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	)	

RESPONSE OF THE UNITED STATES TO DEFENDANT'S MOTION IN LIMINE REGARDING EXPERT WITNESSES

The United States, through the undersigned counsel, hereby responds to *Defendant's Motion in Limine Regarding Expert Witnesses Proffered by the United States*, filed August 29, 2011 (Dkt. 165).

I. IDENTITY OF WITNESSES

In our notice of intent to use expert testimony (Dkt. 164-3), which is not classified, we did not include the full names of six of the nine proposed expert witnesses (eight present or former CIA employees and one former FBI Special Agent). We did not want to publicly identify these six witnesses because they are present or former covert employees. The government has, however, previously provided the full names of three of these six persons in classified discovery.

We have prepared for defense counsel a summary of the backgrounds and work experiences of all nine proposed expert witnesses. The witnesses are identified by full name. As all but one of these witnesses is a present or former CIA employee, this information is classified as "Secret."

The expert notice, when coupled with the additional information provided to defense counsel, satisfies the requirements of Rule 16 of the Federal Rules of Criminal Procedure and

Rule 702 of the Federal Rules of Evidence. All but two of these witnesses were involved in the classified program at issue in this case or were in the defendant's managerial chain of command during the defendant's employment with the CIA and his involvement in this same program. They have been interviewed by the FBI, and the FBI reports of their interviews have been provided to the defense. The relevant cables these witnesses prepared about the classified program have also been provided in discovery. In other words, the defendant has been provided with more than sufficient information about these witnesses to satisfy the notice requirement.

The opinions offered by these agency fact witnesses are based on their training and experience as CIA case officers and managers. All of them have had experience in conducting intelligence operations, including foreign operations; all have had experience with human intelligence sources and classified intelligence methods; all have had experience with foreign governments and foreign intelligence services. None has testified previously as a fact or expert witness.

The testimony offered by the CIA Information Review Officer (IRO) will be limited to classification issues (the relevance and scope of which are discussed in more detail below). Although this testimony is more fact than opinion, we nevertheless included this subject matter in the expert notice because of the IRO's specialized knowledge, training and experience in this area. The IRO is responsible for the review and protection of classified information and for the review of proposals for releasing or withholding classified information in the context of CIPA proceedings. The IRO is authorized to assess the current classification of CIA information. The IRO is knowledgeable concerning the statutes, rules, regulations, executive orders, and procedures governing classified information. The IRO is competent to discuss the substantive

categories of classified information (*i.e.*, Top Secret, Secret and Confidential) and explain the use of enhanced internal access controls for certain types of information and CIA programs.

Finally, Jill Eulitz is a former FBI agent. She has had considerable experience in counterintelligence investigations, including experience as a Supervisory Special Agent, particularly as it relates to Russian espionage activities within the United States. Through her training and experience in counterintelligence investigations, she has learned how potentially damaging the unauthorized disclosure of classified information and sources can be, and her testimony will address the potential damage to national security caused by such disclosures.

II. SUBJECT MATTERS OF EXPERT TESTIMONY

The defendant contends that two areas of testimony, "classification procedures" and "training and experience," are not relevant. We disagree. These two subject matters of expert testimony are directly relevant to the elements of offenses charged in the indictment.

The defendant is charged in six separate counts of having violated Title 18, United States Code, Sections 793(d) and (e).[1] For each of these counts, the government must prove that the defendant communicated "information relating to the national defense." National defense information is information that is both closely held and potentially damaging to the United States or useful to its enemies. *United States v. Morison*, 844 F.2d 1057, 1076 (4th Cir. 1988). The government must also prove that the defendant communicated national defense information to "a person not entitled to receive it," and that the defendant acted with "reason to believe" that the

[1] Counts One, Four and Six of the indictment charge the communication and attempted communication of information relating to the national defense, in violation of Title 18, United States Code, Section 793(d). Counts Two, Five and Seven of the indictment charge the communication and attempted communication of a document relating to the national defense, in violation of Title 18, United States Code, Section 793(e).

information in question could be used to the injury of the United States or to the advantage of a foreign nation.

