

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES OF AMERICA)	Criminal No. 1:10CR485
)	
)	
)	Hon. Leonie M. Brinkema
v.)	
)	
JEFFREY ALEXANDER STERLING)	
)	
Defendant.)	

**DEFENDANT JEFFREY STERLING'S
OPPOSITION TO GOVERNMENT'S
MOTION IN LIMINE TO PRECLUDE EXPERT TESTIMONY**

Defendant Jeffrey Sterling timely disclosed to the Government that at trial he may call Mr. Mark Feldstein as an expert witness in journalism and, in particular, journalistic practices with respect to the use and protection of unnamed sources. Mr. Feldstein is the Richard Eaton Professor of Broadcast Journalism at the Phillip Merrill College of Journalism at the University of Maryland at College Park. In its Motion in Limine to Preclude Testimony (DE 183), the Government does not challenge Professor Feldstein's background, training, experience or qualifications to testify as an expert on journalistic practices. Rather, distorting the detailed three-page disclosure of Professor Feldstein's anticipated testimony it received from Mr. Sterling (attached to the Government's motion as Attachment A), the Government claims that Professor Feldstein will testify as to two subjects -- one the Government deems "speculation and surmise" and the other the Government deems to be within the common knowledge of the jury. Since the Government's motion is not based on Professor Feldstein's actual anticipated testimony, as set forth in the disclosure statement, but rather is based on a caricature of the anticipated testimony, it should be denied.

BACKGROUND

The Government has repeatedly conceded that it has no direct evidence that Mr. Sterling was the source of the alleged national defense information that appears in Chapter 9 of Mr. Risen's book, State of War. The Government has no documentary evidence directly supporting its theory that Mr. Sterling was Mr. Risen's source and it has never spoken to Mr. Risen. Rather, the Government intends to put on an entirely circumstantial case. The Government will, explicitly or implicitly, ask the jury to infer from various facts that Mr. Risen obtained national defense information from Mr. Sterling. A jury may, of course, infer a fact from evidence presented, but only to the extent that the inference is a reasonable one.

One of the most obvious pieces of evidence in the trial will be Chapter 9 itself. Accordingly, the jury will be asked, in part, to draw inferences from the manner in which Chapter 9 is written about who the sources for Chapter 9 were. For example, there are portions of Chapter 9 that are written from the perspective of a CIA case officer. *See, e.g., State of War* at 203-04 ("In fact, the CIA case officer who was the Russian's personal handler, had been stunned by the Russian's statement."); ("The CIA case officer couldn't believe the senior CIA officer's answer . . ."). The Government will presumably argue that this officer was Mr. Sterling.

Additionally, the Government has indicated its intent to introduce Mr. Risen's book proposal into evidence.¹ The Government will presumably also ask the jury to infer from the book proposal that Mr. Sterling was a source for Mr. Risen.

As the expert disclosure for Professor Feldstein makes clear, it is anticipated that he will testify regarding journalistic practices pertaining to the use and description by journalists of

¹ Mr. Sterling does not concede the admissibility of this hearsay document.

unnamed sources. Mr. Feldstein will not be offering any opinion as to who was or was not a source for Chapter 9 of State of War. That is a factual issue for the jury to decide. Rather, Professor Feldstein will assist the jury by offering his opinion about journalistic practices for the jury's consideration in deciding whether or not the inferences the Government may ask it to draw are, in fact, reasonable inferences.

Thus, for example, it is anticipated that Professor Feldstein would explain that Chapter 9 of State of War is written in "the third-person omniscient, a narrative style," which includes

imputing to the characters' internal voices what they are thinking and feeling. This style has become increasingly popular with mainstream journalists in recent years, as exemplified by books authored by Bob Woodward. One effect of the third-person omniscient narrative style is that it tends to mask the identity of a story's sources, protecting both the anonymity of sources and disguising the number of sources. It is not uncommon using this style for an author to ascribe thoughts or motivations to particular "characters," whether or not the author has actually spoken directly to the individual to whom thoughts and motivations are being ascribed.

Expert Disclosure at 1-2.

Without such testimony, a juror might read portions of Chapter 9, such as those quoted above, that appear to ascribe thoughts, feelings or reactions of the CIA case officer and infer from those passages that the case officer must have been a source. Professor Feldstein's opinion testimony would assist the jury in deciding whether or not that would be a reasonable inference.

