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.)

BRIEF FOR THE UNITED STATES (PUBLIC VERSION)

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STATEMENT OF JURISDICTION

This is an interlocutory government appeal from two pretrial orders suppressing evidence in a criminal proceeding, and a third pretrial order requiring the disclosure of classified information at trial. The government filed a timely notice of appeal on October 19, 2011. JA 996-1001.[1] The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over the first and second issues on appeal under 18 U.S.C. § 3731. The Court has jurisdiction over the third issue on appeal under 18 U.S.C. § 3731 and the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, § 7.

STATEMENT OF ISSUES

1. Whether, in a prosecution for disclosing classified national defense information to a reporter, the reporter may assert a First Amendment privilege and refuse to testify at trial concerning the source of that information.

2. Whether the pretrial disclosure of material that could potentially be used to impeach two government witnesses pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), occurring less than 12 hours after the expiry of the district court's discovery deadline and four days before trial, warranted suppression of all testimony from those two witnesses.

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[1] Record citations are to the Joint Appendix ("JA"), the Joint Sealed Appendix ("JSA"), the Joint Classified Appendix ("JCA"), and the Government's *Ex Parte* Classified Appendix ("GXCA").

3. Whether the government is required to disclose to the defendant and to the jury the true full names of seven government witnesses who are currently covert officers or contractors of the Central Intelligence Agency ("CIA").

INTRODUCTION

Defendant Jeffrey Sterling is a former CIA case officer who allegedly and illegally communicated classified national defense information to James Risen, a reporter for *The New York Times*. As soon as the CIA became aware of Sterling's actions, senior government officials contacted the *Times* and urged it not to publish the information because doing so could seriously damage the national security interests of the United States and endanger a covert CIA asset. The *Times* agreed not to publish the information Sterling had provided. Nonetheless, after extensive further contacts with Sterling, Risen revealed the classified information in a 2006 book called *State of War: The Secret History of the CIA and the Bush Administration*.

A federal grand jury charged Sterling with unauthorized retention and communication of national defense information, unauthorized conveyance of government property, mail fraud, and obstruction of justice. In three pretrial rulings, the district court severely circumscribed the government's ability to prove these allegations and effectively terminated the prosecution.

First, the court held that Risen—the only eyewitness to the crime and the only person who could identify Sterling as the perpetrator—had a First Amendment right to refuse to identify his source. This ruling suppressed the only direct evidence of Sterling's crime.

Second, the court suppressed the testimony of two of the government's key witnesses as a sanction for the late disclosure of alleged *Giglio* information. The court found no evidence that the disclosure (which occurred less than 12 hours after the expiry of the district court's discovery deadline and several days before trial) was the result of bad faith, and it never meaningfully considered granting a continuance or any other remedy before striking the witnesses. This decision had the effect of terminating the prosecution.

Third, the court announced that the government was required to disclose to the defendant and the jury the true names of several covert CIA officers and contractors who it intended to call to testify at trial. The court reached this conclusion despite having previously held that the government need not identify the witnesses by name in discovery or at trial because that information (which is classified) would not be useful or necessary to Sterling's defense, could place the witnesses in significant danger, and could damage national security.

The district court's rulings are erroneous. The government respectfully requests that this Court reverse those rulings and remand this case to the district court for trial.

STATEMENT OF THE CASE

A federal grand jury indicted Sterling on six counts of unauthorized disclosure of national defense information, in violation of 18 U.S.C. § 793(d) and (e); one count of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e); one count of mail fraud, in violation of 18 U.S.C. § 1341; one count of unauthorized conveyance of government property, in violation of 18 U.S.C. § 641; and one count of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1). JA 25-55. Sterling's trial was scheduled to begin on October 17, 2011. *Id.* at 663-664.

Prior to trial, the district court made three evidentiary rulings that are the subject of this appeal: (1) that James Risen was protected by a "reporter's privilege" and could not be compelled to disclose the name of the source who gave him classified information, JA 717-718, 721-752; (2) that two of the government's witnesses should be struck as a sanction for the government's late disclosure of alleged *Giglio* information, JCA 589-590; and (3) that the government was required to disclose to the defendant and the jury the true names

and identities of several covert CIA officers and contractors who were slated to testify at trial, *id.* at 596-598.

STATEMENT OF FACTS

A. Background

Sterling was hired as a CIA case officer in 1993. JA 27, 725; JSA 7. At the time he was hired, and periodically throughout his employment, Sterling signed agreements with the CIA in which he explicitly acknowledged that all classified information provided in the course of his employment was the property of the United States, that he was not permitted to retain or disclose that information without authorization, and that doing so could be a crime. JA 27-30; JSA 7.

In November 1998, the CIA assigned Sterling to a classified program intended to impede Iran's efforts to acquire or develop nuclear weapons (hereinafter "Classified Program No. 1"). JA 30-31.[2] Sterling served as the case officer for a covert asset (hereinafter "Human Asset No. 1") who was assisting the

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[2] In order to provide the Court with a fuller understanding of the factual background of this case, the government has filed an *ex parte* classified appendix containing *ex parte, in camera* declarations from the district court record that describe Classified Program No. 1 in further detail. *See* GXCA 4, 8-23, 140-150. For the reasons stated in the certificate of confidentiality that accompanies the *ex parte* appendix, the documents in that appendix have not been disclosed to Sterling or Risen. Some relevant portions of those documents have been provided to Sterling in redacted form. *See, e.g.*, JCA 12-17.

CIA with this program. *Ibid.* Sterling was reassigned in May 2000, at which point his involvement with Classified Program No. 1 ended. JA 31.

B. Sterling Files Suit Against The CIA.

In August 2000, Sterling filed an equal employment opportunity ("EEO") complaint with the CIA alleging that he had been denied certain assignments because he was an African American. JA 32-33, 725; JSA 8. The CIA's EEO office investigated Sterling's complaint and determined that it was without merit. JA 33. In August 2001, Sterling filed a federal lawsuit against the CIA claiming that he had been the victim of racial discrimination. *Id.* at 725; JSA8-9. Sterling made several settlement demands seeking hundreds of thousands of dollars in compensation, which the agency rejected. JA 33, 36; JSA 27-28.

Sterling was "outprocessed" from the CIA in October 2001 (at which point his employment effectively ended), and was officially terminated on January 31, 2002. JA 725; JSA 9. As part of his termination, Sterling was asked to sign a final acknowledgment of his continuing legal obligation not to disclose classified information. Sterling refused. JA 28-29.[3]

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[3] Sterling's lawsuit against the CIA was dismissed in March 2004 based on the state secrets privilege, a decision that this Court affirmed. *See Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005).

C. Sterling's Relationship With Risen

On November 4, 2001, shortly after Sterling was outprocessed from the CIA, Risen published an article in *The New York Times* entitled, "Secret C.I.A. Site in New York Was Destroyed on Sept. 11." JA655-656; JSA 23-24. The article stated that the agency's "undercover New York station" was located in one of the World Trade Center buildings destroyed in the September 11 terrorist attacks and cited an anonymous "former agency official" as a source. *Ibid.*

[redacted] *See* JSA 24; *see also* GXCA 24.

On March 2, 2002, Risen published an article in *The New York Times* about Sterling's discrimination suit entitled, "Fired by C.I.A., He Says Agency Practiced Bias." JA 156-157, 725. The article states that Sterling provided Risen with a copy of one of his CIA performance evaluations, which is identified as a classified document. *Id.* at 156-157; *see also* JSA 26. The article also states that Sterling "relished" his involvement in a "secret assignment to recruit Iranians as spies." JA 156, 725.

Risen later told [redacted]

[redacted]JSA 41-43. [redacted]

[redacted] and Risen agreed. *Id.* at 44.

D. Sterling Meets With Staff Members Of The Senate Select Committee On Intelligence.

In January 2002, as required by Sterling's secrecy and non-disclosure agreements with the CIA, Sterling submitted a book proposal and sample chapters of his memoirs to the CIA's Publications Review Board. JA 34. The Board expressed serious concerns about Sterling's inclusion of classified information in the materials he submitted. *Id.* at 34-35. On January 7, 2003, Sterling contacted the Board and expressed "extreme unhappiness" over the Board's efforts to prevent the possible disclosure of classified information in his memoirs, and stated that he "would be coming 'at [the CIA] with everything at his disposal.'" *Id.* at 35-36.

On March 4, 2003, Sterling filed a second civil suit against the CIA in the United States District Court for the District of Columbia, claiming that the agency had unlawfully infringed his right to publish his memoirs. JA 36-37. The next day, Sterling met with two staff members of the Senate Select Committee on Intelligence ("SSCI") and informed them—for the first time, and three years after his involvement with the operation ended—that he had concerns about Classified

Program No. 1. JA 37, 725; JSA 28-29.[4] Sterling misrepresented several aspects of Classified Program No. 1 at this meeting and impugned the CIA's handling of the operation. JA 37. According to one of the SSCI staff members who attended the meeting, Sterling also "threatened to go to the press," though it was unclear "if Sterling's threat related to [Classified Program No. 1] or his lawsuit." *Id.* at 725-726; JSA 29.

E. Sterling Leaks Classified Information To Risen.

On February 27, 2003, having been rebuffed in his attempts to settle his discrimination suit and publish his memoirs, Sterling began telephoning Risen's home. JA 36-37, 726.[5] Telephone records indicate that Sterling called Risen seven times between February 27 and March 29, 2003. *Ibid.* Sterling also sent an e-mail to Risen on March 10, 2003—five days after his meeting with the SSCI staff—in which he referenced an article from CNN's website entitled, "Report: Iran has 'extremely advanced' nuclear program," and asked, "quite interesting, don't you think? All the more reason to wonder . . ." JA 37, 726; JSA 30-31.

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[4] If a CIA employee has concerns about particular intelligence or activities, he has several legal remedies, including contacting the House and Senate intelligence committees or the CIA's Office of the Inspector General. *See* Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, tit. VII, 112 Stat. 2396, 2413-2417.

[5] The indictment refers to Risen as "Author A." JA 31.

On April 3, 2003, four days after Sterling telephoned him, Risen informed the CIA and the National Security Council that he had been provided with classified information concerning Classified Program No. 1 and intended to write a story about the operation. JA 37-38, 726; JSA 32. Risen subsequently confirmed to the CIA that he obtained his information from government documents and [redacted] JA 39; JSA 32. The CIA explicitly warned Risen that he had improperly received classified information and that its dissemination could cause exceptionally grave damage to national security, but Risen stated that he intended to write the story anyway. JA 38-39.

Risen's revelation alarmed senior officials. On April 30, 2003, National Security Advisor Condoleezza Rice and Director of Central Intelligence George Tenet met with Risen and Jill Abramson, the Washington Bureau Chief of *The New York Times*. JA 39, 726; JSA 32-33. Dr. Rice and Director Tenet explained that revealing information about Classified Program No. 1 could compromise national security and place Human Asset No. 1 in imminent danger, and they urged Risen and Abramson not to publish the information Risen had received. JA 39, 726; *see also* GXCA 33-34. The *Times* ultimately decided not to publish a story about Classified Program No. 1. JA 40, 726-727; JSA 35.

