

No. 11-5028

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JEFFREY ALEXANDER STERLING,

Defendant-Appellee,

and

JAMES RISEN,

Intervenor-Appellee.

On Appeal From The United States District Court For The
Eastern District of Virginia (Brinkema, J.)

UNOPPOSED MOTION CONCERNING ORAL ARGUMENT

Oral argument in this matter is scheduled for May 18, 2012. Because this case involves classified information, the Court has requested the parties' views "on whether all of the oral argument should be held in a sealed courtroom, or whether the argument should be bifurcated, with a portion of the argument held in an open courtroom, and the portion of the argument related to the classified materials held in a sealed courtroom." Letter from Clerk (Apr. 6, 2012).

In response to the Court's letter, the parties have conferred and respectfully request that the Court bifurcate the oral argument. The first portion of oral argument would be devoted to the first issue on appeal, and would be open to the public. The second portion of oral argument would be devoted to the second and third issues on appeal, and would be conducted (at least in part) in a sealed courtroom. In support of this request, the government states the following:

1. This case involves three issues. The first—whether intervenor James Risen has a constitutional or common law privilege to refuse to disclose his source—will not require the parties to discuss or consult classified materials during oral argument. Indeed, neither Risen nor his counsel is cleared to receive classified information. There is thus no need to seal the courtroom for the oral argument concerning this issue.

2. Unlike the privilege issue, the second and third issues on appeal—concerning the district court's discovery order and its order related to witness security—do involve classified information, and the district court's decisions concerning these matters were announced at sealed hearings conducted pursuant to the Classified Information Procedures Act, 18 U.S.C., app. C. It is necessary and appropriate to seal the courtroom during the oral argument concerning these issues, as follows:

a. It will be necessary to seal the courtroom for the argument concerning the second issue on appeal (discovery), because that issue requires the parties to discuss classified matters with the Court—including, most obviously, the alleged *Giglio* information at issue—and may require the parties to consult the classified briefs and other classified record documents during the hearing. Because it is likely that discussion of classified information will pervade the argument on this issue, the courtroom should be sealed for the entire hearing.

b. It may be necessary to seal the courtroom for at least part of the argument concerning the third issue on appeal (witness security). The parties do not foresee a need to discuss classified information in open court with respect to this issue, but the Court may find it useful or necessary to consult classified record documents during the hearing. In that event, the Court would need to seal the courtroom for at least part of this argument.

c. This Court has adopted a similar bifurcation procedure in prior cases to prevent the unauthorized disclosure of classified information while assuring that as much of the oral argument remains open to the public as possible. *See, e.g., United States v. Moussaoui*, 65 F. App'x 881, 890-891 (4th Cir. 2003) (Appeal No. 03-4162); *United States v. Abu Ali*, 528 F.3d 210, 244 n.13 (4th Cir. 2008) (Appeal Nos. 06-4334, 06-4521). The same approach is warranted here.

3. Because this case involves two distinct sets of issues—the first relating principally to intervenor Risen, and the second relating principally to defendant Sterling—the parties further request that the Court adjust the time for oral argument in this case as follows:

- Regarding the first issue on appeal (privilege), 20 minutes per side. Risen and Sterling may agree to share the argument time on their side in whatever manner they wish.
- Regarding the second and third issues on appeal (discovery and witness security), 20 minutes per side. If the Court decides to seal the hearing for some but not all of the argument concerning these issues, it may be appropriate to further subdivide this time between the sealed and unsealed portions.

4. The government is authorized to state that Sterling and Risen agree to bifurcate the oral argument in this matter and to adjust the time for oral argument as described above. Sterling further agrees that the courtroom should be sealed for the entire oral argument concerning the second issue on appeal and for whatever part of the argument concerning the third issue that the Court deems appropriate. Risen has no involvement with the second and third issues and therefore takes no position on whether the courtroom should be sealed.

WHEREFORE, the United States respectfully requests that this Court bifurcate and adjust the time for oral argument in this case in the manner described herein.

Respectfully submitted,

NEIL H. MACBRIDE
United States Attorney

JAMES L. TRUMP
Senior Litigation Counsel
United States Attorney's Office
Eastern District of Virginia

WILLIAM M. WELCH II
Senior Litigation Counsel

TIMOTHY J. KELLY
Trial Attorney
Criminal Division
U.S. Department of Justice

April 9, 2012

LANNY A. BREUER
Assistant Attorney General

MYTHILI RAMAN
Principal Deputy Assistant
Attorney General

s/ Robert A. Parker
ROBERT A. PARKER
Criminal Division, Appellate Section
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-3521

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2012, I filed the foregoing Unopposed Motion Concerning Oral Argument with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to the following registered users:

Barry J. Pollack
Miller & Chevalier
655 15th Street, NW
Suite 900
Washington, DC 20005

David N. Kelley
Joel Kurtzberg
Cahill, Gordon & Reindel LLP
80 Pine Street
New York, NY 10005

Edward B. MacMahon
107 E. Washington Street
Middleburg, VA 20118

Counsel for James Risen

Counsel for Jeffrey Alexander Sterling

s/ Robert A. Parker
Robert A. Parker