UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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

MEMORANDUM IN OPPOSITION TO GOVERNMENT'S MOTION FOR CLARIFICATION AND RECONSIDERATION

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The Government's motion for clarification and reconsideration should be denied because (1) this Court's July 29, 2011 Memorandum Opinion ("Opinion") and Order ("Order") clearly deny the relief sought by the Government here, (2) the Government points to no new facts or law in its motion that would justify reconsideration, and its attempt to remedy this failure in a supplemental filing ("Supplement") still fails to raise any new facts that alter the Court's earlier analysis, and (3) the Government says nothing in this motion or the Supplement beyond a rehash of the Government's prior arguments and offers nothing sufficient to alter the balancing of interests already performed by this Court. In addition, the Government is not entitled to the information it seeks because that information is protected as a matter of law by the reporter's privilege previously recognized by this Court in its Opinion and Order.

Notwithstanding the Government's request for additional clarity, this Court's Opinion and Order could not be any clearer in precisely defining the permissible scope of Mr. Risen's testimony at trial in this matter. The Court's Opinion is abundantly clear that the questioning that the Government seeks here is not permitted:

> Risen will be required to provide testimony limited to confirming the following topics: (1) that Risen wrote a particular newspaper article or chapter of a book; (2) that a particular newspaper article or book chapter that Risen wrote is accurate; (3) that statements referred to in Risen's newspaper article or book chapter as being made by an unnamed source were in fact made to Risen by an unnamed source; and (4) that statements referred to in Risen's newspaper article or book chapter as being made by an identified source were in fact made to him by that identified source.

Opinion at 32. Unsatisfied, the Government now seeks testimony from Mr. Risen about additional topics — not a clarification of the scope of testimony that has already been ordered.

By filing this motion, the Government attempts to do an end-run around the Court's earlier ruling, which directed the Government to proceed with evidence other than that which it asked for from Mr. Risen about the identity of his confidential

source(s). While the Government tries to frame this motion as limited to a series of discrete topics that, it asserts, either fall outside the scope of the reporter's privilege or that have been allegedly waived by Mr. Risen, it cannot disguise its motivation.

In seeking Mr. Risen's testimony for this trial, the Government has only one objective: to elicit testimony from Mr. Risen that will tend to prove the identity of his confidential source(s). This Court has already balanced the fundamental rights and competing interests at stake and directed the Government to proceed with alternative evidence in the absence of any showing that Mr. Risen's testimony is necessary or critical to the presentation of its case. Opinion at 31.

The Government's Supplement essentially restates the same arguments, buttressed only by subsequent clarifications of what was always assumed to be Defendant's strategy: raising the prospect that Mr. Risen's source(s) could be someone other than the Defendant. The details of that position, the Government appears to assert, are changing day-by-day. But it cannot be that the Court must reconsider its ruling with each new pre-trial development, all of which amounts to nothing more than speculation of what may or may not actually happen at trial. None of the supposedly new developments meet the Government's burden of showing the necessity or criticality of Mr. Risen's testimony. For all the same reasons set forth in the Court's Opinion, this motion for reconsideration should be summarily denied.

ARGUMENT

I. Reconsideration Should Be Denied Because The Government Simply Rehashes Arguments Previously Considered And Rejected By This Court

Motions for reconsideration of an interlocutory order are subject to the discretion of the court and are justified only in limited circumstances, such as where there is the "discovery of substantially different evidence, a subsequent change in the controlling applicable law, or the clearly erroneous nature of an earlier ruling . . . ." *Gordon* v.

ArmorGroup, N.A., 2010 WL 4272979, at *1 (E.D. Va. Oct. 19, 2010) (denying motion to reconsider interlocutory order). Here, the Government has failed to show that any such grounds for reconsideration exist.

First, the Government does not argue that there has been any change in law since it briefed and argued its prior motion.[1] Instead, the Government acknowledges, for purposes of this motion, that the applicable standard is the very balancing test set forth in this Court's Opinion — a standard with which the Government was fully familiar at the time of the prior briefing. *See* Motion at 3, 8 (citing the Government's prior argument under that standard); Tr. at 12 ("And as the Court knows, we are staking out the position legally that *Branzburg* controls. That if the Court doesn't find that and employs the balancing test, we have articulated how that should be employed."). Second, the Government does not even argue that reconsideration is necessary to correct a clear error. *See Gordon*, 2010 WL 4272979, at *1.

