

WILLIAM WELCH, JEFFREY STERLING, AND THE SIXTH AMENDMENT

As Josh Gerstein reported, the government has submitted a filing in its appeal of some rulings in the Jeffrey Sterling case that reveals a little more about their reason for appealing. The key detail is that the government considers two people, about whom the government withheld impeachment information, so critical to their case that without them, the prosecution would be “terminated.”

The second issue on appeal relates to the district court’s decision to strike two of the government’s witnesses as a sanction for the late disclosure of alleged impeachment material related to those witnesses. This decision was rendered orally at a pretrial hearing and is based on factual conclusions concerning the weight and necessity of the government’s evidence and the history of discovery in this case. The district court’s decision to strike these witnesses effectively terminated the prosecution.

In order to adequately respond to the district court’s decision, the government believes it is necessary to explain the government’s extensive discovery efforts (much of which involved the review and disclosure of classified information); the import of the alleged impeachment material at issue and the ways in which Sterling proposes to use it; and the ways in which the two witnesses are important to the government’s case. The government must also address the effect of precedent from the Supreme Court and from this and other circuits concerning a district court’s limited authority to

strike witnesses as a sanction for an alleged discovery violation. [my emphasis]

I have suggested that one of these witnesses likely leaked classified information, but was not prosecuted for it. If I'm right that this is one of the witnesses that Judge Leonie Brinkema struck, consider what it means: that one of the most critical witnesses in this case also disclosed classified information (behavior, Sterling asserted in a filing, that was "more egregious" than what he was alleged to have done).

The government is preparing to argue that this may not amount to impeachment information. Presumably, they're also going to offer some excuse for how they didn't manage to find and turn over this information until shortly before the trial.

And this witness is crucial to the government's case.

Now couple all that with one of the other disputes at issue: the government wants to withhold the real names of 10 CIA witnesses—not just from the jury, which I understand to a point. But also from Sterling himself.

The third issue on appeal relates to the district court's decision to require the government to disclose to Sterling and the jury the true names of government witnesses who are covert CIA officers or contractors. This decision was rendered orally at two pretrial hearings, and requires a close familiarity with the extensive procedural history concerning the discoverability and admissibility of the witnesses' true identities (which are classified).

Now, the government claims these two efforts aren't that closely related—"each of [these appellate issues] is almost entirely distinct

from the others." Yet is that really true? The government, either by accident or intent, tried to prevent Sterling from learning details about two key witnesses against him. And it is also trying to prevent him from tying the people testifying against him to actions he probably knows firsthand, from his time at the CIA—if not from this late-produced discovery information.

It sure looks like the government is trying to play games with evidentiary issues to eliminate the Sixth Amendment. Typical William Welch.