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	)	Hearing: July 7, 2011

GOVERNMENT'S REPLY TO DEFENDANT'S
OPPOSITION TO MOTION TO ADMIT TESTIMONY OF JAMES RISEN

The United States of America, by and through its Attorneys, Neil H. MacBride, United States Attorney for the Eastern District of Virginia; William M. Welch II, Senior Litigation Counsel, Criminal Division; Timothy J. Kelly, Trial Attorney, Public Integrity Section, Criminal Division; and James L. Trump, Senior Litigation Counsel, United States Attorney's Office, hereby replies to the Defendant's Opposition to Government's Motion to Admit the Testimony of James Risen (Docket 113).

The defendant raises no credible objection to an order directing James Risen to testify at trial. The defendant suggests, however, that this Court should defer ruling on the government's motion for such an order (and, presumably, Risen's motion to quash as well) until trial. The defendant claims the government's motion is not properly before the Court in that it seeks a ruling as to the admissibility, rather than the inadmissability, of evidence. He also argues that the Court should not entertain the government's motion because it is "speculative." The Court, he says, has no "credible proffer" of testimony from Risen and that Risen has stated publicly he has no intention of testifying.

The government's motion *in limine* and Risen's motion to quash are appropriately before this Court and should be decided promptly.[1] Under Rule 104 of the Federal Rules of Evidence, "[p]reliminary questions concerning the . . . existence of a privilege, or the admissibility of evidence shall be determined by the court . . . . " Rule 12(a)(2) of the Federal Rules of Criminal Procedure provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." Significantly, subsection (d) of Rule 12 further states that "[t]he court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal." Here, an order from this Court quashing the trial subpoena to James Risen or otherwise excluding relevant testimony from him would be appealable pursuant to Title 18, United States Code, Section 3731. *See, e.g., United States v. Smith*, 135 F.3d 963, 967 (5th Cir. 1998)(holding that a district court order quashing a trial subpoena to a television station is a ruling that effectively suppresses or excludes evidence within the meaning of 18 U.S.C. § 3731).

That we have no proffer from Mr. Risen is hardly surprising, nor was it unexpected that he would state publicly that he has no intentions of testifying at trial. But those are not reasons to defer ruling on the government's effort to enforce the trial subpoena or on Risen's effort to have it quashed. Indeed, the very reason we are in this posture is Mr. Risen's desire not to testify. And the relevance of his testimony cannot be disputed. A grand jury has found that national

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[1] The defendant seems particularly concerned with the government's use of the term "*in limine*." That term simply means "preliminarily." *Luce v. United States*, 469 U.S. 38, 40 n.2, (1984), *quoting* Black's Law Dictionary. Of course, there is no practical difference between a motion to enforce a subpoena by the government and a motion to quash a subpoena by a witness. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997)

defense information was communicated to persons not entitled to receive it through the vehicle of Mr. Risen's book.[2] Who provided the information to Risen and when and how that occurred are, without question, central to the trial of this case. Mr. Risen surely knows all of this, and there simply is no need to obtain a proffer from Mr. Risen before deciding whether he should be required to testify. Indeed, Risen, in his motion to quash the subpoena (Docket No. 115), concedes that his testimony would be relevant on certain issues.

Finally, the defendant asserts that the government disclosed classified information in its motion *in limine*. As we explained to defense counsel when this accusation first surfaced (*see* attached letter to Edward B. MacMahon, Jr.), we submitted the motion to the CIA for classification review prior to filing, and the agency determined that the pleading did not contain any classified information. Simply put, there was nothing improper about the references in the motion to the defendant's discovery requests or to the letter found on the defendant's computer.[3]

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[2] The grand jury's judgement is equivalent to that of a neutral and detached magistrate, *Gerstein v. Pugh*, 420 U.S. 103, 118, n. 19 (1974), and the indictment, standing alone, establishes probable cause that the defendant committed the offenses charged. Furthermore, in ruling on preliminary questions of law, as is the case here, the court generally is bound by the factual allegations contained within the four corners of the indictment, and such allegations should be accepted as true. *See generally United States v. Hall*, 20 F.3d 1084 (10th Cir. 1994); *United States v. Welch*, 327 F.3d 1081, 1090 (10th Cir. 2003).

[3] Defense counsel confuses the government's references to documents or pleadings containing classified information and the classified information itself. For example, in this case, the government has responded to the defendant's under seal CIPA filings with public, unclassified pleadings. *See* Docket Nos. 89 and 93. Similarly, court opinions often make reference to classified filings and discovery requests under CIPA without disclosing the underlying classified information. *See, e.g.*, *United States v. Moussaoui*, 333 F.3d 509, 512 n. 1 (4th Cir. 2003)("[t]he name of this individual is classified, as is much of the information involved in this appeal.")

CONCLUSION

For these reasons, we ask the Court to adjudicate promptly the pending motions regarding the trial testimony of James Risen.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of the foregoing Government's Reply to Defendant's Opposition to Motion to Admit Testimony of James Risen to be served via ECF upon Edward B. MacMahon, Jr., and Barry J. Pollack, counsel for the defendant, and upon Joel L. Kurtzberg and David N. Kelley, counsel for James Risen.

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