Instead, the Government alludes to a few pre-trial clarifications of the details of Defendant's point-the-finger-elsewhere strategy that always underpinned the Government's requests for Mr. Risen's testimony and puts a slightly different spin on the same arguments that it made earlier, expressly acknowledging that it previously raised these very same requests:

> (i) Seeking testimony as to when Risen received information in its Response to Risen's Motion to Quash at 10-12; *see also* Tr. at 34;

[1] The Government cites only one case decided since the Court issued its Opinion, *see* Motion for Reconsideration ("Motion") at 9 (citing *United States* v. *Bonner*, 2011 WL 3375650 (4th Cir. Aug. 5, 2011)). But that case, which acknowledged that "it is possible to convict a defendant solely on circumstantial evidence," *id.* at *4 — a point that contradicts the argument made by the Government here — did not purport to change any relevant legal standard. Indeed, the Government does not even assert that the case constitutes a change in applicable law.

(ii) Seeking testimony as to Risen's manner of writing in its Response to Risen's Motion to Quash at 5-10; *see also* Tr. at 34;

(iii) Seeking testimony about "Sterling's 2004 Letter" in its Motion *In Limine* at 20 and its Response to Risen's Motion to Quash at 12-13;

(iv) Seeking testimony about non-sources in its Response to Risen's Motion to Quash at 13-14; *see also* Tr. at 35-38;

(v) Seeking testimony about the so-called Simon & Schuster "book proposal" in its Response to Risen's Motion to Quash at 9; and

(vi) Seeking "direct evidence" from Mr. Risen about (a) the identity of his confidential source(s) and (b) venue in its Motion *In Limine* at 18-21 and its Response to Risen's Motion to Quash at 14-15.

See Motion 3-7. Because the Government is merely rehashing arguments that it has already made — and that were already rejected by this Court — this motion is the quintessentially improper motion for reconsideration. *See Above the Belt, Inc.* v. *Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) ("[P]laintiff simply reargued its previous argument. Perhaps its new brief was better than its former brief but that is not significant. Plaintiff improperly used the motion to reconsider to ask the Court to rethink what the Court had already thought through — rightly or wrongly.").

The Government's primary justification for seeking reconsideration is that the Court did not expressly reiterate and then separately deny every potential line of questioning that the Government sought from Mr. Risen or could have sought from Mr. Risen. *See* Motion at 4 (arguing that the Court "did not specifically address certain issues" in its Opinion). That argument is without merit. The Court was presented with full briefing and oral argument concerning the scope of Mr. Risen's testimony, if any, and sensibly crafted the Order to specify the limited topics upon which Mr. Risen would be required to testify. The limited scope of the required testimony inherently addresses — and denies — the Government's repeated requests for testimony outside that scope.

Because the Government's motion and Supplement raise no new arguments upsetting the Court's careful balancing, it should be summarily rejected. Regardless, as demonstrated below, the Government's motion should also be rejected because the Government still fails to carry its burden to demonstrate that any of the testimony it seeks from Mr. Risen is unavailable from reasonable alternative sources or is necessary or critical, as would be necessary to overcome Mr. Risen's qualified First Amendment privilege. Opinion at 30.

II. The Government Fails To Satisfy Its Burden Of Demonstrating That The Information It Seeks Is Not Protected By The Reporter's Privilege

Even if the information sought by the Government were not identical to the information it sought from Mr. Risen previously (and it is), the Government's motion should still be denied because the Government has failed to satisfy its burden of demonstrating that the reporter's privilege has been overcome. The Court's reasoning in its Opinion applies equally to each of the Government's requests in the Government's motion for reconsideration.

