

**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 REPLY  
TO GOVERNMENT’S OPPOSITION TO  
MR. STERLING’S MOTION TO DISMISS  
COUNT NINE OF THE INDICTMENT**

On February 24, 2011, Mr. Sterling moved to dismiss Count Nine because the Government failed adequately to allege in the Indictment that the government property Mr. Sterling purportedly conveyed had a value greater than \$1000, an essential element of 18 U.S.C. § 641 (Unauthorized Conveyance of Government Property), if charged as a felony offense. [DE 55] (“Motion”). The Government opposed this Motion [DE 73] (“Opposition”), and Mr. Sterling respectfully submits his reply to the Government’s Opposition.

**ARGUMENT**

As the Government correctly notes, “[m]otions to dismiss test whether the indictment sufficiently sets forth the charged offense against the defendant.” DE 73 at 2. While an indictment “need not set forth with detail the government’s evidence[,]” (*id.* at 3) it must, at the very least, provide sufficient detail to ensure that the grand jury had before it all the facts necessary to charge the defendant with the offenses contained in the indictment. *Russell v. United States*, 369 U.S. 749, 770 (1962).

First, the Government argues that the Indictment sufficiently alleges the value of the property at issue because Count Nine tracks the language of the statute. DE 73 at 4-5. Reciting statutory language is not the same as alleging *facts* in support of the charges. The Federal Rules of Criminal Procedure require the Indictment to contain “a plain, concise and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). Beyond repeating statutory language, the Indictment does not include a “plain, concise and definite written statement of [ ] essential facts” alleging that the government information at issue in the Indictment is worth more than \$1000, in order to establish that the offense charged is a felony.

Second, the Government’s Opposition relies on allegations in the Indictment that the information was classified and on the conclusory statement that “classified information is by its very nature extremely valuable.” DE 73 at 6. The Government’s argument that classified information is valuable cannot retroactively inject the missing element into the Indictment. Moreover, the Government’s reliance on *United States v. Caso* for the proposition that “[i]t is hard to imagine ‘any record’ more valuable to the United States than its classified documents” is unavailing. *Id.* (citing *United States v. Caso*, Nos. 90-5830, 90-5831, 1991 U.S. App. LEXIS 12312 (4th Cir. June 14, 1991)). *Caso* discussed the potential value of classified documents and that the unauthorized conveyance of such documents can form prosecution under 18 U.S.C. § 641. 1991 U.S. App. LEXIS, at \*13-14. However, never, at any point, does *Caso* address whether the Indictment in that case adequately alleged the monetary value of the classified information. Mr. Sterling does not dispute whether classified documents *may* have a value greater than \$1000. The issue here is whether the Indictment adequately alleges that the classified information in question in this case in fact had the requisite monetary value. It plainly

does not, as it alleges no facts whatsoever about the monetary value of the information in question.

Nor does *United States v. Morison* save the Indictment. As the Government describes, the Fourth Circuit in that case upheld a conviction under § 641 for the theft of classified information when “the information at issue was identified in the indictment merely as classified photographs and documents, without *apparent significant* further elaboration.” DE 73 at 6-7 (citing *United States v. Morison*, 844 F.2d 1057, 1076 (4th Cir. 1988)) (emphasis added). The Government includes these two qualifying words to describe the indictment in *Morison* because it must. Nowhere in *Morison* does the Court indicate the extent of the indictment’s factual support for its assertion of value. Thus, it is unknown whether the indictment included more than the mere tracking of statutory language or the identification of information as classified, and the holding does little to support the Government’s position.

Essentially, the Government asks to be relieved of the requirement to provide a “plain, concise and definite written statement of essential facts constituting the offense charged” under Federal Rule of Criminal Procedure 7(c)(1), even though the Indictment alleges no facts about the information’s value, because, as a general matter “classified information is by its very nature extremely valuable.” DE 73 at 6. While this assertion may be true, it does not cure the deficiency of the factual allegations in the Indictment adequately to allege an offense under 18 U.S.C. § 641. Accordingly, Count Nine of the Indictment must be dismissed.

### **CONCLUSION**

For the foregoing reasons, Mr. Sterling respectfully requests the Court grant his Motion to Dismiss Count Nine of the Indictment.

Dated: March 16, 2011

Respectfully submitted,

JEFFREY A. STERLING

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](mailto:ebmjr@verizon.net)

\_\_\_\_\_/s/  
Barry J. Pollack (admitted *pro hac vice*)  
Miller & Chevalier Chartered  
655 Fifteenth St. N.W. Suite 900  
Washington, D.C. 20005  
(202) 626-5830  
(202) 626-5801 (facsimile)  
[bpollack@milchev.com](mailto:bpollack@milchev.com)

*Counsel for Jeffrey A. Sterling*

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of March, 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](mailto:ebmjr@verizon.net)

*Counsel for Jeffrey A. Sterling*