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.	)	
	)	

GOVERNMENT'S REPLY TO JAMES RISEN'S OPPOSITION TO ITS MOTION FOR CLARIFICATION AND RECONSIDERATION

The United States, by and through its attorneys, hereby replies to James Risen's Opposition to the Government's Motion for Clarification and Reconsideration (Docket No. 190; hereinafter "Opp.").

Mr. Risen argues that the Court should deny the government's motion because (1) the government has not alleged that a subsequent change in the law requires a different result, thereby making the motion procedurally barred; (2) the government has failed to carry its burden of proving that the reporter's privilege has been overcome with regard to specific areas of testimony for which it seeks clarification or reconsideration; and (3) similarly, nothing in the government's supplement to its motion should alter the balance of interests the Court struck in its Memorandum Opinion and Order of July 29, 2011. None of these arguments has merit.

First, Mr. Risen argues that the Court should deny the government's motion as procedurally barred because it does not argue that a subsequent change in the law requires a different result, but merely repeats arguments contained in its original motion in limine. *See* Opp. at 2-5. But he cites no criminal case suggesting that the government's motion is barred as he alleges. In fact,

the gravamen of the government's motion is not an attempt to re-argue issues the Court analyzed and resolved in its opinion, as Mr. Risen suggests; rather, it is to respectfully request that the Court clarify or reconsider significant matters raised by the government in its initial briefing that the Court did not analyze and resolve in its opinion. These matters include, for example: (1) whether Mr. Risen must authenticate his book proposal, as the logic of the opinion would otherwise suggest, *see* Dkt. 162 at 2; (2) whether Mr. Risen must testify regarding certain matters, such as his receipt of a letter in 2004 from the defendant, and whether he waived any privilege as to other matters, such as when he received the classified information, *see id.* at 3-8; and (3) the effect of the government's compelling interests in prosecuting violations of federal criminal laws and in protecting the nation's security secrets on the *LaRouche* balancing test, *see id.* at 10. The government's motion is an appropriate request that the Court clarify, and, if necessary, reconsider these significant matters about which its lengthy opinion is silent.

Moreover, as Mr. Risen recognized, the Court all but invited the government to clarify the state of its evidence in certain areas that are relevant to its analysis. *See* Memorandum Opinion, Dkt. 148 at 28 ("Had the government provided the Court with a summary of its trial evidence, and that summary contained holes that could only be filled with Risen's testimony, the Court would have had a basis upon which to enforce the subpoena. The government has not provided such a summary, relying instead on the mere allegation that Risen provides the only direct testimony about the source of the classified information in Chapter 9."); *see also* Opp. at 12. The

government's motion permits the Court to clarify and reconsider its prior ruling with the benefit of a complete evidentiary record.[1]

Second, Mr. Risen also argues that as to each of the specific matters for which the government seeks clarification or reconsideration, it "has failed to satisfy its burden of demonstrating that the reporter's privilege has been overcome." Opp. at 5. The government, however, has no such burden. The government has argued that in each of these cases, a reporter's privilege has either been waived by Mr. Risen or never extended to the matter in question. Therefore, it need not demonstrate that the privilege has been overcome under the *LaRouche* balancing test, or make any showing that this testimony is "necessary and critical" to the case, as Mr. Risen repeatedly demands. *See* Opp. at 9, 10, 11. Moreover, in each case, the arguments that Mr. Risen himself advances are unavailing.

For example, Mr. Risen correctly defines a waiver as the intentional relinquishment of a known right or privilege, and argues that he has not waived his privilege as to the fact that he learned most of the information about Classified Program No. 1 in his book by 2003. Opp. at 6. But it is difficult to see how his submission of affidavits setting forth these facts to the Court and the government, and his acquiescence to those affidavits being placed on the public record, does not meet this textbook definition. Moreover, there is no reason to believe that the protective order (to which Mr. Risen's testimony will otherwise be subject) could not adequately address his concern about opening the door to cross-examination about additional details as to which he has not waived the privilege. Mr. Risen also argues that the government has not identified any

[1] Indeed, Mr. Risen himself filed a motion for reconsideration in the grand jury litigation in which he supplemented the record for the Court. *See* Dkt. 118 at 9-10.

specific individual who has been accused of being Mr. Risen's source who gained access to Classified Program No. 1 after 2003, but such individuals are in fact identified in the classified documents submitted by the defendant in its Section 5(a) notice. *See* Dkt. 171.

Similarly, Mr. Risen argues that requiring him to testify about individuals who were not his source would open the door to testimony covered by the privilege. Opp. at 8. But again, there is no reason why such concerns could not be addressed through a protective order that would prevent questioning about whether the defendant was his source. Moreover, under no circumstances does the government contemplate compelling Mr. Risen to assert his privilege in front of the jury, a scenario he apparently envisions. *See id.*

Mr. Risen labors under a similar misconception about the testimony the government seeks concerning his writing style. To be clear: the government seeks only to ask him questions about his writing style, or that which is unquestionably not privileged because it was placed in the public domain through his book. The government does not propose to ask Mr. Risen "directly whether 'Human Asset No. 1' was a source" in connection with questions about his writing style, as he suggests. Opp. at 9.