F. Risen Remains In Frequent Contact With Sterling.

In August 2003, about three months after *The New York Times* decided not to publish a story on Classified Program No. 1, Sterling moved from Virginia to Missouri and spent the next year living with friends. JA 727; JSA 35, 38-39. During that time, 19 calls were placed from the *Times*' Washington office to Sterling's friends' home telephone number. JA 40-41, 727; JSA 35.[6]

A forensic analysis of the computer Sterling used during this time revealed 27 e-mails between Sterling and Risen. JA 727; JSA 36-38. [redacted] several e-mails revealed that Sterling and Risen were actively meeting and exchanging information. *Ibid.* For example, in a December 23, 2003 e-mail from Risen to Sterling, Risen asks, "Can we get together in early January?" JA 40; JSA 37. On May 8, 2004, Risen sent an e-mail to Sterling stating, "I want to call today[.] I'm trying to write the story[.] * * * I need your telephone number again." *Ibid.* On May 16, 2004, Risen sent an e-mail to Sterling stating, "I'm sorry if I failed you so far but I really enjoy talking to you and would like to continue." JA 41; JSA 37. Risen also apparently sent documents to Sterling for review: a June 10, 2004

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[6] Sterling's friends testified before the grand jury that they never received a call from anyone at the *Times*. JA 727; JSA 35. The only other adult living in the house was Sterling.

e-mail from Risen to Sterling states, "I can get it to you. Where can I send it?" and [redacted] JA 41; JSA 37.

In August 2004, Sterling got a job and moved out of his friends' home. JA 727; JSA 38-39. Between August 2004 and November 2005, there were 17 telephone calls between Sterling's cell phone or work phone and *The New York Times* or Risen's personal telephone number. JA 41-42, 727; JSA 39. In March 2005, Sterling told [redacted] that he had met with a reporter named "Jim" who had previously written an article about Sterling's discrimination lawsuit and "was then working on a book about the CIA." JA 727-728; JSA 40. [redacted] JSA 40.

G. Risen Discloses Classified Information In *State Of War*.

State of War was released on January 3, 2006. Chapter 9 of the book, entitled "A Rogue Operation," reveals details about Classified Program No. 1, which Risen refers to as "Operation Merlin." JA 728; *see* JSA 219-232 (full text of Chapter 9). Although Risen never reveals his source for the information in Chapter 9, there are strong indications that it was Sterling: for example, large sections of the chapter are told from the point of view of the case officer responsible for handling Human Asset No. 1 (which at the time was Sterling),

and the chapter describes two classified meetings at which Sterling was the only common attendee. *See* JA 728. Shortly after the book was published, Sterling showed it to [redacted] in a bookstore and, without opening it, he told her that Chapter 9 was about work he had done for the CIA. JA 728; JSA 40.

The grand jury subsequently found probable cause to believe that Sterling had illegally disclosed classified national defense information about Classified Program No. 1 and Human Asset No. 1 to Risen, and that Sterling had falsely and misleadingly characterized the results of Classified Program No. 1 in order to convince Risen to publish the information Sterling had provided. JA 39-42; *see also* JCA 12-17; GXCA 8-23, 143-150.

SUMMARY OF ARGUMENT

1. There is no First Amendment "reporter's privilege" that would protect Risen from a lawful, good-faith subpoena seeking testimony about criminal activity he personally witnessed, regardless of any promises of confidentiality Risen may have made to the perpetrator. The Supreme Court explicitly rejected such a privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and numerous courts of appeals have followed suit. This Court has recognized a qualified "reporter's privilege" in civil cases, but it has rejected such a privilege in criminal cases absent a showing that the subpoena was issued in bad faith for

the purpose of harassment. The district court found no bad faith here, and its reliance on civil privilege standards in this criminal case was erroneous.

Even if Risen were entitled to a qualified "reporter's privilege," it would be overcome. Risen is the only eyewitness to the crime and, as the recipient of the classified information at issue, he is inextricably linked to the criminal conduct. Risen's testimony is the only direct evidence of Sterling's guilt; no circumstantial evidence, or combination thereof, is as probative as Risen's testimony or as certain to foreclose the possibility of reasonable doubt. The information Risen can provide is therefore relevant and unavailable from other sources, and the government has demonstrated a compelling need for Risen's testimony. There is no merit to the district court's belief that Risen's testimony is unnecessary.

2. The government disclosed alleged impeachment material concerning certain government witnesses to the defense approximately 12 hours after the expiry of the district court's discovery deadline, but still four-and-a-half days before trial. The district court found no evidence that the government's delay was due to bad faith, but it nonetheless struck two of the government's most important witnesses as a sanction and effectively terminated the prosecution.

This decision was an abuse of discretion. The information at issue has little, if any, actual impeachment value, and there is no reason why Sterling could

not have made use of it without delaying the trial. If more time were needed, however, the obvious solution would have been to grant a continuance. The district court never meaningfully considered this course. This and other courts of appeals have repeatedly held that a district court must choose the least severe sanction that will remedy a discovery violation and, absent evidence of bad faith, the preferred remedy is a continuance instead of suppression of evidence. The district court's decision is inconsistent with that precedent.

3. The true names of covert CIA officers and contractors are classified secrets, and the district court repeatedly held that disclosing this information in discovery or at trial could endanger the officers' personal safety and the national security, and would not be useful or necessary for Sterling's defense. Although the district court granted the government's request to allow certain CIA officers and contractors to testify at trial using pseudonyms, the court decided—on the eve of trial and without any prompting from Sterling—that the government must also disclose the witnesses' true names to the defendant and the jury. The district court did not find that the classified information was necessary to Sterling's defense or to the jury's ability to fairly judge his guilt, nor did it meaningfully consider the danger to the witnesses and national security that could result from such disclosure, which the district court had earlier found compelling. The court

also made clear that its decision to order the disclosure of this classified information was intended in part to compel the government to reduce the number of witnesses it intended to call at trial. The district court stated no proper basis for ordering the disclosure of classified information, and its decision is an abuse of discretion.

ARGUMENT

I. THERE IS NO "REPORTER'S PRIVILEGE" APPLICABLE TO CRIMINAL PROSECUTIONS BROUGHT IN GOOD FAITH, AND EVEN IF THERE WERE, IT WOULD NOT APPLY IN THIS CASE.

In a criminal trial, "'the public * * * has a right to every man's evidence.'" *Trammel v. United States,* 445 U.S. 40, 50 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). Absent proof that a criminal proceeding is conducted in bad faith or for the purpose of harassment, there is no constitutional or common law privilege that exempts reporters from this rule, even if the reporter's testimony would reveal confidential sources or information. *Branzburg v. Hayes*, 408 U.S. 665 (1972). Indeed, we are not aware of any case in which a court has excluded the testimony of a reporter who personally witnessed a crime, let alone crimes like the ones charged here that may have endangered the nation's security.

The district court nonetheless concluded that Risen—the only eyewitness to the crimes charged in the indictment and, as the recipient of classified

information, a person inextricably involved in the criminal conduct[7]—has a First Amendment privilege that forbids the government from questioning him about the source of his information. That decision presents "a mixed question of law and fact subject to *de novo* review," and as the proponent of the privilege, Risen bears the burden of demonstrating its applicability. *United States v. Bollin*, 264 F.3d 391, 412 (4th Cir. 2001); *In re Grand Jury Proceedings*, 33 F.3d 342, 353 (4th Cir. 1994). The district court's decision is incorrect and should be reversed.

A. Background

1. *Grand Jury Subpoenas*

On January 28, 2008, with the approval of then-Attorney General Michael B. Mukasey,[8] the government issued a grand jury subpoena seeking Risen's testimony concerning the identity of the individual who provided him with information regarding Classified Program No. 1. JA 532. Risen moved to quash the subpoena, claiming that a "reporter's privilege" precluded the government

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[7] The grand jury has not alleged that Risen himself engaged in criminal activity. Nonetheless, at Risen's request, the government has agreed to grant Risen immunity from prosecution in exchange for his testimony, and thus the subpoena raises no Fifth Amendment concern. *See* JA 745 n.6.

[8] In light of the important First Amendment considerations involved, Department of Justice regulations require "the express authorization of the Attorney General" before issuing a subpoena to a journalist. 28 C.F.R. § 50.10(e).

from inquiring as to the identity of his source. *Ibid.* The district court granted Risen's motion in part but concluded that if Risen told anyone else that Sterling was his source, that information would not be privileged. *Id.* at 532-533.

Both Risen and the government asked the court to reconsider this decision. While the motions for reconsideration were pending, the grand jury's term expired and another grand jury was convened. JA 533. On August 5, 2009, the district court stayed further proceedings concerning the subpoena "to allow the new Attorney General an opportunity to evaluate the wisdom of reauthorizing the subpoena, given its significant First Amendment implications." *Ibid.*

On January 19, 2010, Attorney General Eric Holder authorized a second grand jury subpoena for Risen. JA 533. This subpoena did not request that Risen directly identify his confidential source; instead, it sought "the where, the what, the how, and the when" of the disclosures of classified information as well as testimony concerning Risen's non-confidential source relationship with Sterling concerning the discrimination lawsuit. *Id.* at 534-535.

The district court again quashed the subpoena. *See* JA 524-558. It held that whenever "a reporter presents some evidence that he obtained information [from a source] under a confidentiality agreement *or* that a goal of the subpoena is to harass or intimidate the reporter," he may invoke a qualified privilege under the

First Amendment that precludes the government from inquiring as to the identity of his source in a civil or criminal proceeding. *Id.* at 542 (emphasis added). The court found that Risen had promised to keep his source's identity confidential and that this agreement extended to the information sought by the subpoena. *Id.* at 543-545.

To overcome the resulting privilege, the court required the government to establish several elements under a multi-factor balancing test imported from civil cases, including "'(1) whether the information [is] relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information.'" *Id.* at 539-540 (quoting *LaRouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986)). The court concluded that the government could not satisfy these factors because it had enough circumstantial evidence to establish probable cause to believe that Sterling was the source, and thus it did not need Risen's testimony. *See id.* at 546-555, 557. The court noted, however, that "[w]ere Sterling to be indicted and a trial subpoena to be issued to Risen, the analysis might well change, because at trial the government would have the much higher burden of proving Sterling's guilt beyond a reasonable doubt." *Id.* at 557-558.

2. *Trial Subpoena*

The grand jury indicted Sterling on December 22, 2010. JA 25-55. On May 23, 2011, Attorney General Holder authorized the issuance of a trial subpoena to Risen under which the government intended to ask him "to identify Sterling as his source for Chapter 9, and to provide other information about [his] relationship with Sterling, such as the time and place of the disclosures, as well as to authenticate *State of War*." *Id.* at 730. Risen again moved to quash. *Ibid.*

Despite its earlier recognition that the government's burden at trial would be far more demanding than its burden before the grand jury, the district court quashed the trial subpoena for essentially the same reasons it had quashed the grand jury subpoenas. The court reiterated its earlier conclusion that, regardless of whether a case is civil or criminal, a First Amendment "reporter's privilege" is implicated and "the *LaRouche* test is triggered by *either* an agreement to keep sources confidential *or* evidence of harassment." JA 736 (emphases added). Because Risen promised confidentiality to his source, the court held that Risen could invoke a First Amendment "reporter's privilege" even absent a finding of bad faith. *Id.* at 737-740 & n.5.

The district court then applied the *LaRouche* balancing test and concluded that the government could not overcome Risen's privilege. The court

acknowledged that Risen's testimony was indisputably relevant to proving the charges against Sterling and establishing that the subject communications occurred at least in part in the Eastern District of Virginia (where Sterling lived before moving to Missouri in August 2003), which would be necessary to establish venue. *Id.* at 742. The court concluded, however, that the government had enough circumstantial evidence to prove its case by "alternative means," including the telephone calls and e-mails between Sterling and Risen and the testimony of [redacted] which the district court believed would establish that Risen admitted that Sterling was his source for information concerning Classified Program No. 1. *Id.* at 741-747. The district court also found that, although Risen's testimony would simplify the trial, the government lacked a "compelling interest" sufficient to overcome the privilege. *Id.* at 749-750. The court ordered Risen to testify for the limited purpose of authenticating his publications (including confirming that statements attributed to named or unnamed sources were in fact made by those sources), but shielded him from any other questions. JA 752.