A. Mr. Risen Should Not Be Compelled To Testify As To When He Learned The Information Recited in Chapter 9

When Mr. Risen learned the information recited in Chapter 9 is protected because the timeframe may tend to establish the identity of his source(s). *See* Opinion at 20 ("Risen's testimony about his reporting, including the time and location of his contacts with his confidential source(s), is protected by the qualified reporter's privilege because that testimony could help the government establish the identity of Risen's source(s) by adding or eliminating suspects."). The Government argues that Mr. Risen waived that protection with regard to the fact that he learned the information in 2003 by referencing that fact in his affidavits, and asserts that his testimony on this point is necessary to allow

the jury to eliminate as potential suspects any individuals who learned the information after 2003. There are several problems with the Government's argument.

First, no waiver occurred because Mr. Risen has gone to great lengths to resist any efforts to compel him to testify about when he received confidential information from his confidential source(s). "The classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.'" *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Here, Mr. Risen has demonstrated repeatedly that he has done anything but intentionally relinquish his right against testifying with respect to timing. *See generally* Motions to Quash 2008 and 2010 Grand Jury Subpoenas (moving to quash request that Mr. Risen testify about *when* he received information from his confidential source(s)) and Opposition to Government's Motion *In Limine* and Motion to Quash Trial Subpoena at 17, 32-48.

Second, as a practical matter, compelling Mr. Risen to testify as to the timeframe (even if initially only to the limited statement contained in his affidavit), would likely subject Mr. Risen to cross examination seeking to reveal more precise timing information for which Mr. Risen has not waived any protection. The Government does not assert waiver with respect to any further information concerning timing. Nor could it. Thus, Mr. Risen's limited disclosure that he learned the information in 2003 cannot require him to be subjected to full questioning about the timing of any such disclosure. That is, in fact, what the Government seeks here.

Finally, the Government's basis for asserting that such testimony is necessary or critical — i.e., that "Risen's testimony about the timing of the disclosures will allow the Government to exclude other individuals" as potential sources (*see* Motion *In*

Limine at 21; Tr. at 35-37), is no more availing now than before. While the Government alludes to the possibility of a potential source who might have learned of the disclosed facts after 2003, the Government fails to carry its burden to demonstrate that this fear is real, and not purely hypothetical. Specifically, the Government identifies no individual who has been accused of being Mr. Risen's source who learned of the facts in Chapter 9 after 2003. And even if it did, it is quite clear from even a cursory reading of the Indictment in this case that the Government does not need Mr. Risen's testimony to rule out that purported source at all because, as the Indictment makes clear, Mr. Risen met in April 2003 with representatives of the Government and disclosed to those officials the allegedly classified information contained in Chapter 9. *See* Indictment ¶¶ 39-41 (recounting three separate conversations in April 2003 between "Author A" and the Director of the Office of Public Affairs for the CIA, in which Author A allegedly "provided the OPA Director with certain highly classified information"); *id*. at ¶ 42 (recounting April 30, 2003 meeting with Author A, "United States government officials," and representatives of Author A's employer at which allegedly classified documents and information were discussed). The Government never explains why it cannot use the OPA Director and the "United States government officials" referenced in these paragraphs in the Indictment to demonstrate that Mr. Risen had received the information at issue here by April 2003.[2]

Therefore, even if the Court were to reconsider its prior ruling on this point —which, as discussed above, it should not — the request for testimony as to timing should be denied because the Government makes no serious effort to carry its burden.

[2] Because such testimony would not be admitted for the truth of the matter — but rather to establish the fact of Mr. Risen's knowledge at a given point of time — it would not constitute hearsay. *See* Fed. R. Evid. 801(c).

B. Mr. Risen Should Not Be Required To Testify As To Non-Sources

The Government argues that the Court did not specifically address the request for Mr. Risen's testimony "identifying who was *not* a source" for the classified information in Chapter 9. Motion at 7. The Court has already considered and rejected this impossibly narrow construction of the reporter's privilege. *Compare* Tr. at 23, 35-36 (Mr. Welch: "Bottom line, we have to prove identity. . . . And that means as much proving Mr. Sterling as the source as eliminating other suspects.") *with* Opinion at 19 ("[T]he reporter's privilege is not narrowly limited to protecting the reporter from disclosing the names of confidential sources, but also extends to information that could lead to the discovery of a source's identity."). The only new argument here is that "because the defendant has identified" SCSI staffers and one individual suspect as possible sources, the Government would like "Risen's testimony that this individual was not a source." Motion at 7-8.

