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 MOTION FOR CLARIFICATION AND RECONSIDERATION

The United States of America, by and through its attorneys, hereby moves this Court to clarify and reconsider in part its Memorandum Opinion (Dkt. 148) (hereinafter "Opinion") and Order of July 29, 2011 (Dkt. 142).

The Opinion and Order did not specifically address certain issues, such as the authentication of the Simon & Schuster book proposal and Risen's waiver of the qualified reporter's privilege as to certain facts. The government therefore seeks clarification regarding the Court's rulings on these issues or, alternatively, reconsideration if the Court's Order is intended to deny those requests.

In addition, in connection with to the Court's request for further information, s*ee*, *e.g.,* Opinion at 23, 38, 30, we explain below why the circumstantial evidence in this case is simply no substitute for Risen's eyewitness testimony. Risen's eyewitness testimony is uniquely and qualitatively different than the circumstantial evidence in this case, and 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.

In light of the October 17, 2011 trial date, the government respectfully requests an expedited decision on this Motion for Reconsideration.

ARGUMENT

I. The Court's Order Should Direct Risen to Authenticate the Simon & Schuster Book Proposal.

In its initial Motion in Limine, the government explained the relevance of the Simon & Schuster book proposal, *see* Dkt. 105 at 20, and in its Reply the government specifically referenced the book proposal as one of the items of evidence that Risen needed to authenticate. *See* Dkt. 121 at 8, 9 n.6 Although the Court has ordered that Risen must testify and authenticate his book and relevant newspaper articles, neither the Court's Order nor its Opinion address specifically the book proposal that Risen submitted to Simon & Schuster. *See* Dkt. 142 at 1; Dkt. 148 at 32. The government seeks clarification from the Court that Risen also must authenticate the book proposal that he wrote and submitted to Simon & Schuster.

Risen's book proposal identified his sources as "CIA officers involved in the operation." *See Motion in Limine*, Dkt. 105 at 20. This information is "necessary or critical" (*see* n.3, *infra*) to prove the defendant's identity as Risen's source and to rebut one of the defendant's stated defenses that a staffer from the Senate Select Committee on Intelligence (SSCI) was the true wrongdoer. Dkt. 131 at 3 (stating that "it was one of the [SSCI] staff members and *not* Mr. Sterling who unlawfully disclosed classified information"); Dkt. 160 at 2 (stating that "one obviously likely defense at trial will be that individuals other than [the defendant] are responsible" for the charged crimes). In addition, the book proposal contains very specific, classified information that the defendant and very few others knew, thus tending to prove that the

defendant was the source of that information. *See Reply*, Dkt. 121 at 9 n.6. As the author of the book proposal, only Risen can confirm the accuracy of the information contained therein.

II. Risen Has Waived the Qualified Reporter's Privilege as to Some Information, and the Privilege Does Not Protect Other Information.

Like any testimonial privilege, a qualified reporter's privilege can be waived. *United States v. Cuthbertson,* 630 F.2d 139, 147 (3d Cir.1980) (citations omitted) ("[t]he privilege belongs to CBS, not the potential witnesses, and it may be waived only by its holder."). Risen has conceded the same through counsel. *See* July 7, 2011 Transcript at 27 (hereinafter "Tr.") ("it is only the journalist who can decide whether or not to waive it.").

Both in its Reply and at oral argument, the government identified five topics that, notwithstanding any finding of a qualified reporter's privilege, covered non-privileged, non-confidential information as to which the privilege did not apply or had been waived, and thus was not even subject to balancing. *See* Reply at 5-15; Tr. at 34 (stating that "in our reply we carved out five subject areas that we say are not subject to any privilege because either they are not confidential or they have been waived"). Although the Court's Opinion addressed the existence and scope of the qualified reporter's privilege, it did not specifically address the waiver of the privilege; nor did it address some of the government's arguments that the privilege does not even apply. We respectfully submit that Risen should be compelled to testify about those topics because he waived the privilege or the information was not privileged at all.