The government asked the court to reconsider and clarify its decision. JA 796-812. The government noted that the court's opinion left several questions unanswered, including whether Risen should be required to authenticate his book

proposal, explain his writing style, and confirm that certain individuals were *not* his source, and whether Risen waived any privilege concerning the timing of his receipt of classified information by disclosing in pleadings that he received the information in 2003. *Id.* at 797-803. The government also reiterated the many reasons why circumstantial evidence was not an adequate substitute for Risen's direct evidence in this case, both factually and as a matter of law. *Id.* at 803-809.[9] In a supplemental submission, the government further explained that Risen's testimony was necessary because (1) Sterling intended to use the government's supposed lack of direct evidence to claim that numerous other individuals with knowledge of Classified Program No. 1 could have been Risen's source; (2) Sterling intended to call an expert witness to testify about Risen's writing style and opine that Risen's attribution of certain statements and thoughts to the "CIA case officer" did not mean that Risen had actually spoken to that individual; and

[9] In its initial opinion quashing the trial subpoena, the district court mistakenly stated that the government had not "provided the Court with a summary of its trial evidence" identifying the "holes that could only be filled with Risen's testimony." JA 748. The government reminded the court that it had submitted a 74-page declaration describing in detail the evidence against Sterling and the multiple ways in which the circumstantial evidence was not a sufficient substitute for Risen's testimony. *Id.* at 807 & n.5; *see* JSA 1-74; GXCA 1-75. The district court relied extensively on this document throughout the grand jury proceedings and incorporated the factual record of the grand jury subpoenas (based largely on the government's declaration) in its opinion quashing the trial subpoena. *Id.* at 722 n.1.

(3) [redacted] had clarified that Risen did *not* expressly tell him that Sterling was Risen's source of information about Classified Program No. 1, and that the district court's understanding of his testimony was mistaken. *Id.* at 853-865.

The district court refused to reconsider the legal underpinnings of its decision and denied most of the government's requests. JA 957-958, 977-978. The court did agree that Risen should be required to authenticate his book proposal, explain his writing style (at least to some extent), and confirm that he received the classified information in 2003. *Id.* at 953, 958-984.

B. The First Amendment Creates No "Reporter's Privilege" That Would Shield Risen From His Obligation To Testify At Sterling's Criminal Trial And Identify His Source.

The Supreme Court has held unambiguously that the First Amendment does not exempt a reporter from testifying about his sources, even those to whom the reporter has promised confidentiality, so long as the reporter's testimony is sought in connection with a criminal proceeding brought in good faith. *See Branzburg*, 408 U.S. at 667, 690-691 ("reporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial"); *id.* at 691 ("Neither [reporter nor source] is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial."). The same result is appropriate here.

The reporters in *Branzburg* argued, much as Risen did below, that forcing them to identify confidential sources in a criminal proceeding would deter people from providing information to the press and impede "the free flow of information protected by the First Amendment." 408 U.S. at 679-680. The Supreme Court dismissed this concern, finding it unsupported by history and, in any event, clearly outweighed by "the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." *Id.* at 695-699.

Nor did the Court accept the related contention that a reporter's promise of confidentiality to his source is constitutionally protected and enforceable in the criminal context. The Court explained that "[t]he preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution," which, "while understandable, is hardly deserving of constitutional protection." *Branzburg*, 408 U.S. at 691. The Court refused to "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. * * * The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter

than when they are not." *Id.* at 692.

The Court also flatly rejected the suggestion that courts should conduct a case-by-case balancing of interests each time a journalist is called upon to testify in criminal proceedings, as the district court did here. The Court concluded that such balancing "would present practical and conceptual difficulties of a high order" by "embroil[ing] [the courts] in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance" without the benefit of a full evidentiary showing at trial, and would require courts to make inappropriate judgments concerning "the value of enforcing different criminal laws." *Branzburg*, 408 U.S. at 701-06.

Of course, reporters (like any other witnesses) are protected from subpoenas issued in bad faith or as pretexts for harassment. *Branzburg*, 408 U.S. at 707-708. Justice Powell, who joined the *Branzburg* majority opinion in full, underscored this point in a concurring opinion, noting that the government is not permitted to harass journalists and thus "if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement," he may have

grounds for filing a motion to quash. *Id.* at 709-710 (Powell, J., concurring).[10]

Not surprisingly, this and other courts of appeals have repeatedly followed *Branzburg*'s mandate and have refused "to grant newsmen a testimonial privilege that other citizens do not enjoy" in criminal cases so long as the proceedings are brought in good faith. *Branzburg*, 408 U.S. at 690. In *In re Shain*, 978 F.2d 850 (4th Cir. 1992), for example, four reporters were held in contempt after they refused to testify about on-the-record interviews they conducted with the defendant that "arguably evidenced knowledge of wrongdoing." 978 F.2d at 851-852. This Court concluded that, "absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution." *Id.* at 852.

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[10] While Justice Powell used the term "privilege" (rather than "protection") to describe the protections referenced in the majority opinion, it is clear that the majority's rejection of a reporter's privilege—which Justice Powell joined—is binding. *See, e.g.*, *In re Grand Jury Subpoena (Judith Miller)*, 438 F.3d 1141, 1148 (D.C. Cir. 2006) ("Justice Powell's concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by its terms, rejecting none of Justice White's reasoning on behalf of the majority. * * * Justice White's opinion is not a plurality opinion[;] * * * it is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants."); *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 400 (9th Cir. 1993) (same, and noting that Justice Powell's concurrence does not authorize lower courts to "rebalanc[e] the interests at stake in every claim of privilege made before a grand jury"); *In re Grand Jury Proceedings (Storer Commc'ns, Inc.)*, 810 F.2d 580, 584-585 (6th Cir. 1987) (same).

Other courts of appeals have held similarly. As the D.C. Circuit explained in *Judith Miller*, the Supreme Court "[u]nquestionably" decided in *Branzburg* "that there is no First Amendment privilege protecting journalists * * * from testifying before a grand jury * * * regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter." 438 F.3d at 1147. The First Circuit has likewise concluded that *Branzburg* "flatly reject[s] any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege." *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004). *See also The New York Times Co. v. Gonzales*, 459 F.3d 160, 173-174 & n.6 (2d Cir. 2006) (same); *Scarce*, 5 F.3d at 400-402 (same); *Storer Commc'ns*, 810 F.2d at 583 (same; contrary ruling "would be tantamount to our substituting, as the holding of *Branzburg*, the dissent * * * for the majority opinion"); *cf. McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) ("We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.").

To be sure, this Court has recognized a qualified reporter's privilege in *civil* cases that may require a balancing of the relevant interests at stake. *See Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *LaRouche*, 780 F.2d at 1139.

There is, however, no comparable privilege in *criminal* cases, though reporters may (like other citizens) seek protection from criminal subpoenas issued in bad faith or with a purpose to harass. *See Branzburg*, 408 U.S. at 690-692, 707-708; *Shain,* 978 F.2d at 852-853; *Ashcraft*, 218 F.3d at 287 (holding that trial court abused discretion in requiring reporter to testify about confidential sources in civil matter, but recognizing that a "reporter, like [an] ordinary citizen, must respond to grand jury subpoenas and answer questions related to *criminal* conduct he personally observed and wrote about regardless of any promises of confidentiality he gave to [the] subjects of stories" (emphasis added)).

There is simply no evidence that Sterling is being prosecuted in bad faith or that the trial subpoena was issued to harass Risen. The district court explicitly declined to make any finding in that regard. *See* JA 737-738 n.5. While Risen has long believed that members of the former Bush administration improperly orchestrated a effort to discredit him because they were displeased with his reporting on issues unrelated to Classified Program No. 1, *see* JSA 186-191, he has never cited a shred of evidence linking any such effort to the subpoenas in this case, which simply and properly seek the testimony of the only eyewitness to the crime. Indeed, two of the subpoenas—including the trial subpoena at issue in this appeal—were authorized by Attorney General Holder and other senior Justice

Department officials appointed by President Obama,[11] and the trial subpoena was issued only after a federal grand jury issued an indictment based on probable cause to believe that Sterling committed serious crimes and that Risen witnessed those crimes. These facts obviate any possibility of bad faith.

The district court concluded that because Risen promised Sterling confidentiality, that alone was sufficient to trigger the "reporter's privilege" and require the sort of balancing this Court had previously approved only in the civil context. JA 736-740. The court distinguished this Court's contrary statements in *Shain* because that case "did not involve any confidentiality agreement" and found no privilege based on "'the absence of confidentiality *or* vindictiveness,'" which the district court took to be a tacit acknowledgment that confidentiality alone would justify the privilege. JA 735 (quoting *Shain*, 978 F.2d at 853).

The district court's reasoning is incorrect, for several reasons. First, and most obviously, it is at odds with *Branzburg*, in which the Supreme Court held

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[11] The district court sought an express assurance from the government that [redacted] JSA 85-87. The government explained that [redacted] *Id.* at 86, 66-68 (explaining process).

that a confidential source relationship does *not* in itself give rise to a "reporter's privilege" in criminal cases. 408 U.S. at 691. The reporters in *Branzburg*, like Risen, witnessed criminal activity and agreed to keep the perpetrators' identities confidential in subsequent reporting about the crimes. *Id.* at 667-673. Under the district court's theory, that should have been enough to render the communications privileged and require balancing. But the Supreme Court emphatically rejected that result, holding that "neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence," and refusing "to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 682, 690; *see also id.* at 682 n.21 ("'[T]he mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. * * * No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice.'" (quoting 8 Wigmore, *Evidence* § 2286 (McNaughton rev. 1961)).

The Court also rejected the very same balancing test the district court adopted here. *See Branzburg*, 408 U.S. at 705. The petitioners in *Branzburg* argued that the fact they obtained information from their sources in confidence afforded them a qualified privilege that precluded a subpoena "unless sufficient grounds

are shown for believing that the reporter possesses information relevant to [the] crime, * * * that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override" the privilege. *Id.* at 680. The Supreme Court emphatically disagreed. *Id.* at 703-706; *see also id.* at 708 (government is not required to "demonstrate[ ] some 'compelling need' for a newsman's testimony"); *Storer Commc'ns*, 810 F.2d at 584 (*Branzburg* "specifically dealt with, and rejected, * * * a testimonial privilege conditioned upon the inability of prosecutors to establish relevancy, unavailability from other sources, and a need so compelling as to override invasion of the [F]irst [A]mendment interests occasioned by the disclosure").

The Supreme Court has subsequently confirmed, consistently and repeatedly, that the confidentiality of a communication is not a standalone justification for a reporter to refuse to identify his source in a criminal case. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, *even though the reporter might be required to reveal a confidential source*" (emphasis added)); *Univ. of Penn. v. EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* "rejected the notion that under the First Amendment a reporter could not be

required to appear or to testify as to information *obtained in confidence* without a special showing that the reporter's testimony was necessary" (emphasis added)). The Court has also repeatedly confirmed *Branzburg*'s conclusion that reporters have the same First Amendment rights and responsibilities as any other citizen. *See Saxbe v. Washington Post Co.*, 417 U.S. 843, 849-850 (1974) (regulations that "do[ ] not place the press in any less advantageous position than the public generally" are consistent with First Amendment);[12] *Pell v. Procunier*, 417 U.S. 817, 833-834 (1974); *cf. Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws."). Thus, while reporters (like other citizens) are protected from criminal subpoenas issued in bad faith or for purposes of harassment, *see Univ. of Penn. v. EEOC*, 493 U.S. at 201 n.8 (citing *Branzburg*, 408 U.S. at 707), there is no warrant for a sweeping confidentiality exception for reporters on which no other citizen could lawfully rely.