The Government's Motion for Reconsideration of the Court's July 29, 2011 Opinion regarding Mr. Risen illustrates the importance of Prof. Feldstein's anticipated testimony. In that motion, the Government conceded that Mr. Risen's "manner" or "style" of writing raises inferences as to the identity of his sources. In its motion, the Government asks this Court to draw the inference that not only is the "CIA case officer" referenced in Chapter 9 is Mr. Sterling, but also that the "CIA case officer" is the same person as the "senior CIA officer" also

referenced in Chapter 9. *See* Motion at 5. As illustrated by Mr. Risen's Opposition to the Government's Motion for Reconsideration, the inference the Government sought to have this Court draw was not a reasonable one, as Mr. Risen's affidavit makes clear that these are two different people. *See* Opp. at 9-10. Just as the Government will need to try this case without Mr. Risen, so will Mr. Sterling. The Government is entitled to argue inferences from Mr. Risen's writing style. Mr. Sterling is equally entitled to put on expert testimony that will assist the jury in determining the reasonableness of these inferences.

I. Professor Feldstein Will Not Offer an Opinion as to the Truth or Falsity of any Statement

The Government notes that Professor Feldstein will not have reviewed the underlying facts pertaining to Classified Program No. 1 or the sourcing for Chapter 9 and argues that this renders his testimony "speculative." DE 183 at 2. Rather, what the Government highlights is merely that Professor Feldstein is not a fact witness. He is an expert witness. He will not be testifying to the underlying facts about which, like any expert witness, he has no first-hand knowledge. Rather, he will be testifying about journalistic practices, about which the Government implicitly concedes, he has great expertise. *See Certain Underwriters at Lloyd's v. Sinkovitch*, 232 F.3d 200, 203 (4th Cir. 2000) ("[A]n expert can answer hypothetical questions and offer opinions not based on first-hand knowledge because his opinions presumably will have a reliable basis in the knowledge and experience of his discipline.") (internal quotation marks omitted).

Thus, the Government's argument is based on a mischaracterization of Professor Feldstein's anticipated testimony. The Government asserts that "the expert's testimony regarding whether statements that identify sources are true or false is pure speculation" and notes that "one witness may not opine about another witness's veracity." *Id.* While these observations

may be true, they are wholly beside the point. As the expert disclosure makes clear, Mr. Sterling has no intention of calling Professor Feldstein to opine on whether or not any particular statement is true or false, much less to opine about any other witness' veracity. Rather, as set forth above, Professor Feldstein will testify about common and accepted journalistic practices. This testimony will assist the trier of fact in making its determination about whether or not to credit any particular statement or witness and, more specifically, whether or not to draw certain inferences from the evidence presented. F.R.E. 702 (expert testimony permissible where it "will assist the trier of fact to understand the evidence"); *See Vaughn v. Metropolitan Life Ins. Co.*, No. 3:96CV06, 1996 U.S. Dist. LEXIS 11077, at *26 (E.D. Va. July 11, 1996) (noting that absent expert testimony explaining the meaning and significance of a statistical analysis, the jury could not "be called upon to draw the inferences urged by [the plaintiff]").

II. Professor Feldstein's Anticipated Testimony is Not Within the Common Knowledge of a Lay Jury

The Government seizes on a single fact in the three-page expert disclosure for Professor Feldstein, that Chapter 9 is written in the "third-person omniscient narrative style," and argues that this fact is within the common understanding of a lay juror. As set forth above, what is significant about the narrative style is how that style is employed by journalists who are using unnamed sources. While a lay juror may or may not be familiar with the "third-person omniscient narrative style," what the Government ignores is that Professor Feldstein, with his years of training and experience as a journalist and a professor of journalism, plainly possesses "specialized knowledge" (F.R.E. 702) about common and accepted practices by journalists in how to use a particular narrative style in a book or article that is relying on unnamed sources. Accordingly, Professor Feldstein's anticipated testimony is not confined to matters within a lay

CERTIFICATE OF SERVICE

I hereby certify that on the 16th, day of September 2011, 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.

By: _____/s/
Edward B. MacMahon, Jr. (VSB # 25432)
Law Office of Edward B. MacMahon, Jr.
107 East Washington Street
P.O. Box 25
Middleburg, VA 20118
(540) 687-3902
(540) 687-6366 (facsimile)
ebmjr@verizon.net

Counsel for Jeffrey A. Sterling