This minor twist of the Government's prior argument does not alter the analysis. As Mr. Risen's counsel has previously explained, "once you go down that road of identifying this person is or is not a source and confirming the truth of whether a person is or is not a source, you've opened the door to any questions about whether someone else is or is not the source." Tr. at 23. Requiring Mr. Risen to answer questions ruling out a potential source would eviscerate the reporter's privilege and reveal Mr. Risen's source by process of elimination. If, for example, Mr. Risen denies that a particular individual is a source and then asserts the privilege when the next individual is asked about, it will be obvious what that means.

In short, the type of testimony about "non-sources" requested by the Government cannot be reconciled with the reporter's privilege.

C. Risen Should Not Be Compelled To Testify As To His Style of Writing

The Government argues that it should be entitled to ask Mr. Risen detailed questions about the "manner" or "style" of his writing for precisely the same reasons that it argued for this testimony before. *Compare* Motion at 4-6 *with* Reply at 6-8. That argument should be rejected. The information the Government seeks here is clearly designed to provide the Government with information that would tend to reveal the identity of Mr. Risen's source(s), and, as such, is covered by the reporter's privilege. *See* Opinion at 19 ("Courts have long held that the reporter's privilege is not narrowly limited to protecting the reporter from disclosing the names of confidential sources, but also extends to information that could lead to the discovery of a source's identity."). For example, in yet another attempt to get Mr. Risen to rule out certain individuals as a potential source, the Government wants to be able to ask Mr. Risen if the italicized thoughts of "Human Asset No. 1" in Chapter 9 were indeed provided to Mr. Risen by "Human Asset No. 1" — i.e., the Government wants to ask Mr. Risen directly if "Human Asset No. 1" was a source. *See* Motion at 5. The Government similarly wants Mr. Risen to testify about how many source(s) he had by "clarifying" whether "the senior CIA officer" described in Chapter 9 is a different person than the "CIA case officer." *Id.* These are merely back door attempts to circumvent this Court's ruling and force Mr. Risen to testify about information that will tend to rule out certain individuals as potential confidential sources. They should not be permitted for the same reasons (outlined above) that the testimony about "non-sources" should not be permitted.

Moreover, the Government fails entirely to meet its burden of demonstrating that such testimony is "critical" or "necessary" to its case. *See* Opinion at 30. The Government does not provide this Court with specific statements it claims are important to its case. Nor does the Government explain how any such statements fit into the evi-

dence that the Government plans to present at trial. In fact, the Government provides the Court with no information at all about the evidence it intends to present.

Finally, some of the testimony sought by the Government of Mr. Risen is completely unnecessary on its face. For example, the Government says it wants to ask Mr. Risen whether "the senior CIA officer" described in Chapter 9 is a different person than the "CIA case officer." Motion at 5. But Chapter 9 itself makes clear that they are separate people. *See, e.g.*, Risen Aff., Ex. 2 (*State of War*) at 203 (recounting a conversation between the "CIA case officer" and the "senior CIA officer"). What the Government *really* wants to know, of course, is whether Mr. Risen spoke to any of these individuals. That information is privileged, however, and the Government has not even come close to meeting its burden of demonstrating that the privilege should yield in these instances.

D. The Government Has Presented No Basis For Seeking Testimony Concerning Sterling's 2004 Letter

The Government notes that the Court did not specifically address the 2004 letter purportedly authored by Sterling but not sent to Risen, asserting that without Risen's testimony as to his receipt, or lack thereof, of the letter, a "jury cannot fairly evaluate whether the 2004 letter is true or false." Motion at 6-7. But the Government does not — because it cannot — explain how Mr. Risen's testimony would alter the Government's presentation of the case, much less be necessary or critical.