The district court's reliance on *Shain*'s statement that a lack of

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[12] Although Justice Powell dissented from the majority opinion in *Saxbe* with respect to the particular Bureau of Prisons regulation at issue, he agreed with the majority "that neither any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals." *Saxbe*, 417 U.S. at 857 (Powell, J., dissenting).

"confidentiality *or* vindictiveness" precluded the claim of privilege in that case is far too slender a reed to overcome Supreme Court precedent to the contrary, and is in any event a misapplication of *Shain*. The issue of confidentiality was not presented in *Shain* at all, and this Court repeatedly emphasized the lack of bad faith or harassment. 978 F.2d at 852-853. The Court's recognition that neither of the necessary conditions for balancing in a criminal case were present does not mean that confidentiality alone is enough to trigger the privilege. *Ibid.* Indeed, this Court subsequently confirmed in *Ashcraft* that, under *Branzburg*, a "reporter, like [an] ordinary citizen, must respond to grand jury subpoenas and answer questions related to criminal conduct he personally observed and wrote about *regardless of any promises of confidentiality he gave to [the] subjects of stories.*" 218 F.3d at 287 (emphasis added); *see also United States v. King*, 194 F.R.D. 569, 584 (E.D. Va. 2000) (*Shain* is best read to require "both confidentiality of the source material and vexation or harassment" to justify balancing in a criminal case). Other courts of appeals have recognized that, under *Branzburg*, reporters must demonstrate bad faith or harassment to quash a criminal subpoena. *See Special Proceedings*, 373 F.3d at 45; *Storer Commc'ns* 5 F.3d at 400-401; *Lewis v. United States*, 517 F.2d 236, 238 (9th Cir. 1975).

Second, the district court's failure to see "any distinction between civil actions and criminal cases" in applying the claimed privilege, JA 736, is fundamentally mistaken. As the Supreme Court explained in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), "the need for information in the criminal context is much weightier" than in the civil context "because 'our historical commitment to the rule of law is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer.'" *Id.* at 384 (quoting *United States v. Nixon*, 418 U.S. 683, 708-709 (1974)) (alterations omitted).

> In light of the 'fundamental' and 'comprehensive' need for 'every man's evidence' in the criminal justice system, * * * privilege claims that shield information from a grand jury proceeding or a criminal trial are not to be 'expansively construed, for they are in derogation of the search for truth.' The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of * * * criminal subpoena requests, * * * [and] the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions.'

Ibid. (quoting *Nixon*, 418 U.S. at 709-711) (citations omitted); *cf. Rakas v. Illinois*, 439 U.S. 128, 137 (1978) (there is a strong "'public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth'").

Unlike in civil cases, privileges in criminal cases "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (quotation marks omitted); *United States v. Dunford*, 148 F.3d 385, 391 (4th Cir. 1998). The Court in *Branzburg* repeatedly emphasized this fact and concluded that the unique concerns and requirements of criminal trials overcome a reporter's interest in shielding the identity of his sources. The Court

> perceive[d] no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Branzburg, 408 U.S. at 690-691. The reporter's interest in using confidential sources to gather news does not "take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future," nor does the First Amendment "override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens" by committing crimes. *Id.* at 691-692, 695. Thus, even if a "reporter's First Amendment privilege" exists "in

civil cases, where the public interest in effective law enforcement is absent," there is simply no reason to apply the same privilege in the criminal context. *Judith Miller*, 438 F.3d at 1149 (quotation marks omitted).

Third, the district court's rule is at odds with common sense. If reporters are allowed to evade lawful subpoenas in criminal cases simply by promising confidentiality to their sources (and thus shift the burden to the government to overcome that privilege), it would effectively eviscerate *Branzburg* by allowing a "reporter's privilege" in virtually any criminal case. Individuals who commit crimes in the presence of reporters (such as disclosing classified information to them) will almost always do so subject to a promise of confidentiality, which "is hardly deserving of constitutional protection." *Branzburg*, 408 U.S. at 691. It bears repeating that the Supreme Court has refused to

> seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

Branzburg, 408 U.S. at 692.

This is a particularly weighty concern in cases involving the criminal disclosure of classified national defense information. As the grand jury's indictment makes clear, this case involves a defendant who allegedly divulged classified national defense information for reasons of personal animus in an effort to discredit his former employer. This sort of crime can only exist in the shadows behind promises of secrecy and confidentiality.

There is no justification for the district court's conclusion that Risen converted a non-privileged disclosure into a privileged one simply by promising not to tell anyone about Sterling's crime. No other citizen could plausibly refuse to testify in a criminal proceeding on such a basis. Because there is no privilege, there was no cause for the district court to employ the civil balancing standard adopted in *LaRouche*. The district court's decision should be reversed.[13]

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[13] Risen argued below that he was also protected by a common law "reporter's privilege" independent of any First Amendment privilege. *See* JSA 152-159. The district court rejected this argument, noting that this Court had never recognized such a privilege in a criminal case, and Risen has not cross-appealed from that decision. JA 732 n.3.

Nonetheless, we note that *Branzburg* flatly rejected the notion a common law "reporter's privilege," just as it denied the existence of such a privilege under the First Amendment. *See* 408 U.S. at 685 ("At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury"); *id.* at 698-699 ("the common law recognized no such privilege"). Federal courts have repeatedly held likewise. *See Special Proceedings*, 373 F.3d at 44; *Storer Commc'ns*, 810 F.2d at 584; *Lewis*, 517 F.2d at 238.

C. Even Assuming *Arguendo* The Existence Of A Qualified "Reporter's Privilege" That Warrants A Balancing Of Interests In This Case, Risen's Testimony Should Still Have Been Admitted.

Even if there were a qualified First Amendment "reporter's privilege" that justified the use of the *LaRouche* civil balancing standard in this case, the balance should have been struck in the government's favor. There is no dispute that Risen's testimony is relevant to proving the charges against Sterling and establishing that the Eastern District of Virginia is a proper venue for his prosecution. *See* JA 742. Nonetheless, the district court held that the government could not satisfy the other two *LaRouche* factors—"whether the information can be obtained by alternative means" and "whether there is a compelling interest in the information"—because it could prove its case using circumstantial evidence. JA 742-751.

The district court's ruling is incorrect. Risen is the only eyewitness to this crime and the only person who can directly identify Sterling as the perpetrator. Risen's receipt of the information is also an indispensable component of the criminal offenses alleged in the indictment. The government's legitimate and compelling interests in Risen's testimony far outweigh any interest Risen may have in refusing to identify his source.

1. *The Information Is Not Available By Alternative Means Because Circumstantial Evidence Is Not An Acceptable Substitute For Risen's Direct Testimony.*

Risen is the only witness who can provide firsthand, direct evidence of the charged crimes. The circumstantial evidence of Sterling's guilt, though compelling, is simply not comparable to Risen's eyewitness testimony, which "shows so much at once" and does not require the jury to draw inferences from other circumstances and conduct. *Old Chief v. United States*, 519 U.S. 172, 187 (1997); *see also Gonzales*, 459 F.3d at 170 ("[A]s the recipients of the disclosures, [reporters] are the only witnesses—other than the source(s)—available to identify the conversations in question and to describe the circumstances of the leaks. * * * There is simply no substitute for the evidence they have.").

Risen's eyewitness testimony is particularly important because the identity of the perpetrator is in dispute. In such cases, the jury will likely expect direct evidence linking the defendant to the crime and may be less willing to draw inferences from the surrounding circumstances. *See United States v. Bonner*, 648 F.3d 209, 214 (4th Cir. 2011) ("While it is possible to convict a defendant solely on circumstantial evidence, in cases where the identity of the perpetrator is in dispute, usually there is some specific 'identity' evidence or uncontroverted physical evidence that links the defendant to the scene of the crime."). The

government must be permitted "to satisfy the jurors' expectations about what proper proof should be," and jurors who know "that more could be said than they have heard" may well conclude that the government has not met its burden of proof. *Old Chief*, 519 U.S. at 188-189; *see also id.* at 188 (noting, for example, that jurors may expect "that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about."). The jury will know that there was an eyewitness to this crime, and forcing the government to forego that testimony and rely instead on a mosaic of circumstantial evidence that requires the jury to connect a disparate series of dots is not an acceptable substitute.

The difference between circumstantial and direct evidence is even more acute given that Sterling intends to use the government's supposed lack of direct evidence as a defense by arguing that numerous other individuals could have been Risen's source. Although the district court did not believe that Sterling would pursue such a defense, *see* JCA 119, Sterling has confirmed that he will indeed point the finger at a variety of individuals in an effort to sow reasonable doubt, including the SSCI staff members to whom he reported his alleged concerns about Classified Program No. 1 and numerous other CIA officers who

had knowledge of the program. JA 666-667, 853-856; JCA 99-100, 321-326, 644. The district court's refusal to require Risen to identify his source has thus opened the door for a defense that will unnecessarily mislead the jury and distort the truth-seeking function of the trial, and will force the government to repeatedly attempt to prove a negative by calling witnesses to testify that they were not the source. There can be little doubt that Risen's direct testimony, which would incontrovertibly establish identity, is superior to circumstantial proof.

The circumstantial evidence in this case is also not as definitive as the district court assumed. While the government believes that the circumstantial evidence is compelling, it does not foreclose a jury's finding of reasonable doubt as to identity; only Risen's testimony can do that.

There is no non-testimonial direct evidence in this case that can establish what Risen can. There are, for example, [redacted] *See* JA 807, 809; JSA 35-36, 39. [redacted]

[redacted] *Id.* at 31, 36-38.

The district court also placed great weight on the testimony of [redacted] whom the district court believed would testify that Risen definitively identified Sterling as his source. *See* JA 744-747. While the government wishes this were true, it is not. [redacted] JSA 42-43; JCA 622, 624-625. [redacted] JSA 43; JCA 622-624; *see also* GXCA 42-43. [redacted] has also subsequently clarified that his conversation with Risen about Classified Program No. 1 occurred several months after the two men discussed Sterling, and Risen never linked his knowledge of Classified Program No. 1 to Sterling. *See* JA 857-858. In any event, [redacted]'s testimony is hearsay, and there is no reason the

jury would necessarily give it the same weight as direct testimony from Risen.[14]

As for [redacted], she is now married to Sterling. *See* JA 808 n.6. Thus, as the district court acknowledged, her pre-marriage grand jury testimony confirming that Sterling met with a reporter named "Jim" in 2005 and knew that *State of War* was about his activities at the CIA would likely be inadmissible at trial under the spousal privilege. JA 747-748.