Mr. Risen offers no argument at all that his testimony concerning the 2004 letter drafted by the defendant is privileged, nor could he do so. His argument is merely that Mr. Risen's testimony on the subject is irrelevant – that "whether Mr. Risen saw the letter or not has no bearing whatsoever on the truth of its contents or the motivation of its author." Opp. at 10. This argument defies common sense. The government's theory is that the defendant wrote a falsely exculpatory, self-serving letter on his computer, and that he did not intend to actually send it to

Mr. Risen. If Mr. Risen testifies that he never received the letter, it will strengthen the government's theory markedly.

Similarly, Mr. Risen makes no argument that his testimony authenticating his book proposal is privileged, and he does not address at all the government's argument that the logic of the Court's ruling that Mr. Risen must authenticate Chapter Nine of his book and newspaper articles that he authored is equally applicable to his book proposal. Again, he questions only the relevance of testimony the government seeks. As the government represented in its motion, in the proposal, Mr. Risen identified his sources as "CIA officers involved in the operation." As a result, the proposal is plainly relevant, and any suggestion to the contrary is absurd. Moreover, the proposal, which was submitted to the Court in connection with the government's CIPA Section 6(a) and 6(c) motion,[2] contains classified information that is not contained in Mr. Risen's book, and that the defendant and very few others knew. Mr. Risen apparently questions these assertions. If necessary, the government can make further representations to the Court about the nature of the information in a classified setting.[3]

Third, Mr. Risen asserts that the government's supplement contains no new information that should alter the balance of interests the Court has already struck. Opp. at 14-17. He is wrong. Given the highly fact-specific *LaRouche* analysis the Court conducted in its opinion, the significant developments cited in the government's supplement are precisely the type of facts that should tip the balance in the government's favor. Indeed, only Mr. Risen can prevent the defense

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[2] *See* Tab 122.

[3] Mr. Risen asserts that he does not now possess a copy of his book proposal. The Government will be filing a request for a protective order shortly permitting it to make a redacted copy available to him.

from turning the trial into an odyssey in which the government must parade witness upon witness to the stand to deny that they were his source. Only Mr. Risen can definitively exclude certain witnesses, including Ms. Vicki Divoll and Human Asset No. 1, from being unfairly accused of a serious crime by the defendant. Only Mr. Risen, as opposed to an expert witness, can testify about his writing style with the appropriate personal knowledge. And it is simply not speculation, as Mr. Risen baldly asserts, that only Mr. Risen can provide direct evidence establishing venue, and do so with testimony that need not reveal anything about the identity of his source.

Finally, Mr. Risen's weak arguments concerning the changed testimony of the "former intelligence official" only serve to underscore the significance of this change in the evidence. Opp. at 17. Indeed, Mr. Risen is all but reduced to arguing that the government has no proof of this changed testimony, or that, alternatively, the government knew about this change before it filed its motion. In fact, that this witness has changed his testimony as the government has described is undisputed, insofar as it has been independently confirmed by the defendant. *See* Dkt. 187 at 5-6. Moreover, the government did not learn of this change until August 25, 2011, a day after it filed its motion for clarification and reconsideration. Such a noteworthy change in the evidence is especially relevant here, where, in denying the government's request for Mr. Risen's testimony in certain areas, the Court engaged in a highly fact-specific analysis in which it relied significantly on its conclusion that this witness's testimony – as the Court understood it then – was duplicative of the testimony the government sought from Mr. Risen.

WHEREFORE, the government respectfully requests that the Court grant the motion and admit Mr. Risen's testimony in the Government's case-in-chief.

Respectfully submitted,

Neil H. MacBride
United States Attorney
Eastern District of Virginia

Lanny A. Breuer
Assistant Attorney General
Criminal Division
U.S. Department of Justice

William M. Welch II
Senior Litigation Counsel
U.S. Department of Justice

Timothy J. Kelly
Trial Attorney
U.S. Department of Justice

James L. Trump
Senior Litigation Counsel
United States Attorney's Office

By: /s/
Timothy J. Kelly
Attorney for the United States

United States Attorney's Office
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Phone: (703) 299-3700
Fax: (703) 299-3981
Email: Timothy.Kelly@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 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:

Edward B. MacMahon
107 East Washington Street
Middleburg, VA 20118
(703) 589-1124

Barry J. Pollack
Miller & Chevalier
655 Fifteenth Street, NW
Suite 900
Washington, DC 20005-5701
(202) 626-5830
(202) 626-5801 (fax)

Peter Stackhouse
219 Lloyds Lane
Alexandria, VA 22302-3708
(703) 684-7184

/s/
Timothy J. Kelly
Trial Attorney
United States Department of Justice