The Government will argue either that the letter was sent to Mr. Risen in an effort to create seemingly exculpatory evidence, or it will argue that the letter was drafted and not sent for that purpose. Whether Mr. Risen saw the letter or not has no bearing whatsoever on the truth of its contents or the motivation of its author. Rather, this is just one more attempt by the Government to require Mr. Risen to testify about specific contacts with the Defendant in the hopes that, notwithstanding the Court's Order,

it will elicit some testimony from Mr. Risen that tends to reveal whether the Defendant was a confidential source of Mr. Risen's.

E. Testimony About the So-Called "Book Proposal" Should Not Be Permitted

The Government asks that the Court clarify "that Risen also must authenticate the book proposal that he wrote and submitted to Simon & Schuster." Motion at 2. But the Government makes no showing that information they seek about this document is necessary or critical to the Government's case. Nor does the Government demonstrate that the information contained in the document is not also included in the actual book, which the Court has ordered Mr. Risen to authenticate. In fact, as far as we are aware, the Government has not even submitted the document to the Court or made it part of the record in this case. Mr. Risen does not even have a copy of the document at issue.

Rather than make an affirmative showing that the document is necessary or critical to its case, as is required under the law, the Government merely asserts that the document "contains very specific, classified information that the defendant and very few others knew, tending to prove that the defendant was the source of the information." Motion at 2-3; Government Reply to Motion *In Limine* at 9 n.6. But the Government provides no evidence of this assertion. It does not specify what the information in question is. It does not demonstrate who had access to the information either.

Moreover, by its own description, the Government is seeking testimony that, simply put, cannot prove guilt (because the Government concedes that others knew the information), but which it would presumably use as evidence to eliminate other possible sources of the information. As noted, the Court clearly held that the reporter's privilege protected Risen from providing testimony that could lead to the discovery of the identity of his source(s). Opinion at 19.

F. The Government's Argument That It Cannot Prove Its Case With Purely Circumstantial Evidence Is Contrary To Law

The Government's argument that Mr. Risen's testimony is necessary and critical (and that it has a compelling interest in the testimony and no alternative sources), boils down to the argument that circumstantial evidence is "not comparable" to the direct evidence that Mr. Risen would provide. *See* Motion at 9. This is exactly the same argument it made at oral argument, where the Government alluded to a recent Florida case as support for the argument that "from a practical standpoint" the two types of evidence are viewed differently by juries. Tr. at 17; *see also* Motion *In Limine* at 24-25. The Court considered and rejected this line of argument, noting that the standard jury instruction given by the court to a jury "is that . . . direct and circumstantial evidence is worthy of the same degree of credibility and the jury is to use all of it in coming to its conclusion." Tr. at 15; *see also* Opinion at 22-23 (citing *Stamper* v. *Muncie*, 944 F.2d 170, 174 (4th Cir. 1991)).

Though the Government now insinuates that it may not have sufficient direct evidence on certain points addressed in its Motion, it fails to remedy the fundamental failing with its prior argument on this point. Putting aside all its rhetoric about the theoretical limitations of circumstantial evidence, "[t]he government has not stated whether it has nontestimonial direct evidence, such as email messages or recordings of telephone calls in which Sterling discloses classified information to Risen; nor has it proffered in this proceeding the circumstantial evidence it has developed." Opinion at 23. The Government cannot meet its burden to demonstrate that the evidence it has is insufficient and that Mr. Risen's testimony is necessary or critical, and thus overcome Mr. Risen's qualified privilege under the First Amendment, without providing the evidence it does have and permitting Mr. Risen an opportunity to respond. Surely, after several opportunities to provide the Court with such information, the time has passed for reconsideration on this point. *See Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 815-17 (1988)

(law of the case doctrine "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues,'" and a court should be "loathe" to reconsider its prior rulings absent "extraordinary circumstances") (citation omitted).

Finally, the Government again repeats its arguments for whether there is a compelling interest in Mr. Risen's testimony. The Court held in its Opinion that "for a compelling interest to exist, the information must be necessary or, at the very least, critical to the litigation at issue." Opinion at 30. In its motion for reconsideration, the Government makes the exact same argument as it has in its prior motions — Mr. Risen's testimony is the "best evidence" for proving that Sterling was the confidential source. Motion at 11-13 *see also* Motion *In Limine* at 25-27; Tr. at 39-40. The Court disagreed. *See* Opinion at 30 ("The government, however, in specifying the compelling interest, has not pleaded that Risen's testimony is necessary or critical to proving Sterling's guilt beyond a reasonable doubt. . . .").