The government will also have a difficult time establishing venue without Risen's testimony. The government must prove by a preponderance of the evidence that the "'essential conduct elements'" of the charged offenses occurred within the Eastern District of Virginia. *United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005). The government can prove that Sterling used his home telephone in the Eastern District of Virginia to communicate with Risen seven times between February 27 and March 31, 2003, but without Risen's testimony, the government cannot establish conclusively that classified information was disclosed during these calls. The district court acknowledged that the circumstantial evidence of venue was weak and that the government might be

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[14] Although the district court rejected the government's hearsay concerns in quashing the subpoena, it did not conclusively rule that the evidence would be admissible at trial. *See* JA 744-747. Sterling has informed the government that he will challenge the admissibility of [redacted]'s testimony if he is called as a witness. *Id.* at 808.

required to dismiss certain counts as a result. *See* JCA 116.

Sterling may also be able to use some circumstantial evidence to his advantage if Risen does not testify. Sterling has confirmed, for example, that he will argue that the SSCI staff members to whom he reported his alleged concerns about Classified Program No. 1 could have been the source, and will attempt to bolster this theory by claiming that information shared with the SSCI has found its way to Risen in the past. *See* JA 843-844, 854-855; JCA 326 n.5. Although the SSCI staff members will testify that they were not Risen's source, the jury might find enough reasonable doubt to acquit without Risen's testimony.

Sterling also wrote a letter to Risen in March 2004, a copy of which was recovered from the hard drive of Sterling's computer, in which he states that his contacts with Risen were related solely to the discrimination lawsuit and denies being Risen's source. *See* JA 570-571, 801-802. This letter was written after Sterling was interviewed by the FBI in connection with this case, and the government believes that Sterling fabricated the letter in an attempt to falsely exculpate himself. Sterling may also have been attempting to signal to Risen that he denied being the leaker in his interview with the FBI. Regardless, the jury might still conclude that this evidence is sufficient to create reasonable doubt

unless Risen testifies and identifies his source.[15]

Quite simply, the circumstantial evidence in this case, though compelling, does not foreclose the possibility that a jury will find that the perpetrator's identity is reasonably in doubt and will acquit Sterling on that basis. Risen's testimony would permit no doubt.

2. *The Government Has A Compelling Interest In Risen's Testimony.*

For these same reasons, the government plainly has a compelling interest in Risen's testimony. Risen is the only eyewitness to the crime and his testimony is the only evidence that can incontrovertibly establish the identity of the perpetrator and foreclose Sterling's effort to tar numerous other innocent individuals with the accusation that they have committed a federal crime without fear of rebuttal. Moreover, as the recipient of the information Sterling is accused of unlawfully disclosing, Risen is inextricably involved in the crimes charged in the indictment. Those crimes may have jeopardized the national security of the United States, and the federal government has a strong interest in prosecuting them and bringing the perpetrator to justice. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more

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[15] Sterling has stated that he will seek to admit this letter at trial if necessary "to rebut evidence introduced by the Government." JCA 319.

compelling than the security of the Nation.").

The district court concluded that to establish a compelling interest under *LaRouche*, the government had to prove that Risen's testimony was "necessary [ ]or critical to proving Sterling's guilt beyond a reasonable doubt." JA 749-750. That standard does not appear in any Fourth Circuit decision; the district court adopted it from a Second Circuit decision in a civil case, *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (1982). The government objected that the *LaRouche* standard was not so limited, *see* JA 806 & n.3, but regardless, having established that Risen's testimony is "necessary to [the] proper preparation and presentation of the case," the government has satisfied the "compelling interest" prong under any interpretation. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *as modified*, 628 F.2d 932 (5th Cir. 1980).

II. THE DISTRICT COURT SHOULD NOT HAVE SUPPRESSED THE TESTIMONY OF TWO GOVERNMENT WITNESSES AS A DISCOVERY SANCTION.

When a party violates a discovery order, the district court must choose the "least severe sanction" that will remedy the violation. *United States v. Hammoud*, 381 F.3d 316, 336 (4th Cir. 2004) (en banc) (quotation marks omitted), *vacated on other grounds*, 543 U.S. 1097 (2005). Unless the violation is intentional and in bad faith, "[a] continuance is the preferred sanction." *Ibid.* Here, the government

provided the defense with its final *Giglio* disclosures 12 hours after the deadline set in the district court's discovery order, but still four days prior to trial. The district court refused to consider granting a continuance and, despite finding no evidence of bad faith, it struck two of the government's key witnesses and effectively terminated the prosecution.

The district court's decision is reviewed for abuse of discretion. *Hammoud*, 381 F.3d at 336. That standard is met here. There is no reason why Sterling's attorneys could not have made effective use of the information the government provided four days prior to trial. Even if Sterling did need more time to review the information, the proper remedy would have been to grant a continuance, not striking the witnesses and terminating the case. This is particularly true given that the information at issue is not exculpatory and has little, if any, impeachment value. The district court's decision should be reversed.

A. Background

At the outset of this case, the parties agreed to a discovery order that permitted the government to produce impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), up to five calendar days before trial. JA 59. The government reviewed a vast number of documents in order to comply with its discovery obligations, many of them classified, and was required to submit all

discoverable classified documents to the CIA for a line-by-line classification review before they could be produced.[16] The government explained at Sterling's arraignment that it would be producing a large amount of classified and unclassified discovery to the defendant on a rolling basis. JA 1024-1026. Between January and October 2011, the government produced to the defense over 19,500 pages of classified and unclassified discovery, four CD-ROMs of data, and a computer hard drive, including potential *Brady* and *Giglio* information.

In the course of its due diligence, and without prompting by any specific defense discovery demand, the government reviewed classified security files of several current and former CIA employees whom the government intended to call as witnesses. The prosecutors identified potential *Giglio* information in these security files and provided that information to the CIA to conduct the necessary classification review. The CIA responded promptly, and the prosecutors satisfied themselves that they had the proper clearance to disclose the information on the evening of October 12, 2011 (the same day the district court's discovery deadline

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[16] The CIA must review these documents to satisfy its legal obligations to strictly control the dissemination of classified information. *See* Executive Order No. 13526, 75 Fed. Reg. 707, 720-723 (Jan. 5, 2010); JA 112-123 (protective order establishing detailed requirements for the disclosure and handling of classified information in this case).

expired) and hand-delivered two letters to defense counsel the following morning disclosing the relevant information—less than 12 hours after the expiry of the discovery deadline and four-and-a-half days before the start of trial. JA59, 663-664; JCA 560-563, 578-579.

The first of these letters stated that [redacted] *Ibid.* The government stated that it would object if Sterling sought to use this information at trial. *Id.* at 561.

The second letter stated that [redacted]

[redacted] The letter also disclosed tha[redacted]

[redacted] The government stated that it would object if Sterling sought to use this information at trial. *Ibid.*

In addition to these letters, the government filed an *ex parte* motion with the district court in which it identified two issues that the government did not believe qualified as *Giglio* material and asked the court for a ruling on whether those issues must be disclosed. JCA 557-559. [redacted]

[redacted] The government argued that these would not be proper subjects for impeachment because they did not bear on the witnesses' truthfulness and would be highly inflammatory and prejudicial. *Ibid.*

Sterling's attorneys acknowledged receiving this information at a hearing on October 13, 2011 and stated they intended to use it during cross-examination of the government's witnesses; they did not object to the timing of the disclosure. *See* JCA 527, 550, 552. Nor did Sterling's attorneys object in a letter they sent to the government later that day; instead, they asked whether there was any additional information regarding the government's disclosures, and the government stated there was not. *See* JSA 332-333.

Nonetheless, at a hearing on October 14, 2011 convened to address issues unrelated to discovery, the district court *sua sponte* raised the fact that the government's *Giglio* disclosure was late and stated that it was "very upset" with the government for having missed the discovery deadline. JCA 573, 575. The court ordered the government to produce its *ex parte* motion to Sterling and noted that it was "awfully nice" of Sterling not to object. *Id.* at 568, 571, 573. Not surprisingly, defense counsel immediately lodged an objection and stated that it wanted to further investigate the *Giglio* issues and subpoena [redacted] and proposed that the court "continue the trial to give us the opportunity to do the investigation that we should have been able to do." *Id.* at 572-575. The district court interrupted and said, "[w]e could strike the witnesses, too," and proposed striking [redacted] because they had "the most

significant amount of *Giglio* material" and suppressing their testimony would "even up the playing field." *Id.* at 575, 577.

The government argued that such a sanction would not be commensurate with the nature of the violation and explained that the late disclosure was unintentional and unexpectedly delayed. JCA 578-580. Although the district court criticized the government for not producing the documents sooner, it found no evidence that the delay was the result of bad faith. *Id.* at 578-579.

In addition to the continuance that defense counsel proposed, the government offered to do a number of things to ameliorate any possible prejudice to Sterling. The government stated, for example, that it was "more than willing to do whatever [it] can to expedite the defense in investigating [the] allegations" concerning [redacted] including by obtaining "as quickly as possible" the current addresses and contact information of [redacted] that Sterling could subpoena them as witnesses. JCA 579-580, 591-592. The government also agreed to waive its blanket objection to the use of the alleged *Giglio* information during cross-examination, and to permit Sterling to recall government witnesses for further cross-examination during his own case-in-chief. *Id.* at 579-580. The government further explained that striking [redacted] as witnesses "would have a tremendous impact on the government's case" and

would probably require the government to appeal, thus postponing the trial indefinitely. *Ibid.*[17]

The district court nonetheless struck [redacted] as witnesses. JCA 589-590. The court concluded that the alleged *Giglio* information should have been disclosed earlier, and that it would be "unrealistic" for Sterling's defense team to make effective use of the information and still be ready for trial on schedule. *Id.* at 589-592. The court also stated that, in its view, "the government has enough witnesses on its list, [and] should be able to go forward." *Id.* at 589.[18]

It was only *after* the court rendered this decision, and learned that the government would indeed appeal it, that the court asked defense counsel whether a continuance of "an extra two weeks" would be helpful. JCA 594-595.

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[17] [redacted] was a key figure in the implementation of Classified Program No. 1 and would lay the necessary foundation for nearly half of the government's trial exhibits, in addition to providing expert testimony on the potential harm caused by Sterling's unlawful disclosure of information to Risen. *See* JCA 223-224, 446-451, 593. Sterling conceded that [redacted] was a "very significant witness." *Id.* at 574. [redacted] supervised Sterling while he worked on Classified Program No. 1 and would provide expert testimony on Sterling's training, experience, and ability to understand the potential harm caused by leaking the information. JCA 226, 455.

[18] The district court had previously stated, on several occasions, that it believed the government was calling too many witnesses; the government explained that it had to call more witnesses in light of the court's decision to exclude Risen's testimony and limit the government to a purely circumstantial case. *See, e.g.*, JCA 118-120, 484-486, 495-496.

Unsurprisingly, and despite having earlier proposed a continuance, Sterling declined. *Id.* at 595. Defense counsel stated that he had "something set for early November and depositions in other cases," and that in light of the court's decision to suppress the evidence, Sterling no longer wanted a continuance and "we should just have the appeal." *Ibid.* The district court did not inquire further.

B. The District Court Abused Its Discretion In Suppressing The Witnesses' Testimony.

"In determining what sanction, if any, to impose" for delayed disclosure of *Brady/Giglio* information, a district court "'must weigh the reasons for the government's delay and whether it acted intentionally or in bad faith; the degree of prejudice, if any, suffered by the defendant; and whether any less severe sanction will remedy the prejudice and the wrongdoing of the government.'" *Hammoud*, 381 F.3d at 336 (quoting *United States v. Hastings*, 126 F.3d 310, 317 (4th Cir. 1997)). The court "must [then] impose the least severe sanction that will 'adequately punish the government and secure future compliance.'" *Ibid.*

The suppression of evidence is an extreme sanction usually reserved for parties who violate the discovery rules intentionally and in bad faith. *See Taylor v. Illinois*, 484 U.S. 400, 415-417 (1988). Absent a finding of bad faith, "[a] continuance is the preferred sanction." *Hammoud*, 381 F.3d at 336; *see Taylor*,

484 U.S. at 413 ("alternative sanctions are adequate and appropriate in most cases," including "granting a continuance or a mistrial to provide time for further investigation"); *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002) ("It would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings.").

