoll was fired from her SSCI job for leaking information to Mr. Risen. It would be ineffective assistance of counsel for the defense not to investigate that claim and that is what the defense has done despite the Government's breathless and somewhat ironic claim that the defense is making a false charge against an innocent person.

At a recent meeting at the Senate, of which the Government has elected to air details of publicly, the defense learned that the FBI never obtained - in 2003 or later – from Ms. Divoll or anyone else at the SSCI a single email and never asked to see her telephone records from the SSCI. Contrary to the Government's impression of a diligent investigation, it was disclosed at that meeting that the FBI never asked the SSCI or Ms. Divoll to even preserve much less produce any emails at all and none have been given to the defense as of this date. It may be that the defense does not ever call or even need to call Ms. Divoll at the trial of this case since the Government now says it cannot even prove venue. The fact that the defense is investigating the case - a job this Court appointed us to do - cannot be used against Mr. Sterling as part and parcel of the Government's effort to obtain testimony from a journalist who says he will not talk and who the Government claims it wants to call in its case-in-chief. In no way can the fact that the defense is investigating the case provide a constitutionally acceptable basis for the Government to introduce "rebuttal" evidence in its case-in-chief much less to obtain reconsideration of the Court's Order that is the subject of this motion.

That the defense must follow all leads - and should be free to do so without opening doors for the Government in its case-in-chief - is shown by the Government's recent claim that the testimony of a "foreign intelligence official" has "changed" six weeks before trial in a case it has been investigating for eight years. (Motion for Clarification p. 13-14) The defense will leave it to the Government to explain how it is that such an event could occur years after the "foreign intelligence official" had been repeatedly interviewed and testified on several occasions before the Grand Jury. The defense does not know because, as of this date, no FBI 302 has been produced that would detail how and when the "changed" testimony became apparent to the Government. Regardless, this witness - alone among the CIA witnesses identified in this case - was willing to meet with the

defense and thus the defense was able to investigate and uncover the same disclosed fact which contradicts the Government's world view that all roads lead to Mr. Sterling and that any suggestion to the contrary is baseless.

While the Government had no choice but to disclose this supposed change of testimony to the Court and defense counsel, the mere fact that a witness' testimony may be less than what the Government hoped it would be and less than what had previously been represented to the Court provides no basis for the Court to reconsider the Order that has already been entered in this case. In fact, this shows why the Court should not entertain a Motion in Limine in which the Government cannot even actually proffer the proposed testimony of the witness. In its Order dated July 29, 2011, the Court was clear that Mr. Risen was subject to subpoena and ordered him to testify as to four matters about which he agreed to testify. The Government cannot tell this Court that it knows any more today than it did in 2003, 2006, 2009, 2010 or 2011, about what his testimony would be other than what he has agreed to say and thus cannot fairly be said to have provided a proper predicate for a Motion in Limine, motion less a motion for reconsideration.

3. **Conclusion**.

The Government has not provided any valid legal basis for reconsideration or clarification. As such, the Motion for Reconsideration should be denied.

Dated: September 14, 2011

JEFFREY A. STERLING
By counsel

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2011, I caused an electronic copy of Opposition of Defendant Jeffrey A. Sterling to Government's Motion for Clarification and Reconsideration to be served via ECF upon William W. Welch, II, James L. Trump, United States Attorney's Office.

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