Last, the Government's argument that it has a compelling interest in direct evidence of venue also fails. The Court has previously held that the Government has information sufficient to establish venue through alternative sources, pointing to the same evidence addressed in the Government's Motion. *See* Opinion at 23, 26. Specifically, "[t]he government 'will rely on the numerous telephone calls between Risen and Sterling's home . . . in order to prove venue.'" Opinion at 23. The Government responds that the phone calls were short. The Government then raises a number of arguments that *might* be made *if* venue is challenged. That is no grounds for reconsideration of the Court's earlier analysis of this evidence.

Moreover, the Government now claims in a more recent filing (Docket 181) that it has additional evidence of venue: seized classified documents that the Government says were taken from the defendant's residence in this district. (*Id.* at 9) Al-

though it is not yet clear whether this evidence will be admitted at trial, the Government has once again attempted to seek Mr. Risen's testimony *before* seeking alternative evidence. The reporter's privilege, of course, requires that a reporter be the last resort for evidence, not the first. *See* Opinion at 14.

III. The Government's Supplement Does Not Satisfy the Government's Burden of Demonstrating that Mr. Risen's Testimony is Necessary or Critical

The Government's Supplement changes nothing. Despite the Government's assertions that the Supplement addresses new developments that have strengthened the government's arguments that Mr. Risen's testimony is necessary and critical, in fact, it offers nothing new, lists evidence that demonstrates that there is no need for Mr. Risen's testimony, and does nothing to satisfy the Government's burden of showing that Mr. Risen's testimony is truly necessary or critical to its case.

First, the Government asserts that it is now "obvious that the Defendant plans to point the finger at as many other individuals as possible." Supplement at 1. That was fairly obvious already and certainly was assumed by the Government's earlier demands for Mr. Risen's testimony. The Government now cites to sealed papers filed by Sterling[3] that purportedly assert that "a likely defense at trial" would be that others were responsible for the alleged crimes and suggest that "it is clear" that Sterling *intends* to rely on classified documents. Supplement at 1. But the Government's concern that countering Sterling's possible "scattershot" would be "time-consuming" and "laborious" is an

[3] The Government has apparently also filed an "Exhibit B" to the Supplement under seal. Motion at 4 n.3; Docket 179. Other documents referenced by the Government in either its motion papers or the Supplement were filed under seal by the Defendant (e.g., Docket 94, 144, 160, and 171) and are unavailable to Mr. Risen. Without access to these sealed documents, it is impossible for Mr. Risen's counsel to evaluate whether they, in fact, support the Government's arguments. To the extent that the Court deems these documents relevant to its decision, Mr. Risen requests access to the documents and an opportunity to be heard before the Court decides this motion.

argument the Government has already made to the Court, and which the Court has flatly considered and rejected. *See* Motion at 5 (asserting that Mr. Risen's testimony would "simplify the trial and clarify matters for the jury" and "allow for an efficient presentation of the Government's case"); Opinion at 30 ("An efficient and simpler trial is neither necessary nor critical to demonstrating Sterling's guilt beyond a reasonable doubt."). The Government states that it "may be forced to rely on more and more classified information" to refute Sterling's potential defenses, but it makes no effort to explain why such information, should it become necessary, could not be protected from disclosure by, for example, following CIPA procedures, which have been employed extensively in this case already. In short, the Government repeats an argument the Court has flatly rejected and makes no showing that Mr. Risen's testimony is necessary or critical to its case.