The government disclosed the information on the morning of October 13, several days before the trial was due to begin and less than 12 hours after the discovery deadline. The district court found no evidence that the government acted in bad faith, and although it criticized the government for taking too long to complete its classification review, the court found nothing approaching the sort of willful misconduct, harassment, or attempts to improperly gain a tactical advantage that might indicate bad faith. *See, e.g.*, *Taylor*, 484 U.S. at 415-417.[19] Nonetheless, the court disregarded Sterling's original proposal that it grant a continuance, announced *sua sponte* that it intended to strike the government's witnesses, and never meaningfully considered any other remedy. That decision was an abuse of discretion, for at least three reasons.

[19] Indeed, the court did not conclude—nor is there any evidence to suggest—that there was any unnecessary delay in the classification review at all.

1. *Although The Government Disclosed The Information Shortly After The Discovery Deadline, Sterling Still Had Ample Time To Use The Information At Trial.*

The fact that the government's disclosure of alleged *Giglio* information was approximately 12 hours past the court-imposed deadline does not mean that Sterling's due process rights were violated. To establish a *Brady/Giglio* violation, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Evidence is not considered "suppressed," and thus "there is no due process violation," if it "is disclosed before it is too late for the defendant to make effective use of it" at trial. *United States v. Russell*, 971 F.2d 1098, 1112 (4th Cir. 1992); *United States v. Houston*, 648 F.3d 806, 813 (9th Cir. 2011) ("there is no *Brady* violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value").

Thus, even in cases involving far later disclosures than that here, courts have refused to find a due process violation if the defendant still had an opportunity to put the evidence before the jury, including during his own case-in-chief. *See, e.g., United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (no due

process violation from mid-trial disclosure of classified *Brady* material where continuance allowed defendant "to further investigate and determine if the preparation and presentation of additional witnesses was necessary"); *Houston*, 648 F.3d at 813 (citing cases).

The alleged *Giglio* information in this case was disclosed four-and-a-half days before trial, and the government explained that it would then be at least another two weeks before the defense could begin its case-in-chief. JCA 231, 591-592. This gave Sterling ample time to research the information and decide how to use it, even without a continuance. Indeed, the investigation Sterling wished to conduct principally involved locating and subpoenaing [redacted] as witnesses in the hope that they would [redacted] veracity. *See* JCA 572-574, 588-589. While this testimony (if deemed relevant) could have been admitted during Sterling's case pursuant to Federal Rule of Evidence 608(a), it would *not* have been admissible during the government's case. *See* Fed. R. Evid. 608(b) (defendant may mention specific instances of prior conduct to challenge witness's truthfulness during cross-examination, but may not introduce extrinsic evidence of that conduct); *United States v. Bynum*, 3 F.3d 769, 772 (4th Cir. 1993) ("A witness' credibility may not be impeached by extrinsic evidence of specific instances of conduct. * * * A cross-examiner may

inquire into specific incidents of conduct, but does so at the peril of not being able to rebut the witness' denials."). Sterling could also have recalled [redacted] for further testimony during his case-in-chief if necessary. The government repeatedly offered to help Sterling locate and subpoena witnesses before his case began, but he declined.[20] There is simply no reason why, under these circumstances, Sterling would be unable to make use of the information at trial.

2. *There Were Many Alternatives To Excluding The Witnesses, None Of Which The District Court Meaningfully Considered.*

As explained, when the government violates a discovery order, the district court must choose the "least severe sanction" that will remedy the problem. *Hammoud*, 381 F.3d at 336. The court must carefully weigh whether the delay was intentional and in bad faith, whether and to what extent the defendant was prejudiced, and the availability and propriety of lesser sanctions, such as a continuance. *Ibid.* The "severest sanction" of evidence suppression usually

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[20] The court's conclusory finding that it would be "unrealistic" to expect Sterling's defense team to investigate the alleged *Giglio* material and prepare for trial, JCA 577, 592, is thus fundamentally mistaken. The "location and interrogation of potential witnesses and the serving of subpoenas" is among the "routine demands of trial preparation," *Taylor*, 484 U.S. at 415-416, and there is no reason why Sterling's defense team could not perform this task, especially with the government's help. Indeed, if the court's reasoning were correct, it is difficult to imagine a case in which a *Giglio* disclosure made shortly before trial (much less during trial) would ever be permissible.

requires a finding of bad faith. *See Taylor*, 484 U.S. at 413, 415-417; *Hammoud*, 381 F.3d at 336; *Golyansky*, 291 F.3d at 1249; *cf. Hudson v. Michigan*, 547 U.S. 586, 591 (2006) ("Suppression of evidence * * * has always been our last resort, not our first impulse.").[21]

The district court's decision to suppress evidence in this case was flatly inconsistent with these principles. The alleged *Giglio* material was disclosed less than 12 hours after the discovery deadline, the court found no bad faith on the part of the government, including the CIA, and Sterling readily acknowledged that one possible solution would be to "continue the trial to give [him] the opportunity to do [an] investigation." JCA 575. The district court gave no meaningful consideration to this suggestion and instead immediately stated that it intended to strike witnesses to "even up the playing field." *Id.* at 575, 577.

The court never wavered from that decision or considered other options. It found, for example, that Sterling's attorneys would not "have enough time to * * * research" the alleged *Giglio* information and still be ready for trial on

[21] This is true even in cases where the disclosure occurs in the middle of trial. *See, e.g., United States v. Mathur*, 624 F.3d 498, 506 (1st Cir. 2010) ("The customary remedy for a *Brady* violation that surfaces mid-trial is a continuance and a concomitant opportunity to analyze the new information and, if necessary, recall witnesses."); *United States v. Kelly*, 14 F.3d 1169, 1177 (7th Cir. 1994) (same); *United States v. Presser*, 844 F.2d 1275, 1283-1284 (6th Cir. 1988) (same).

schedule, JCA 577, 589, without once considering whether a continuance would resolve that problem. The government proposed several other alternatives—including helping Sterling locate rebuttal witnesses, waiving certain objections to the use of the information in cross-examination, and permitting Sterling to recall government witnesses during his case-in-chief—but the court summarily rejected these proposals as "unrealistic" under the existing trial schedule, again without considering whether a continuance would mitigate the harm. *Id.* at 592.[22] When the government explained that the court's decision would effectively terminate the prosecution and force an appeal, the district court refused to reconsider its decision. *Id.* at 590, 593.

In fact, the district court's only mention of a possible continuance came *after* it struck the witnesses and stated that it was "not backing off of that decision." *See* JCA 592, 594-595 ("just wondering" whether Sterling could use "an extra two weeks" to resolve *Giglio* issue). Unsurprisingly, Sterling said he "d[id]'nt want a continuance" in light of the court's suppression order, which the

[22] The court stated that it might have viewed the government's proposals more favorably "if 30 days ago you had done this." JCA 592. That is an exaggerated estimate of the time Sterling would need to make use of the information at issue, but more fundamentally, the district court never considered granting a continuance to give the defendant that time.

district court accepted without inquiring further. *Id.* at 595.[23] This is a far cry from the careful balancing of factors a district court must perform before imposing "the least severe sanction."

The courts of appeals have repeatedly held that it is an abuse of discretion to suppress evidence rather than grant a continuance in circumstances such as these. In *Golyansky*, the government waited until 19 days before trial to disclose *Giglio* information concerning a key witness's history of mental illness (even though the government had known the information for "several years"), in violation of the district court's discovery orders. 291 F.3d at 1248-1249. The district court found that the government had not acted in bad faith but nonetheless struck the witness as a sanction. *Id.* at 1249. The court of appeals concluded that the district court abused its discretion because there was no

[23] Defense counsel also stated, vaguely, that a two-week continuance might conflict with his schedule. JCA 595. The district court had already rendered its decision and did not cite counsel's schedule as a reason for striking the witnesses, nor did the court ask whether counsel's schedule could be changed or whether a continuance of some other duration would be better. And in any event, routine scheduling matters do not warrant the suppression of evidence or outweigh the public interest in trying an alleged criminal. *See Hastings*, 126 F.3d at 317. Indeed, had the district court offered a continuance earlier, and had Sterling declined, it would have weighed heavily *against* finding a *Brady/Giglio* violation. *See Mathur*, 624 F.3d at 506 ("a defendant's outright rejection of a proffered continuance * * * often will reveal, with conspicuous clarity, defense counsel's perception that the belatedly disclosed information was not critical to his client's defense").

apparent reason why, "given time, Defendants [could not] adequately incorporate the impeachment evidence into the presentation of their case." *Id.* at 1249-1250.

In *United States v. White*, 846 F.2d 678 (11th Cir. 1988), the district court suppressed evidence that the government disclosed five days before trial in violation of the discovery rules. *Id.* at 691. The court of appeals reversed. It reiterated that, when faced with a discovery violation, a district court must explicitly weigh "the feasibility of curing [any] prejudice by granting a continuance" and select the least severe effective sanction. *Ibid.* With the exception of rare cases in which a discovery violation is "intentional" and "egregious," "[s]uppression of the evidence [is] *not* the least severe method of ensuring that the Government complies with discovery orders," and a district court should instead grant a continuance to "allow[ ] the defendant additional time to incorporate the [evidence] into his case." *Id.* at 691-692 & n.21 (emphasis added); *id.* at 692 (discovery rules are meant "to promote the fair administration of justice, but suppressing the evidence, rather than granting a continuance, works against that goal"); *see also United States v. Sarcinelli*, 667 F.2d 5, 6-7 (5th Cir. 1982) (although prosecutor willfully ignored discovery deadlines, district court abused discretion by imposing "extreme sanction[ ]" of suppression instead of "[o]ther, less severe, sanctions," such as a continuance).

This Court's decision in *United States v. Shafer*, 987 F.2d 1054 (4th Cir. 1993), is similarly instructive. There, the district court granted a mistrial after the government belatedly disclosed *Brady* and *Giglio* information during trial. *Id.* at 1056-1057. This Court reversed because a mistrial was not the least severe sanction: the court could instead have granted "a brief continuance," recalled "the government's witnesses * * * for additional cross-examination," or allowed the defendant "to introduce the new evidence as part of his case-in-chief." *Id.* at 1058; *cf. Hastings*, 126 F.3d at 316-317 (although government's discovery violation was in bad faith, dismissal of indictment was abuse of discretion because "[a] less severe sanction should have been considered").

As in these cases, the district court's decision in this case "was not the product of a careful consideration of the factors" governing discovery sanctions. *Sarcinelli*, 667 F.2d at 7. The district court imposed a draconian sanction that effectively terminated the prosecution while ignoring every other alternative remedy that was presented. Nowhere in the district court's opinion does it explain why the prejudice to the defendant, which the court concluded was strictly temporal, could not be alleviated by a continuance, by recalling witnesses for additional cross-examination, or by taking advantage of the government's repeated offers to help locate and subpoena rebuttal witnesses. Nor did the court

find any bad faith. Its decision is an abuse of discretion and should be reversed.

3. *The Impeachment Value Of The Information Is Minimal, And Sterling Was Not Prejudiced By Its Late Disclosure.*

The information at issue is not exculpatory and its impeachment value is slight. Under these circumstances, the prejudice to Sterling caused by the government's late disclosure of the information is minimal.