A. Risen Has Waived any Privilege as to *When* He Received the Classified Information Appearing in Chapter 9.

Risen waived any privilege as to *when* he received the classified information appearing in Chapter 9 by publicly confirming the timing in his motion to quash. *See Memorandum in*

Support of Opposition to Motion in Limine, Dkt. 115-1 at 44 ("Risen knew about Operation Merlin as early as 2003 but held the story for three years . . ."); 2011 *Risen Affidavit* ¶ 19 ("I actually learned the information about Operation Merlin that was ultimately published in Chapter 9 of *State of War* in 2003, but I held the story for three years before publishing it."). This was not the first time Risen waived the qualified reporter's privilege as to this fact: Risen confirmed the very same information to the government three years ago. *See* 2010 Memorandum Opinion, Dkt. 118 at 31 (stating "'I actually learned the information about Operation Merlin that was ultimately published in Chapter 9 of State of War in 2003, but I held the story for three years before publishing it.'") (quoting 2008 *Risen Affidavit* ¶ 17).

Although the Court may have found the timing of the disclosure to be protected, the Court did not address the waiver argument in its Opinion. *See* Opinion at 20 ("Risen's testimony about his reporting, including the time . . . of his contacts with his confidential sources is protected . . ."). The value of this information is clear: it will enable the jury to eliminate as potential suspects "CIA officers involved in the operation" *after* 2003. In addition, now that the defendant alleges as a defense that a substantial number of other individuals possessed "much, if not all of the same information" found in Chapter 9, the jury can eliminate as potential suspects other individuals who came into possession of this information *after* 2003. Dkt. 160 at 2. The government simply seeks to elicit from Risen at trial that which Risen has already acknowledged in publicly filed documents.

B. Risen's Manner or Style of Writing Is Not Privileged.

The Court's Order seemingly foreclosed the government from asking clarifying questions about Risen's manner or style of writing in Chapter 9, even though these questions would not

disclose his confidential sources. For example, the government should be permitted to ask Risen to explain his use – and the significance – of quotation marks, indentations, or italics in Chapter 9. The government also should be permitted to clarify, through Risen, that certain references to the word "he" means "the CIA case officer," and that "the senior CIA officer" described in Chapter 9 is a different person than "the CIA case officer." *See, e.g., State of War*, pg. 197, 203, 206. These clarifying points are not privileged, and the government can pose its questions in a way that would not reveal a confidential source.

Without such testimony, it will not be clear to a jury what significance, if any, to attach to certain statements that have been quoted, indented, or italicized in the relevant newspaper articles, the Simon & Schuster book proposal, or Chapter 9. *See, e.g., State of War* at 197, 203, 204-05, 206. It would be highly misleading to the jury if Risen confirmed that certain facts contained within quotations came from an unnamed source, but then failed to explain that the quoted individual and the unnamed source are not necessarily the same person. For example, the jury could easily be misled into believing that the quoted statements or italicized thoughts of Human Asset No. 1 in Chapter 9, *see, e.g., id*. at 194, 195, 198, 204, means that Human Asset No. 1 was the unnamed source for that information. *See, e.g., Mitchell v. United States*, 526 U.S. 314, 321 (1999) ("The justifications for the rule of waiver in the testimonial context are evident: A witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry."). Risen's testimony is even more important given that the defendant has identified Human Asset No. 1 as a potential suspect. Dkt. 160 at 3.

In any event, even if these questions arguably could lead to the disclosure of Risen's source, Risen waived his privilege by having included this information in Chapter 9. Risen's invocation of a qualified reporter's privilege does not compel a sterile, antiseptic presentation of Risen's testimony. The jury is entitled to understand Risen's style or manner of writing in order to resolve any ambiguities that may exist in the relevant newspaper articles, the Simon & Schuster book proposal, or Chapter 9. Put another way, the government's inability to explain and clarify the "central piece of evidence" in the case weakens the circumstantial evidence available to the government by making it extraordinarily difficult for the jury to draw accurate inferences from that evidence. *See* Tr. at 38.

