IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	**Case No. 1:10-cr-00485-LMB**
	)	
JEFFREY ALEXANDER STERLING,	)	
	)	
Defendant.	)	

MOTION FOR DISCOVERY

COMES NOW Jeffrey A. Sterling, by counsel, and hereby moves this Court to enter an Order compelling discovery of any promises or understandings by and between the United States and James Risen.

A Memorandum of Points and Authorities in Support of this motion, and a proposed order, are attached.

WHEREFORE, Jeffrey A. Sterling requests that the instant motion be granted.

JEFFREY A. STERLING
By Counsel

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DISCOVERY

COMES NOW Jeffrey A. Sterling, by counsel, and for his Memorandum of Points and Authorities in Support of Motion for Discovery of any promises or understandings by and between the United States and James Risen, states as follows:

1. Introduction and Standard.

After three years of appellate litigation and over 14 years since Mr. Sterling was employed at the CIA, this matter is now back before this Court for trial. In the appellate litigation that stalled the prior trial, as it has in this Court, the United States has repeatedly sought permission to subpoena Mr. James Risen, a journalist and author, to testify about his sources. At various times in this process, it has proffered to various Courts that without Mr. Risen's testimony, the United States simply cannot prove that Mr. Sterling was the source of the supposed disclosure of alleged national defense information alleged in the Indictment. It makes these proffers even though Mr. Risen has never revealed his sources to the government. The grand jury that indicted Mr. Sterling, did so without Mr. Risen's testimony. In the Fourth Circuit, the United States specifically proffered that its case against Mr. Sterling was so weak

that it could not even prove where the alleged disclosures actually occurred without Mr. Risen's testimony.

The result of the appellate litigation, as it relates to Mr. Risen, was favorable to the United States. The Fourth Circuit has now ruled that there is no reporter's privilege. And, since the Supreme Court declined to review the case, there remains no legal dispute that no reporter enjoys a privilege not to comply with a court order requiring him or her to testify in a criminal case about the source of a published newspaper story or book.

Flush with complete victory, the United States - through the Attorney General - then publicly announced that it would not, after all this litigation, seek to use all of the tools available to it to obtain Mr. Risen's compliance with this Court's eventual order compelling him to testify. In a series of interviews and press statements, Attorney General Holder has apparently promised Mr. Risen that he is not at risk of being jailed for contempt even if he refuses to testify in the upcoming trial of this case. For example, on September 4, 2014, Mr. Holder is quoted as confirming earlier private conversations in which he apparently insisted that Mr. Risen does not face jail time for contempt. *See* Holder, No Jail for Risen, Politico, Josh Gerstein, September 4, 2014 (copy attached)

The defense, of course, has no information, other than what is disclosed in the press, as to what promises or understandings may exist between the United States and Mr. Risen as it relates to his testimony in this case. Indeed, there may be none, and Mr. Risen has throughout the pendency of this case refused to testify as to any matter that is not essentially a matter of public record. Mr. Risen has publicly and repeatedly indicated that he will not identify the source of any story that he has written. The defense does not here posit what Mr. Risen's position may be,

but it is clear that if there are promises and understandings between the United States and Mr. Risen, those matters are discoverable as a matter of law. That is because such evidence may be favorable to the defense, at the very least, as impeachment evidence. Giglio v. United States, 405 U.S. 150 (1972). Indeed, any promise by the Government of favorable treatment of a government witness at his or her eventual sentencing, including during a contempt proceeding, is plainly exculpatory.

Moreover, now is the time for the Government to disclose what its intention may be with respect to Mr. Risen's testimony. After all, this issue has consumed years of litigation during which Mr. Sterling has remained in limbo. This Court clearly has the power to initiate civil contempt proceedings in the event that any witness fails to testify after being ordered to do so. Shillitani v. United States, 384 U.S. 364 (1976). This power is vested in the Court pursuant to 18 U.S.C. § 401. In the case of a finding of civil contempt, the Court can order sanctions, including jail time, to compel compliance with a court order to testify but the contempt order can be cured while the trial is in progress. In no circumstance, in a case of civil contempt, can the court order the person in contempt jailed beyond the term of the trial proceedings. In re Jessen, 738 F.Supp. 960, 962 (W.D. N.C. 1990).

Under Fed. R. Crim. Pro. 42 (a), the Court also has power to find a witness in criminal contempt but only after providing full due process rights to the party it seeks to hold in contempt. In the event of criminal contempt proceedings, the Court does not seek to compel compliance with an existing order. Rather, criminal contempt cannot be cured since the trial has ended and the Court seeks "to uphold the integrity of its orders, to punish a flagrant violation of an order, to

punish a flagrant violation of an order, and hopefully to deter future violations." In re Jessen, at 962.

In neither of these instances, as a matter of statutory construction, does the United States have a final say in what remedy or sentence the Court may eventually impose. Simply put, it is up to the Court and not the United States to decide, after weighing many factors, what happens to a person who is found in contempt either criminally or civilly. In that light, a promise from the United States as to what sanction or sentence Mr. Risen might receive appears to be hollow. However, a promise that the United States will not seek jail time is a promise the government could keep. Any promise or understanding must be disclosed to the defense for a fair trial to ensue.

The United States has certainly publicly signaled to Mr. Risen that he will not be jailed if he refuses to obey a court order requiring his testimony. If the United States is not going to seek jail as a sanction for failure to comply with a court order, then this United States can just affirm that position and the Court and the parties can move forward with that understanding and litigate what that may mean for purposes of this trial.

WHEREFORE, Jeffrey A. Sterling requests that the instant motion be granted.

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By Counsel

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