First, none of the material is related to the evidence of Sterling's crimes, nor does it bear on his proffered defenses (*i.e.*, that he did not leak classified information and that the information was not related to "national defense" within the meaning of 18 U.S.C. § 793). Sterling argued below [redacted] documents were *Brady* material because they suggested that Sterling's actions were not unusual. JCA 571, 588-589. The court declined to find that the information qualified as *Brady* material, *id.* at 589, and there is simply no merit to Sterling's claim that his conduct is somehow analogous to [redacted] as some of the government's witnesses are alleged to have done. Moreover, with the exception of [redacted] none of the witnesses who allegedly [redacted] were struck, nor did Sterling ask that they be.

Second, the impeachment value of the information concerning [redacted] is minimal. "Rule 608 authorizes inquiry only into instances of misconduct that are clearly probative of truthfulness or untruthfulness." *United States v. Leake*, 642 F.2d 715, 718 (4th Cir. 1981) (quotation marks omitted). [redacted] *See* 3 Mueller & Kirkpatrick, *Federal Evidence* § 6:30, 185 (3d ed. 2007) ("proof that a witness is quick to anger is irrelevant and cannot fit [Rule] 608 when the purpose is to shed light on veracity, nor is proof going to any other quality of character, such as immorality or unlawfulness"); *United States v. Alston*, 626 F.3d 397, 404 (8th Cir. 2010) (evidence that police officer was fired for taunting prisoner was not probative of truthfulness and unduly prejudicial); *cf. United States v. McMillon*, 14 F.3d 948, 956 (4th Cir. 1994) ("'there is a duty to protect [a witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him'").

[redacted]

lie in this case. The same is true of the statements by [redacted] *See United States v. Null*, 415 F.2d 1178, 1180 (4th Cir. 1969) ("reputation evidence must be confined to reputation at [the] time" of the matter being tried "or a reasonable time before" (quotation marks and brackets omitted)); 3 Muller & Kirkpatrick, *supra*, § 6:30, 186 ("opinion or reputation testimony should shed light on truthfulness at the time of trial"). Rule 608 "does not require or imply that every negative bit of evidence existing concerning a witness may be dragged into a case no matter how remote or minor the alleged misconduct." *United States v. Lafayette*, 983 F.2d 1102, 1106 (D.C. Cir. 1993).

As for allegations that [redacted] may have violated administrative reporting and conflict-of-interest rules [redacted] but the allegations were never substantiated and did not result in any findings or punishment. JCA 560-561. The impeachment value of the information is therefore minimal. *See, e.g.*, *United States v. Novaton*, 271 F.3d 968, 1006-1007 (11th Cir. 2001) (evidence that witness was investigated but not charged in corruption case six years earlier bore little relevance to truthfulness and was

unduly prejudicial); *United States v. Phibbs*, 999 F.2d 1053, 1070 (6th Cir. 1993) (same for internal disciplinary action against FBI agent that resulted in no punishment). The district court's decision should be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING THE GOVERNMENT TO DISCLOSE TO THE DEFENDANT AND THE JURY THE TRUE NAMES OF COVERT CIA OFFICERS AND CONTRACTORS.

Throughout the pretrial proceedings in this case, the district court consistently held that the true names of covert CIA officers and contractors who intended to testify at trial—which are classified—would not be useful to the defense or essential to a fair trial and could, if disclosed, result in serious damage to national security and jeopardize the personal safety of the witnesses. The court thus excluded that information from discovery and protected it from disclosure at trial. Nonetheless, on the eve of trial and without any prompting from the defendant, the court decided that the government had to disclose the witnesses' full names to the defendant and the jury after all. That decision is reviewed for abuse of discretion. *See United States v. Abu Ali*, 528 F.3d 210, 253 (4th Cir. 2008).

A. Statutory Background

CIPA establishes pretrial procedures governing the discovery and admissibility of classified information in a criminal case. *See United States v.*

Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) (en banc); *United States v. Moussaoui*, 591 F.3d 263, 281-282 (4th Cir. 2010) (hereinafter "*Moussaoui II*"). The statute does not "alter the existing law governing the admissibility of evidence," under which classified information is ordinarily inadmissible in light of the government's "common law privilege[ ]" to protect "military or state secrets." *Smith*, 780 F.2d at 1106-1107; *Abu Ali*, 528 F.3d at 245-246; *cf. O'Hara*, 301 F.3d at 568 (CIPA "evidence[s] Congress's intent to protect classified information from unnecessary disclosure at any stage of a criminal trial.")

Sections 3 and 4 of CIPA relate to the discovery of classified information. Section 3 requires district courts "to protect against the disclosure of any classified information disclosed by the United States to any defendant" in a criminal case. CIPA § 3; *see Moussaoui II*, 591 F.3d at 281 n.15 ("[t]he Government's right to protect such information is absolute"). Section 4 authorizes district courts to permit the government, "upon a sufficient showing," "to delete specified items of classified information from documents to be made available to the defendant through discovery" or "to substitute a summary of the information [or] a statement admitting relevant facts" in lieu of producing classified information. CIPA § 4; *Moussaoui II*, 591 F.3d at 282.

Sections 5 and 6 of CIPA govern the admissibility of classified information at trial. Section 5 provides that, "[i]f a defendant reasonably expects to disclose or to cause the disclosure of classified information" at trial, he must provide advance notice so that the government may object. CIPA § 5. Section 6 authorizes the government to request a pretrial hearing at which the court must "make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial." CIPA § 6(a). If the court decides to admit classified information at trial, the government "may move that, in lieu of the disclosure of such specific classified information," the court substitute a statement admitting relevant facts or an unclassified summary of the information. CIPA § 6(c)(1). "The court *shall* grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." *Ibid.* (emphasis added); *Moussaoui II*, 591 F.3d at 282 (same).[24]

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[24] Even in situations where CIPA's procedures do not strictly apply, the statute "provides useful guidance in determining the nature of remedies that may be available" when classified information is at issue. *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004) (hereinafter "*Moussaoui I*"); *Abu Ali*, 528 F.3d at 245 ("In the area of national security and the government's privilege to protect classified information from public disclosure, we look to CIPA for appropriate procedures.").

B. Factual Background

On February 7, 2011, the government filed an *ex parte* motion with the district court pursuant to Section 4 of CIPA in which it requested permission to delete certain classified information in documents that would be provided to the defendant during discovery and to replace the full names of covert CIA officers [redacted] *See* GXCA 76-90. The government included a sealed declaration from the CIA explaining that revealing the true names of covert CIA officers in discovery could jeopardize their physical safety and the safety of their families, associates, and sources, and would seriously diminish their effectiveness as CIA officers. *Id.* at 104-105. The district court granted the government's requests and issued a protective order preventing the discovery of the true full names of covert officers. JA 81-82. The court specifically found that this information, "when considered in conjunction with the proposed substitutions, does not at this time appear to be a matter for discovery under Rule 16 of the Federal Rules of Criminal Procedure," *id.* at 82, and thus the information was not "material to preparing [Sterling's] defense," Fed. R. Crim. P. 16(a)(1)(E)(i).

On August 9, 2011, the government filed a motion pursuant to Section 6 of CIPA requesting permission to substitute pseudonyms for the true names of

covert CIA officers and contractors in trial exhibits, to allow those witnesses to testify using their pseudonyms, and to permit the witnesses to use a non-public entrance to the courtroom and testify behind a screen that would shield their face from the public (though they would still be visible to the defendant and the jury). JA 763-768. The government submitted a declaration from the CIA explaining that it was vitally important to shield these witnesses' identities at trial because disclosing their names or faces could place them, their families, and their sources in imminent danger. JCA 38-42. The declaration further explained that foreign intelligence and terrorist organizations have a significant interest in identifying CIA officers and could use information gleaned from the trial to expose the officers' intelligence activities, sources, and methods. *Ibid.*

Consistent with its earlier discovery ruling, the district court agreed that the witnesses could testify using pseudonyms. JCA 109. The court explained that "[i]dentifying people as employees of the CIA is a very sensitive matter," and that the use of pseudonyms would not "create[ ] any problem for the defense." *Id.* at 91-92, 109 (CIA declaration "explains * * * what I think is a very solid reason" for keeping secret the true identities of covert CIA officers, and using pseudonyms "do[es] not appear to significantly or if at all jeopardize the defense's ability * * * to put on all of its defense"). The court also permitted the witnesses to use a non-

public entrance to the courtroom and barred sketch artists during their testimony, but refused to allow the witnesses to testify behind a screen. *Id.* at 120-122.

The government asked the court to reconsider this decision and permit five covert CIA officers and two covert contractors to testify behind a screen. JCA 266-267.[25] In support of this request, the government submitted supplemental declarations from the CIA and FBI explaining the specific dangers to the witnesses' safety and effectiveness if their names or faces were linked to the CIA. JCA 280-298, 300-305; *see* GXCA 192-210, 212-217.

The district court granted reconsideration and permitted the witnesses to testify behind a screen. JCA 478. The court then, without any prompting from Sterling, announced that it had decided to disclose the true names of all of the covert witnesses to the jury by providing the jurors with a key card that matched each pseudonym to the witness's true full name. *Id.* at 481-482. The court further held that the government would be required to disclose the witnesses' full names to Sterling because "the defendant may know things about [a] witness, [and] he can then turn to counsel and say: Hey ask him about such-and-such on cross-examination." *Id.* at 487-488.

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[25] The government also sought reconsideration with respect to [redacted] formerly covert CIA officers who are not a subject of this appeal. *See* JCA 267.

The government argued that there was no reason, constitutional or otherwise, why Sterling or the jury would need to know this classified information. *See* JCA 430-439. The government noted that, as a practical matter, Sterling had already been provided with the true names of two of the witnesses in expert disclosures and was acquainted with at least three others from his time at the CIA, and he had been provided all relevant discovery documents identifying the witnesses by their pseudonyms (without objection) in any event. *See* JA 830-838; JCA 160-162, 223-224, 431-435 & n.2, 485, 490-491. Sterling was thus fully able to confront and cross-examine the witnesses without being given additional classified information concerning their true identities, for which he was not cleared. Moreover, the charges against Sterling (which included illegally disclosing information about a covert CIA asset) strongly counseled against unnecessarily providing him with the information. JCA 433-434.

The district court refused to reconsider its decision. The court rejected as "far-fetched" the concern that jurors would "take the trouble to remember that certain people are connected with [the CIA]," and concluded that because the jury was going to be shown some classified information during the trial, there was no harm in disclosing the witnesses' identities as well. JCA 597-598. The court also worried that not giving the information to Sterling would entail "some

degree of presumption of guilt." *Id.* at 597.

The court also made clear that this ruling was motivated, at least in part, by its belief that the witnesses were unnecessary. The government explained that, in light of the district court's decision to exclude Risen's testimony and Sterling's intention to claim that others were Risen's source, the government had to call these witnesses because they had knowledge of Classified Program No. 1 and needed to confirm that they were not the source. JCA 485-486. The district court dismissed this justification and stated that the government should view the court's disclosure order as "a way of judiciously looking at your list of witnesses and really thinking about do you really need this witness" in light of the "potential risks" of disclosing the witness's identity. *Id.* at 495-496, 486 ("You might not need all of these people, and quite frankly, * * * the less exposure you have to make of such people, I would think that's in the government's interests * * *.").

C. Disclosing The Classified Identities Of Covert CIA Officers And Contractors In This Case Is Unnecessary And Will Expose Them To Unjustifiable Risk.