C. Sterling's 2004 Letter

In both its initial Motion in Limine and its Reply, the government pointed out the relevance of the 2004 letter. *See* Dkt. 105 at 20; Dkt. 121 at 12. Neither the Court's Order nor its Opinion, however, specifically address the 2004 letter created by Sterling.

There is nothing confidential or privileged about the letter itself. Sterling, not Risen, created the letter, and the government recovered the letter from Sterling's computer, not Risen's. Nor does the 2004 letter reveal anything about the source-reporter relationship, as the relationship between the defendant and Risen had been well-documented and publicly confirmed by Risen in his March 2002 *New York Times* article. *See* Opinion at 21.

The 2004 letter is evidence of Sterling's consciousness of guilt because the letter is an attempt to exculpate himself falsely and constitutes evidence of the defendant's obstructive intent, as charged in Count Ten (the obstruction of justice charge). Absent Risen's testimony about receipt (or lack thereof) of the 2004 letter, the jury cannot fairly evaluate whether the 2004

letter is true or false. Admission of a journalist's testimony to prove consciousness of guilt may be sufficiently compelling to override an assertion of a journalist's privilege. *See, e.g., In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992) (stating that demonstrating defendant's "knowledge of his guilt through his attempts to minimize what occurred before he became aware that he had been taped" was relevant and material). Accordingly, Risen's testimony about the 2004 letter should be admitted.

D. Risen's Testimony Regarding Non-Sources

Neither the Court's Order nor its Opinion address specifically the admission of Risen's testimony identifying who was *not* a source for the classified information appearing in Chapter 9. In its Reply, and again at oral argument, the government identified the relevance of this testimony. *See* Dkt. 121 at 13-14; Tr. at 35-38.

Risen's testimony on this point is necessary or critical. After oral argument, the defendant's defense has become quite clear: "it was one of the [SSCI] staff members and *not* Mr. Sterling who unlawfully disclosed classified information." Dkt. 131 at 3. On August 24, 2011, the defendant re-affirmed that he intended to put on that defense, stating that "one obviously likely defense at trial will be that individuals other than [the defendant] are responsible" for the charged crimes. Dkt. 160 at 2. Only Risen can corroborate the testimony of the SSCI staffers that they were not his sources and rebut Sterling's contrary allegation in an unimpeachable and unequivocal manner. Therefore, the government should be permitted to ask Risen whether or not the SSCI staffers were his sources for the information found in Chapter 9.

This Court is also familiar with the unavailability of one individual as a witness. *See Motion to Take Deposition*, Dkt. 94. That situation has not changed. If the government is

required to put on a circumstantial case, then it is necessary or critical that the government be able to eliminate a possible suspect where no other direct evidence exists. Once again, Risen's testimony on this point is "necessary or critical" because the defendant has identified this particular individual as a potential suspect. Dkt. 160 at 3. Risen's testimony that this individual was not a source for the classified information appearing in Chapter 9 fills this evidentiary gap.

III. The Government Satisfied the Alternative Means and Compelling Interest Prongs of the *LaRouche* Test Because Risen's Testimony Is Uniquely and Qualitatively Different than the Circumstantial Evidence in this Case.

This Court ruled that, in cases in which confidentiality has been promised to a news source, the Fourth Circuit has developed the following three-part test in considering whether to compel a reporter to testify in a criminal case: (1) whether the information at issue is relevant; (2) whether the information can be obtained by alternative means; and (3) whether there is a compelling interest in the information. *See* Opinion at 17 (citing *LaRouche v. National Broadcasting Co.,* 780 F.2d 1134, 1139 (4th Cir. 1986)). We respectfully submit that this balancing test weighs in in the government's favor.[1]