Second, the Government asserts that Sterling has begun a campaign to "tar anyone with any limited knowledge" of the classified program, and appears to assert that the Government has a compelling interest in Mr. Risen's testimony regarding who was not his source because, otherwise, the character and reputation of other individuals may be "unfairly and publicly smeared" by Sterling "with no way for the government to definitively exclude" those individuals as a source for Mr. Risen. Supplement at 3-4. In particular, the Government refers to one congressional staffer whom it claims has been falsely attacked by Sterling. Supplement at 2-3. Yet in asserting the falsity of Sterling's purported suggestion that the staffer was a source, the Government identifies five separate bases that it argues "patently expose[]" the falsity of the charge. Supplement at 3. Through its own submission, the Government lays out evidence that it clearly believes is sufficient to contradict Sterling's assertion, thereby demonstrating that Mr. Risen's testimony on this issue is wholly unnecessary. Furthermore, the Government's argument that it would not be able to definitively exclude some potential sources without Mr. Risen's testimony has been considered and rejected by the Court. *See, e.g.*, Tr. at 23 (Mr. Risen's

counsel explained that "once you go down that road of identifying this person is or is not a source . . . you've opened the door to any questions about whether someone else is or is not the source"); Opinion at 19 ("Courts have long held that the reporter's privilege is not narrowly limited to protecting the reporter from disclosing the names of confidential sources, but also extends to information that could lead to the discovery of a source's identity."). The Government makes no showing in its Supplement warranting reconsideration of the Court's well-reasoned conclusion on this point.

Third, the Government points to Sterling's recent disclosure that he may call an expert to testify on Mr. Risen's writing style. Supplement at 4. The Government says nothing about why Mr. Risen's testimony is necessary now to counter a potential expert's beliefs about Mr. Risen's writing style. Rather, as discussed above, the Government is merely using this argument in a back-door attempt to get at information that the Court has already concluded is protected by the reporter's privilege: the identities of who Mr. Risen spoke with in his reporting on the information in Chapter 9 of *State of War*. Indeed, the possible testimony of the writing style expert may well be inadmissible evidence, if not easily impeachable, if, as the Government asserts, it is "nothing more than speculation." Supplement at 4. In fact, the Government has now even made a motion *in limine* to preclude the testimony from this expert. (Docket 183) That motion has yet to be decided. The Government has failed to meet its burden of showing that Mr. Risen's testimony is necessary or critical to refute potential testimony that, as the Government argues, may well be held inadmissible. And regardless, the fact that Mr. Risen's writing style leaves some ambiguity as to his source(s) *is the whole point*. The fact that Mr. Risen's writing style does not, on its face, make clear the identity of his source(s) cannot possibly be grounds for asserting that he must clarify that writing to disclose the source(s) now, or the reporter's privilege would be meaningless.

Fourth, the Government asserts that the possibility that the Court may determine that the Government's venue evidence is weak — a matter that has yet to be briefed by the Government — could result in a hole that only Mr. Risen's testimony can fill. Supplement at 5. Again, by its own description, the Government is speculating about what could occur, not about what actually is necessary or critical to its case at this time. At best, the Government's assertion of need regarding Mr. Risen's testimony on venue is premature. In fact, the Court has already indicated that the documentary and testimonial evidence the Government previously indicated it would rely on to prove venue "provides the exact same information that the government is seeking" from Mr. Risen. Opinion at 25-28. Thus, the Government has failed to demonstrate that Mr. Risen's testimony regarding venue is necessary or critical.

Fifth, the Government asserts that the "former intelligence official" referenced in the Court's Opinion has changed his testimony, and that he will now contradict his own grand jury testimony with regard to 1) his description of communications with Mr. Risen about Sterling and the classified program, and 2) the purpose of a trip by Mr. Risen to Sterling's hometown. Supplement at 5-6. However, the Government offers absolutely no evidence in support of this assertion that the former intelligence official's testimony will be different at trial — as the Government must to overcome Mr. Risen's qualified privilege. Nor does the Government provide any details about what this individual will actually testify to at trial or *when* the Government learned about the alleged change in testimony — making it impossible for this Court to determine whether this argument could and should have been raised in the Government's original motion *in limine*. Finally, the Government makes no attempt to explain why it would not be able to use the former intelligence official's grand jury testimony to impeach his trial testimony, should it, in fact, differ. Simply put, the Government fails to meet its burden of demonstrating that Mr. Risen's testimony is necessary or critical to its case.

CONCLUSION

For the foregoing reasons, this Court should deny the Government's Motion for Clarification and Reconsideration and in its entirety.

September 14, 2011

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