WILLIAM WELCH & DOJ'S DISHONEST INTELLIGENCE WITNESS AGAINST JEFF STERLING

In a comment to Marcy's *The Narratology of Leaking: Risen and Sterling* post yesterday, MadDog related this nugget regarding the Sterling case from a Steve Aftergood article in Privacy News:

> I know EW's post's focus was on Sterling's defense team's strategy, but I'd be remiss in not commenting on this tidbit from Steven Aftergood's post:
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> "…In addition, a former intelligence official now tells prosecutors that portions of his testimony before a grand jury concerning certain conversations with Mr. Risen about Mr. Sterling were "a mistake on his part." As a result, prosecutors said (8 page PDF), Mr. Risen himself is "the only source for the information the government seeks to present to the jury."…"
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> I wondered just what this paragraph meant. Did it mean, as I assumed, that one of the prosecution's key witnesses, a former intelligence official, had in fact recanted the former intelligence official's grand jury testimony?
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> Here is just what the prosecution blithely said on the matter from page 5 of their supplement (8 page PDF):
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> "…Fifth, the testimony of the "former intelligence official" referenced in the Court's Opinion has changed. The former official will now only say that on one occasion, Mr. Risen spoke with him about the defendant and stated that the defendant had complained about not being

> sufficiently recognized for his role in Classified Program No. 1 and in his recruitment of a human asset relating to Classified Program No. 1, and that on a separate occasion, Mr. Risen asked him generic questions about whether the CIA would engage in general activity similar to Classified Program No. 1. This former official, however, cannot say that Mr. Risen linked the second conversation with the defendant, although both conversations occurred within several months of each other. The former official termed his grand jury testimony, which linked the two conversations together, as a mistake on his part. In addition, the former official further modified his testimony to say that although Mr. Risen had acknowledged visiting the defendant in his hometown, Mr. Risen's trip to see the defendant was not the main purpose of his travel, but rather a side trip.
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> The testimony of this former official had been cited by the Court as providing "exactly what the government seeks to obtain from its subpoena [to Mr. Risen]: an admission that Sterling was Risen's source for the classified information in Chapter Nine." Memorandum Opinion (Dkt No.148) at 24. The former official's testimony will not now provide such a direct admission, further underscoring the government's contention that for the reasons discuss in its Motion, Mr. Risen is the only source for the information the government seeks to present to the jury…"

So, that got me thinking, what is the status of the "former intelligence officer" in question? Is he still on the witness list? Who is it, and why is he "former"? Has he been charged with false statements to a government officer under 18 USC 1001? Has he been charged with perjury

under 18 USC 1623? Is there a criminal investigation regarding the duplicity underway? What is being done?

Because, giving the government's prosecutors the benefit of the doubt that they did not misrepresent or puff the "former intelligence officer's" statements and testimony to start with, which is a pretty sizable grant for a William Welch run show, then it seems pretty clear that the "former intelligence official" is now saying that he either testified to things he did not, in fact know at the time, or he embellished/lied to the grand jury and the attending prosecutors.

The problem with the above is, the "former intelligence official is not entitled to any protection or benefit of the doubt for a "recantation" under 18 USC 1963(d). Here is the relevant portion on this subject from the US Attorney's Office Criminal Resource Manual:

> Recantation was never a defense to perjury in the common law, and is not a complete defense in a Section 1621 prosecution. United States v. Norris, 300 U.S. 564, 573-74 (1937). Recantation in such cases is relevant only as to whether the defendant intended to make a willfully false statement. Id.
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> Section 1623(d), however, makes recantation a bar to a perjury prosecution in certain cases that meet either three or four requirements. First, the recantation must be made "in the same continuous court or grand jury proceeding" in which the original false declaration was made. Second, the recantation must unambiguously admit that the prior statement was false. A request to clarify or supplement testimony is not enough to satisfy the statutory requirement. Finally, recantation bars prosecution only if the admission occurs at a time when the false declaration has "not substantially

> affected the proceedings, and it has not become manifest that such falsity has been or will be exposed." United States v. Fornaro, 894 F.2d 508, 511 (2d Cir. 1990); United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. Moore, 613 F.2d 1029, 1039 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980). Thus, if the witness has knowledge that the false testimony "has been or will be exposed," no effective recantation can thereafter be made. United States v. Denison, 663 F.2d 611, 615 (5th Cir. 1981). Similarly, if the grand jury has acted in reliance upon the false testimony, no recantation is possible. The United States Court of Appeals for the Eighth Circuit, however, viewed the last two requirements in the disjunctive when it allowed a defendant an opportunity to show either that the proceedings were not substantially affected or that the falsity will be exposed. United States v. Smith, 35 F.3d 344, 347 (8th Cir. 1994). Because recantation is a jurisdictional bar to prosecution, Fed.R.Crim.P. 12(b)(2) requires that it be shown before trial. United States v. Fornaro, 894 F.2d 508, 511 (2d Cir. 1990).

There are two problems here. First, there is no evidence from the government's description in its motion that the "former intelligence officer" made a clear admission his/her testimony was false or did anything other than hemming, hawing and modifying. Secondly, and most importantly, it is simply impossible to say that the false testimony of the "former intelligence official" "has not substantially affected the proceedings". Remember, even the prosecutors, in their motion, stated unequivocally:

> The testimony of this former official had been cited by the Court as providing

> "exactly what the government seeks to obtain from its subpoena [to Mr. Risen]: an admission that Sterling was Risen's source for the classified information in Chapter Nine."

It is pretty amazing that here is the Obama DOJ prosecution team, persecuting yet another clearcut whistleblower, whom they ought to be protecting, and doing so with such inconsistent and malignant gimmicks. Welch and DOJ have accused Mr. Sterling of egregious crimes of dishonesty and betrayal, and put up a dishonest unidentified "former intelligence officer" in front of the grand jury to get the indictment. And now Welch and the DOJ not only want to continue their wrongheaded prosecution, but want to invade the sanctity of the press, Jim Risen, which has already been noted by Judge Leonie Brinkema, to bail their sorry behinds out of their predicament.

So, what is going on with the investigation and/or prosecution of this vaunted "former intelligence officer"? Because, save for there being some meaningful activity in that regard, it just looks like another case of a contrived, manipulated and contorted prosecution by a team led by a man, William Welch, famous for just that.

Oh, and as a late arriving parting shot, it turns out that William Welch, who was rather unceremoniously removed from his post at DOJ's Public Integrity Section (PIN) in the aftermath of the Ted Stevens disaster and court ordered investigation into his conduct, as a news release, pointed out by Shane Harris, about a public official being sentenced in Massachusetts, contains this little plum in its last paragraph:

> The case was investigated by the FBI, with assistance from the Massachusetts Inspector General's Office and the Lowell Police Department. It is being prosecuted by Senior Litigation Counsel

> William M. Welch II and Kevin Driscoll of the Criminal Division's Public Integrity Section, with assistance from the U.S. Attorney's Office, Public Corruption Unit.

What were once vices in the Department of Justice are now just unending bad habits under the Administration of Barack Obama and Eric Holder. Nothing has changed.