A. Availability of Information by Alternative Means

There is no equivalent for Risen's eyewitness testimony. He provides first-hand, direct evidence of the charged crimes. The circumstantial evidence in this case, though compelling, is not comparable to this type of direct, powerful evidence of the defendant's guilt. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("[t]he admissions of a defendant come from

[1] Because the Court ruled that the first prong is not in dispute, *i.e.*, Risen's testimony clearly would be relevant, the government does not address this issue here. In light of the Court's ruling, the government now uses the three-prong *LaRouche* balancing test in this motion for reconsideration, but in doing so, respectfully notes its objection and does not waive its previous arguments.

the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct."). Circumstantial evidence invites the jury to make an inference that they may be unwilling or decline to make; direct evidence does not require the jury to draw any such inferences. The difference between circumstantial evidence and direct evidence is even more glaring where, as here, the defendant intends to use the circumstantial nature of the evidence as a defense against the charged crimes. Dkt. 160 at 2 (discussing the false premise that only the defendant could have been the source given the substantial number of other individuals who possessed "much, if not all of" the information contained in Chapter 9).

Any suggestion that a mosaic of circumstantial evidence can replace the testimony of an eyewitness ignores the uniqueness of that evidence. *See New York Times v. Gonzales*, 459 F.3d 160, 170 (2d Cir. 2006) ("There is simply no substitute for the evidence [the reporters] have" as the recipients of disclosures of information). Moreover, Risen's eyewitness testimony is qualitatively different because, unlike the circumstantial evidence, "it shows so much at once." *Old Chief v. United States*, 519 U.S. 172, 187 (1997). This is particularly true where, as in this case, the defendant has squarely placed at issue the identity of the criminal wrongdoer. *United States v. Bonner*, ___ F.3d ___, 2011 WL 3375650 (4th Cir. Aug. 5, 2011).[2]

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[2] In *Bonner*, the Fourth Circuit affirmed the trial court's judgment of acquittal on the grounds that the circumstantial evidence convicting the defendant of robbery and firearms offenses was insufficient as a matter of law. The Fourth Circuit stated that, "[w]hile it is possible to convict a defendant solely on circumstantial evidence, in cases where the identity of the perpetrator is in dispute, usually there is some specific 'identity' evidence that links the defendant to the scene of the crime." 2011 WL3375650 *4. Risen's testimony would be specific "identity" evidence. It may be possible to convict Sterling based solely on circumstantial evidence as the Court suggests, but a jury may disagree, and the government should not have to take that risk when there is compelling, eyewitness testimony readily available.

In addition, the Court's severe limitation on the scope of Risen's testimony deprives the government of its ability to prove its case as directly and powerfully as possible. *Old Chief*, 519 U.S. at 187-88 (recognizing the "general presumption that the prosecution may choose its evidence"). The burden of proving the defendant's guilt beyond a reasonable doubt rests with the government, and the "persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them." *Id*. at 187. The government should not be forced to dispense with its best evidence and proceed with a connect-the-dots circumstantial case that may ultimately prove to be insufficient for the jury.

B. Compelling Interest

1. Direct Evidence of the Crime and Identity of Wrongdoer

The government has a compelling interest in prosecuting government employees who leak classified, national defense information. Two of the most important duties of the Executive Branch are prosecuting violations of federal criminal laws and protecting the nation's security secrets. Thus, there are few scenarios where the government's interests can be more profound and compelling than a criminal prosecution involving national security interests. As the Supreme Court has noted, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). *See C.I.A. v. Sims*, 471 U.S. 159, 175 (1985) (noting the government's compelling interest "in protecting both the secrecy of information to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service"). The Court failed to consider those compelling interests in applying the *LaRouche* test. *See In re Judith Miller,* 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (stating that the reporter's privilege

must give way in situations involving "[l]eaks similar to the crime suspected here (exposure of a covert agent)" as well as other, even more damaging leaks).

