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 DEFENDANT'S OPPOSITION TO ITS MOTION FOR CLARIFICATION AND RECONSIDERATION

The United States, by and through its attorneys, hereby replies to the Defendant's Opposition to the Government's Motion for Clarification and Reconsideration and its Supplement Thereto (Dkt. No. 187; hereinafter "Opp.").

In opposing government's motion, the defendant makes two principal arguments: (1) that the government is seeking to admit rebuttal evidence for which its need is merely speculative because the defendant has not yet put on his defense; and (2) that there is no factual predicate to admit Mr. Risen's testimony because the government does not know its details, and in any event, Mr. Risen's testimony may not be available at trial because he may refuse this Court's order to testify. *See* Opp. at 2. Neither of these arguments has merit.

First, the need for the testimony the government seeks is quite obviously not speculative, and is not limited to rebuttal evidence. The Indictment charges that the information about Classified Program No. 1 and Human Asset No. 1 was leaked to Mr. Risen and then to the public through Mr. Risen's book. If not for the Court's ruling limiting Mr. Risen's testimony, it is plain that he would be perhaps the first witness called by the government. Moreover, as the

government has represented, "there is no other non-testimonial direct evidence to prove the central issues in this case, namely, the actual disclosures of classified information and the identity of the criminal wrongdoer." Dkt. 162 at 1. Mr. Risen's testimony, therefore, would be highly relevant no matter how the defendant decided to defend the case, and to claim otherwise is absurd. However, that the defendant has repeatedly made clear that he plans to argue that other individuals were responsible for the charged crimes, as is his right, only underscores that the identification testimony the government seeks is necessary and critical. Moreover, this defense – a plausible route for the defendant only because the Court's has denied the government's request to admit Mr. Risen's testimony that would identify his sources directly – has placed the government in the position of having to try a circumstantial case in which it will need to disprove, in its case-in-chief (as opposed to rebuttal) that many innocent individuals were his source.

Indeed, the defendant's specific examples of why the government's need for Mr. Risen's testimony is speculative make little sense. The defendant asserts that the government does not need Mr. Risen's testimony because *the defendant* may not need to call Ms. Vicki Divoll in light of the government's alleged admission that it "says it cannot even prove venue." Opp. at 5. But this is circular reasoning – it is of course *Mr. Risen* whose testimony the government seeks on the issue of venue. In any event, whether the defense decides to call Ms. Divoll as a witness is irrelevant to why the government seeks Mr. Risen's testimony. Without Mr. Risen's testimony, it is *the government* that will be forced to call many witnesses in its case-in-chief, such as Ms. Divoll, simply to deny that they were Mr. Risen's source. Moreover, without Mr. Risen's testimony, the government will not be able to definitively exclude these witnesses as sources,

either by asking Mr. Risen himself about his lack of contact with them, or by asking him about other matters, such as the timing and location of his own receipt of the classified information, which might circumstantially tend to exclude them.

Second, the defendant argues that the government needs to know with precision what Mr. Risen's testimony will be and whether he will honor an order of this Court to testify before it compels his testimony. *See* Opp. at 2-3. He cites no law in support of these propositions, because there is none. As explained above, there is no question that Mr. Risen's testimony in this matter is relevant, and as such it is the proper subject of a motion in limine to admit it. Moreover, any suggestion that Mr. Risen will not honor a lawful order of this Court is irrelevant to the Court's analysis, and is in any event mere speculation.

The defendant also appears to argue that the changed testimony of the witness cited by the government does not provide a basis for the Court to reconsider its ruling. *See* Opp. at 6. But motions for reconsideration are commonly entertained where new or changed evidence is discovered.[1] S*ee, e.g., United States v. Bise*, 2010 WL 3339513 (N.D.W.Va. August 20, 2010). 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.

[1] The government did not learn of this changed testimony until the day after it filed its motion for clarification and reconsideration, on August 25, 2011, thus necessitating the filing of its supplement.

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)

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