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," and "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests." *Haig v. Agee*, 453 U.S. 280, 307 (1981); *CIA v. Sims*, 471 U.S. 159, 175

(1985) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." (quotation marks omitted)); *Snepp v. United States*, 444 U.S. 507, 512 & n.7 (1980).

The true identities of covert U.S. intelligence officers and their sources are thus closely guarded secrets. Congress has explicitly determined that "the interests of the security of the foreign intelligence activities of the United States" require that the true identities of CIA personnel be kept secret, 50 U.S.C. § 403g, and has made it a crime to disclose the identity of a covert CIA officer, *id.* § 421. Identifying a U.S. intelligence officer may pose "a serious danger to American officials abroad and serious danger to the national security." *Haig*, 453 U.S. at 305-306; *Sims*, 471 U.S. at 175 ("Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'"). The government must therefore "tender as absolute an assurance of confidentiality as it possibly can" to its intelligence officers and sources, and courts must exercise extraordinary caution before "order[ing] [their] identit[ies] revealed." *Sims*, 471 U.S. at 175-176.

In determining whether and to what extent classified information of this sort should be admitted at trial, a district court must carefully "balance [the] 'public interest in protecting the information against the individual's right to prepare his defense.'" *Abu Ali*, 528 F.3d at 247 (quoting *Smith*, 780 F.3d at 1105). Classified information is presumptively privileged, and the defendant bears the burden of overcoming this privilege by proving that "the information is at least essential to the defense, necessary to the defense, and neither merely cumulative nor corroborative, nor speculative." *Id.* at 248 (quoting *Smith*, 780 F.2d at 1110). There must also be "'no adequate substitution'" for the information that would preserve the defendant's rights while avoiding disclosure. *Ibid.*; *Moussaoui II*, 382 F.3d at 477. To meet this burden, a defendant must "come forward with something more than speculation as to the usefulness of the disclosure"; rather, he "must * * * show that disclosure will significantly aid his defense." *Smith*, 780 F.2d at 1108; *Abu Ali*, 528 F.3d at 248.

The district court's order does not come close to satisfying these standards. The court repeatedly found that the covert witnesses' true identities and association with the CIA were classified secrets and were *not* necessary or helpful to Sterling's defense, and thus that the information could not be disclosed in discovery or at trial. The court's eleventh-hour decision to reverse course and

require disclosure to the defendant and the jury—despite the fact that Sterling had not asked for such disclosure or identified any reason why he needed the information—is an abuse of discretion.

1. *Disclosing The Classified Identities Of Covert Witnesses Is Not Necessary To Sterling's Defense.*

The district court identified no compelling reason why it was necessary to disclose the true identities of covert CIA officers and contractors to the jury and to Sterling. The court speculated that Sterling might know things about a witness that were not disclosed in discovery and could "turn to counsel and say: Hey ask him about such-and-such on cross-examination." JCA 487-488. This speculation—which depends upon an increasingly unlikely chain of events (*i.e.*, that Sterling would be able to use the witnesses' true names to (a) remember something about them; (b) that was not otherwise disclosed in discovery; (c) that he could not otherwise recall based on their face, [redacted] and (d) that had exculpatory or impeachment value)—is simply insufficient to establish necessity. *See Smith*, 780 F.2d at 1108; *Abu Ali*, 528 F.3d at 248.

The court's speculation is also particularly misplaced in this case. Sterling has already been provided with the full names of two of the witnesses; he is acquainted with at least three others; and it is extremely unlikely he would have the sort of inside knowledge about the final two witnesses (whom he apparently

has never met) that the district court suggested. In any event, Sterling has been provided with full discovery on all of the witnesses—including prior statements, interview reports, cables, and other documents in which the witnesses are identified [redacted] (a substitution to which Sterling has never objected). *See supra* at 73. Sterling therefore knows with precision the factual connection of each witness to the case; he has any *Brady* or *Giglio* material relating to those witnesses; and he will be able to effectively cross-examine them.

A defendant's right to confront the witnesses against him means that he must be given an "opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test." *Smith v. Illinois*, 390 U.S. 129, 132 (1968) (quotation marks omitted). A defendant does not, however, have a right to cross-examine the witness "in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). When revealing a witnesses' true name would expose him to danger or threaten "other legitimate interests in the criminal trial process," *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), and the information would not materially aid the defendant's ability to mount an effective cross-examination, the defendant has no right to insist upon disclosure of the witness's identity. *See Roviaro v. United States*, 353

U.S. 53, 60-62 (1957) (defendant has no constitutional right to know name of confidential informant, unless it would be "relevant and helpful to [his] defense, * * * or is essential to a fair determination of a cause"); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (Confrontation Clause permits limitations on cross-examination "based on concerns about, among other things, * * * the witness' safety").

Thus, for example, this and other courts have permitted undercover police officers and informants to testify using pseudonyms without disclosing their true names to the defendant or the jury. *See, e.g.*, *United States v. Zelaya*, 336 F. App'x 355, 357-358 (4th Cir. 2009) (permitting witnesses to testify using pseudonyms without disclosing their true names to defendants or jury, where "disclosure of the[ir] true names would unnecessarily expose [them] and their families to serious danger" and defendants were provided with witnesses' prior statements and other information that could be used in cross-examination); *Brown v. Kuhlmann*, 142 F.3d 529, 533 n.3, 537-538 (2d Cir. 1998) (undercover police officer identified only by badge number to ensure his safety); *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976) (informant not required to disclose his true name); *Martinez v. Brown*, 2009 WL 1585546, at *1-2, 5 (S.D.N.Y. 2009) (affirming, on collateral review, decision to permit undercover police officer to testify using badge number

and to withhold true name from defendant and jury); *cf. United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969) ("where there is a threat to the life of the witness, the right of the defendant to have the witness' true name * * * is not absolute") .

This rule is particularly important in cases such as this one involving covert witnesses whose true identities and association with the CIA have been classified to protect national security and the witnesses' physical safety. *See Smith*, 780 F.2d at 1107-1108 (adopting *Roviaro* standard in determining admissibility of classified information). In *United States v. El-Mezain*, --- F.3d ---, 2011 WL 6058592 (5th Cir. Dec. 7, 2011), for example, the court of appeals held that the classified names of Israeli security officers who testified at trial did not need to be disclosed to the defendants or the jury in light of the "serious and clear need to protect the true identities of [the witnesses] because of concerns for their safety" and the interest in protecting national security. *Id.* at *8, 10. The court of appeals rejected the defendants' argument that they needed to know the witnesses' identities to verify their credentials, investigate their backgrounds, and discover reputation evidence concerning their character for untruthfulness. *Id.* at *8. As the court explained, these interests were heavily outweighed by the witnesses' interests in anonymity, and the defendants (just like Sterling) "had access to significant information

regarding the witnesses' employment, nationalities, and backgrounds in order to conduct meaningful cross-examination." *Id.* at *10-11; *see also United States v. Marzook*, 412 F. Supp. 2d 913, 923-924 (N.D. Ill. 2006) (permitting Israeli intelligence agents to testify using pseudonyms without disclosing true names to defendant or jury because witnesses' identities were classified, disclosing identities could jeopardize their safety, and defendant could use pseudonyms to investigate witnesses' backgrounds); *United States v. Abu Ali*, 395 F. Supp. 2d 338, 344 (E.D. Va. 2005) (permitting Saudi officials to testify using pseudonyms without disclosing their true names to the defendant or the jury "[f]or security reasons").

Similarly, in *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), Chief Judge Sentelle of the D.C. Circuit held that the government was not required to disclose to the defendant or to the jury the classified true name of a U.S. intelligence officer who testified at a court-martial. *Id.* at 410. The court, based almost exclusively on the federal Constitution and Article III precedent, concluded that possible danger to the witness's safety and the government's compelling interest in maintaining the secrecy of classified information outweighed the defendant's interest in learning the witness's true name, and that the defendant had enough other information to "place [the witness] 'in his proper

setting' and to 'identif[y] the witness with his environment.'" *Id.* at 410 (quoting *Alford v. United States*, 282 U.S. 687, 692-693 (1931)). The same result is appropriate here.

The district court refused to follow *Marzook*, *Abu Ali*, and the district court's decision in *El-Mezain* because those cases involved foreign intelligence officers. JCA 596. The court never explained why this was a salient distinction or, more fundamentally, why U.S. intelligence officers should be entitled to less protection than foreign ones. As for *Lonetree*, the district court summarily disregarded that decision because it was "not [an] Article III court[ ]." *Id.* at 597. The district court made no effort to explain why the reasoning of *Lonetree*—decided by an Article III court-of-appeals judge based on Article III precedent—was unpersuasive.

The district court also acknowledged that its decision was intended, at least in part, to encourage the government to remove the witnesses from its list and thus shorten the trial. JA 486, 495-496. That is not a proper reason for ordering the disclosure of classified information, nor does it have any bearing on whether the evidence is "'necessary to [the] defense.'" *Abu Ali*, 528 F.3d at 248. Moreover, to the extent the court sought to leverage the potential dangers to the witnesses and to national security as a means of compelling the government to

make different case management decisions, *see* JCA 486, 495-496, the court abused its discretion.

2. *The District Court's Decision Unjustifiably Endangers The Witnesses And National Security.*

The court also made no effort to meaningfully address the grave risk of harm to the witnesses and to national security that could result from disclosing the witnesses' true identities. These dangers were described in detail in a series of government declarations, which the court had previously found persuasive and compelling. *See supra* at 70-71; *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (courts "have consistently deferred to executive affidavits predicting harm to the national security" (quotation marks omitted)). The court's only stated reason for ultimately disregarding these dangers was its belief that the jurors and defendant were unlikely to disclose the information. That finding simply does not comport with the facts of this case.

The grand jury found probable cause to believe that Sterling improperly disclosed classified national defense information concerning Classified Program No. 1, including the true identity of Human Asset No. 1. *See* JA 42-43, 46, 48. These findings underscore the serious risks in entrusting Sterling with the true identities of CIA officers he does not already know (or whose names he may have forgotten). The district court refused to consider this argument because it

believed it would undermine the presumption of innocence, JCA 597, but that reasoning is no more valid in this case than in the numerous other cases in which witnesses' true identities have been shielded from defendants accused of serious crimes. *See supra* at 79-81 (citing cases).

As for the jury, there is no support for the district court's belief that the jurors would be unlikely to remember the names of the witnesses. If anything, the court's "key card" procedure—under which the true names of witnesses otherwise testifying under pseudonyms and behind a screen would be disclosed to the jury, making it obvious that the witnesses' true identities are closely guarded secrets—is likely to impress upon the jurors the extraordinary sensitivity and importance of the information they are being provided. This creates an unjustifiable risk that the jurors may inadvertently disclose the information to others after the trial, and will unnecessarily expose the jurors to possible harassment by others who will be very interested to know the names on that list. *See* JCA 38-42; *see also* GXCA 215-216. There is simply no reason to burden the jurors with this classified information without proof that it is necessary to Sterling's defense and to the jury's ability to fairly judge his guilt. The district court abused its discretion in concluding otherwise.

CONCLUSION

For the foregoing reasons, the judgments of the United States District Court for the Eastern District of Virginia should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2012, I filed the foregoing Brief for the United States (Public Version) with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to the following registered users:

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Pursuant to this Court's order dated January 10, 2012, I hereby certify that this brief contains 19,586 words (excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure) and has been prepared in a proportionally spaced, 14-point typeface using WordPerfect X4.

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