Risen's testimony is necessary or critical[3] to the litigation because of these compelling interests, and even more so given that the defendant now points the finger elsewhere.[4] Risen's testimony directly proves essential elements of the charged crimes, such as the substantive disclosures of classified information and the identity of the criminal wrongdoer, and squarely disproves one of Sterling's stated defenses that someone else illegally disclosed to Risen the classified information contained in Chapter 9. Dkt. 131 at. 2 ("a likely defense at trial will be

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[3] The government did not plead the "necessary or critical" language in its motions because it did not agree that the definition of a compelling interest, as used by the Fourth Circuit in *LaRouche*, meant "necessary or critical" to the litigation. *See* Opinion at 30. "Necessary or critical" means "necessary to [the] proper preparation and presentation of the case." *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 – *modified*, 628 F.2d 932 (5th Cir. 1980). In light of the Court's ruling, the government now uses that phrase, but in doing so, respectfully notes its objection and does not waive its prior arguments.

[4] *Cf. United States v. Blake*, 571 F.3d 331 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1104 (2010). In *Blake*, the defendant made two sets of statements to the police, the second following a one-on-one questioning in a polygraph examination. The government indicated that it would not offer the inadmissible polygraph results at trial (the defendant failed the polygraph), but moved in limine to permit the introduction of evidence about the polygraph should the defense argue that the one-on-one questioning was coercive. *Id.* at 346-47. The defense ultimately made this argument, and the government argued that the defense had "opened the door" to the introduction of evidence that the defendant changed his account of events after the polygraph was administered. *Id.* at 348. The Fourth Circuit affirmed the admission of the evidence, holding that "[t]o allow such an attack to go unanswered would have been unfair," and observing that "[i]t was, of course, defense counsel who suggested that the interrogation was coercive." *Id. See also cf. United States v. Wales*, 977 F.2d 1323, 1326 (9th Cir. 1992) (where, in case charging defendant with false statements on a customs immigration form, defense counsel "elicited testimony on cross-examination that various documents which Wales was carrying on his person and which were in his briefcase at the time of his arrest were 'all legitimate,'" defense counsel "opened the door" to government introducing the fact that there were other false identification documents in defendant's briefcase). In this case, of course, Sterling could release Risen from his promise of confidentiality but has chosen not to do so.

that individuals other than Mr. Sterling" committed the charged crimes); Dkt. 160 at 2 ("one obviously likely defense at trial will be that individuals other than [the defendant] are responsible" for the charged crimes). Risen's testimony that Sterling, and not some other person, was the source of the classified information is the best evidence on this point. Although the SSCI staffers will testify and deny that they were the sources for Risen, for Sterling's defense to succeed, he necessarily must attack the testimony of the SCCI staffers and create a reasonable doubt for the jury. Moreover, even if Sterling were unable to impeach the SSCI staffers, he could argue that Risen used many other sources, as he has done already. Dkt. 160 at 2. Risen's direct testimony that Sterling was his source for the specific classified information charged in the indictment would be, by contrast, essentially incontrovertible.

There is no non-testimonial direct evidence in this case that can establish what Risen can. There are no recorded telephone calls in which Sterling discloses classified information to Risen, nor are there emails in which Sterling discloses the same. Had there been such recordings or emails, that evidence would have been disclosed in the Bruce Declaration[5] or in the government's response to Risen's motion to quash the 2010 grand jury subpoena, and the government certainly would have provided such discovery after indictment. There simply is no such evidence.

[5] The Bruce Declaration, which the Court has had in an unredacted, classified form since 2008, and which the government adopted and re-submitted in 2010, is an accurate and fair summary of the anticipated trial evidence in this case. *See* Dkt. 144. The defendant received a redacted, classified version of the Bruce Declaration on June 18, 2011. Pursuant to this Court's Order of June 28, 2011, the government provided counsel for Risen a redacted, unclassified version of the Bruce Declaration (that remains under seal) on June 29, 2011, so that counsel for Risen would have an adequate factual background for the hearing on July 7, 2011.