The program disclosed was, in fact, classified. Most of the documents that will be used by the government and the defense are classified. That the information relating to this program was -- and remains -- classified is relevant to whether the information was closely held. *United States v. Truong*, 629 F.2d 908, 918 n.9 (4th Cir. 1980)("Certainly the classification of the documents was relevant to the question of whether they related to the 'national defense.'"), citing *United States v. Dedeyan*, 584 F.2d 36, 40-41 (4th Cir.1978). That the information communicated was classified is also relevant to whether the communication of the information was potentially damaging to the United States. *Troung*, 629 F.2d at 918 n.9 ("[T]he district judge correctly instructed the jury that the official nature of the documents would be pertinent to whether their transmission would injure the United States or aid a foreign nation."). That the information communicated was classified is also relevant to the issue of whether the communication was to a "person not entitled to receive it."

Classification procedures is a relevant subject matter for testimony because the information unlawfully disclosed in this case was information subject to enhanced internal access controls which limited its dissemination to persons with a need-to-know. That the information was classified and also subject to these additional controls is relevant to the issue of identity. Only a very limited number of people had access to the information discussed in Risen's book, and this is one of the facts that will allow the jury to infer that the defendant was a source for

James Risen.[2]

The IRO will testify concerning the classification process. She will explain the terminology used by the intelligence community for classified information and how the CIA protects its classified information. She will explain how a person is granted a clearance to obtain access to classified information as well as the enhanced internal access controls utilized for the classified program at issue. This testimony is relevant to the issues identified above, and, without this testimony, the jury would certainly be confused.

The subject of "training and experience" is relevant to whether the defendant had "reason to believe" that the information in question could be used to the injury of the United States or to the advantage of a foreign nation. This is an objective, not subjective, standard, thereby making the a case officer's training and experience plainly relevant.[3] The witnesses for the government received the same training as the defendant. They, like the defendant, were (and, in some instances, still are) case officers. The jury is entitled to know how a case officer's training and experience would give the officer "reason to believe" that leaking the information that appears in Risen's book is potentially damaging to the United States.

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[2] It is interesting that the defendant would object to testimony regarding classification procedures. The defendant, in his CIPA Section 5 notice (Dkt. 171) includes a number of classified documents listing persons who had access at one time or another to the program at issue. These lists are meaningless without some explanation regarding the enhanced internal access controls used for this program and the reason these lists were created.

[3] The defendant argues that the government "cannot use expert testimony about training procedures to seek to show that Mr. Sterling acted with the specific intent required to obtain a conviction." Dkt 165 at 6. The defendant confuses two separate offense elements. Evidence about training and experience is relevant to whether the defendant communicated national defense information with "reason to believe" the information was potentially damaging to the United States. The government must also prove the defendant acted willfully, which is different element of the offense.

The defendant also argues that the government's notice is deficient because it does not discuss the actual, rather than potential, harm caused by the unauthorized disclosures in this case.[4] At trial, witnesses will testify as to some of the steps taken by the CIA to assess and mitigate the potential damage caused by the leaks in this case. That is fact, not opinion, testimony, and the government has provided the defendant with discovery as to these facts. The witnesses will relate these facts to the subject areas specifically identified in the notice (*e.g.*, potential harm and nuclear proliferation).

CONCLUSION

For these reasons, the United States asks that the court deny *Defendant's Motion in Limine Regarding Expert Witnesses Proffered by the United States*.

Respectfully submitted,

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[4] "For example, there is no disclosure given as to what damage was caused in the area of nuclear proliferation whatsoever." Dkt. 165 at 6.

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CERTIFICATE OF SERVICE

I hereby certify that I caused an electronic copy of the foregoing *Response of the United States to Defendant's Discovery Motion* and served via ECF on Edward B. MacMahon, Jr., and Barry J. Pollack, counsel for the defendant.

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