The Court's ruling that Risen's extrajudicial statement to the intelligence officer can be admitted as a declaration against penal interest under Federal Rule of Evidence 804(b)(3) is not an equivalent substitute for the direct testimony of Risen for the reasons discussed above.[6] Even if admitted, a hearsay statement may not be sufficient to persuade the jury beyond a reasonable doubt that the defendant was the source of the classified information, particularly when the defendant will argue that others were responsible for the disclosures. Moreover, the Court did not conclusively admit the hearsay statement at trial, leaving the admissibility of that hearsay statement open for Sterling to challenge when offered. In fact, Sterling's counsel has already represented that Sterling will challenge the admission of the intelligence officer's testimony.

2. Direct Evidence of Venue

As this Court previously stated, the government "has a compelling interest in establishing venue." *See* 2010 Memorandum Opinion, Dkt. 118 at 23. We respectfully submit that, where there is direct evidence of venue, the government and the jury should not have to rely upon inferences to prove venue. Risen's testimony is necessary or critical to establishing venue for Counts Three through Seven, which charge the 2003 substantive disclosures and/or retention of classified information.

The Court cites to seven telephone calls between the defendant and Risen from February 27, 2003 through March 31, 2003 that occurred in the Eastern District of Virginia, as

[6] In addition, the grand jury witness referenced at pages 27 and 28 of the Court's Opinion is the defendant's wife, whom he married after her grand jury appearance. She can therefore invoke the marital privilege and refuse to testify at trial. *Trammel v. United States*, 445 U.S. 40, 53 (1980); *United States v. Acker*, 52 F.3d 509, 514-515 (4th Cir. 1995). Her unavailability will also render her grand jury testimony inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004).

sufficient proof of venue. However, no single call is more than one minute, thirty-one seconds in length; collectively, the seven telephone calls do not total more than five minutes in length. Accordingly, the defendant can argue that the telephone calls could not have constituted the substantive disclosures of the classified information given their short duration. Moreover, Risen previously wrote an article about the defendant's discrimination lawsuit in March 2002. That fact offers the defendant a different, innocuous explanation for the telephone calls. Simply put, there is no direct evidence, other than Risen's testimony, that establishes where the substantive disclosures of classified information occurred. Risen's testimony directly establishes venue and rebuts any argument that the government has not met its burden of proof on this issue.

The government's questions would focus on where Risen was when he received the disclosures of classified information appearing in Chapter 9 in 2003, and need not stray into such specifics as a residential address or even a specific place or location. Because Risen previously identified his sources as "CIA officers involved in the operation," *see* Dkt. 105 at 20, and the CIA is headquartered within the Eastern District of Virginia, Risen's testimony that some or all of the disclosures in March and April 2003 occurred within the Eastern District of Virginia would be no surprise to anyone and, significantly, would reveal nothing about the identity of any of his confidential sources. Put another way, the balancing of the interests weighs strongly in favor of the admission of this testimony.

CONCLUSION

The government has not abandoned its position, relying on *Branzburg v. Hayes*, 408 U.S. 665 (1972), and subsequent case law, that there is no reporter's privilege here, and we respectfully submit that the Court has erroneously concluded otherwise. We also believe that the

Court has misapplied *In re Shain*, 978 F.2d 850 (4th Cir. 1992), and other authorities in concluding that the *LaRouche* test is triggered by either an agreement to keep sources confidential or evidence of harassment, and that the test applies in criminal cases. Both, we submit, are required. We recognize, however, that the Court has twice held to the contrary and is unlikely to change its opinion on these legal issues. If further briefing is desired, we certainly will do so. For purposes of this memorandum, we incorporate our prior pleadings and arguments into this motion for reconsideration and clarification.

WHEREFORE, the government respectfully requests that the Court grant its Motion for Clarification and Reconsideration. In light of the substantial briefings on these issues, the government does not request further oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 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 counsel of record for defendant Jeffrey Sterling and counsel of record for James Risen. In addition, courtesy copies of the foregoing have been electronically sent to the same.

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