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

Appeal from the United States District Court
for the Eastern District of Virginia (Brinkema, J.)

Brief of Jeffrey A. Sterling

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 18 U.S.C. § 3731 over the first and second issues raised by the Appellant in this interlocutory appeal.

This Court does not have jurisdiction to hear the third issue raised by the Appellant. Neither 18 U.S.C. § 3731 nor the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA"), § 7, grants the Appellant the right to an interlocutory appeal of the third issue.

STATEMENT OF THE FACTS

From late 1998 through May 2000, Jeffrey Sterling was one of a number of Central Intelligence Agency ("CIA") employees working on a classified operation referenced in the Indictment as Classified Program No. 1. Indictment ¶ 16; JA 31. In March 2003, with war against Iraq dominating the news, Mr. Sterling lawfully met with members of the staff of the Senate Select Committee on Intelligence to voice various concerns he had with Classified Program No. 1. *Id.* at ¶ 36; JA 37. In April 2003, the Government learned that certain information about Classified Program No. 1 had been provided to a reporter for the *New York Times*, James Risen. *Id.* at ¶¶ 39-41; JA 38-39 (the Indictment refers to Risen as Author A). The Government immediately commenced an investigation into this "leak." In early 2006, Mr. Risen published a book, *State of War*, which included a chapter discussing, among other programs, Classified Program No. 1. *See* Gov's Motion

in Limine Ex. A (Docket Entry ("DE") 105-1); JA 154.

During the many years of the Government's investigation, Mr. Risen refused to speak with the Government about his sources. He did not testify before the grand jury. Appellant Brief pp. 17-19.

On December 22, 2010, almost ten years after his last day at work at the CIA, Mr. Sterling was indicted by a federal grand jury in the Eastern District of Virginia for unauthorized retention and communication of national defense information, unauthorized conveyance of government property, mail fraud and obstruction of justice. Indictment ¶¶ 55-75; JA 18-29. The Government obtained that indictment based on what it now concedes is entirely circumstantial evidence. Appellant Brief, p. 38.

On January 14, 2011, Mr. Sterling was arraigned, entered a plea of not guilty to all the charges, and requested trial by jury. Arraignment (DE 13). A discovery order was also entered in the case on January 14, 2011. That order required the Government to disclose all *Giglio* material "no later than" five calendar days before trial. Discovery Order (DE 14) p. 4; JA 56-61.

On January 25, 2011, the district court scheduled the jury trial in this matter for September 12, 2011, meaning that *Giglio* material had to be produced no later than September 7, 2011. Minute Entry (DE 21); JA 4. The Government thus had more than eight months to prepare for trial, an unusually lengthy period of time to

prepare for any trial in the Eastern District of Virginia, much less in a case that the Government had investigated for over seven years prior to bringing the indictment.

The Government, which had issued a trial subpoena to Mr. Risen, moved *in limine* for a pre-trial ruling on the scope of the privilege it anticipated Mr. Risen would invoke at trial. DE 105; JA 124-153. The court heard argument on that motion, and the multiple subsequent motions by the Government for clarification and reconsideration, and granted the Government's motion in part and denied it in part. The district court ruled that while Mr. Risen would be compelled to provide certain testimony, he would not be compelled to reveal his source or sources. Memorandum Opinion (DE 148); JA721-752; Order (DE 261); JA 953.

On July 7, 2011, the district court, upon the joint request of the United States and Mr. Sterling, continued the trial of the case from September 12, 2011 to October 17, 2011. Order (DE 128); JA 663-64. Accordingly, the production of *Giglio* material under the court's prior order was now required to be produced, at the latest, by October 12, 2011, nine months after the indictment was returned.

On October 13 and 14, 2011, on the eve of trial and after the court's deadline, the Government disclosed to the defense significant *Giglio* material pertaining to six of the Government's proposed trial witnesses. Letters of William M. Welch II to Edward B. MacMahon, Jr. (Oct. 13, 2011) (hereinafter "Oct. 13 Letters"); JCA 560-563; Government's *Ex Parte* and Sealed Motion Regarding

Witnesses (filed October 13, 2011 and ordered produced to the defendant on October 14, 2011); JCA 557-563. Because the *Giglio* material the Government had produced at the eleventh hour involved classified information and related to covert CIA employees, the defense could not make meaningful use of it. Carefully weighing the nature of the *Giglio* material and the clear prejudice to the defense, the court struck the two Government proposed trial witnesses to whom the most significant material pertained, while allowing the Government to proceed to trial and to call the other four witnesses for whom it had belatedly produced *Giglio*. Oct. 14, 2011 Transcript (hereinafter "Oct. 14 Tr."); JCA 564-599.

Leading up to the trial, the Government had proposed, and the district court approved over the defendant's objection, numerous security measures with respect to a large number of the Government's trial witnesses. These measures included: a ban on courtroom sketch artists, a screen to prevent the public from seeing the witnesses, the use of a non-public entrance to the courtroom by the witnesses, the assurance that the witnesses would not be publicly identified and authorization for them to be referred to in open court under pseudonyms. Order (DE 278); JCA 600-604. However, the court ruled that the actual identity of the witnesses must be disclosed to Mr. Sterling and the jury. Oct. 14 Tr.; JCA 597-598.

SUMMARY OF THE ARGUMENT

1. Mr. Sterling takes no position on whether a "reporter's privilege" exists and, if so, whether Mr. Risen would have been entitled to invoke the privilege at trial. The Government repeatedly moved *in limine* to admit Mr. Risen's testimony at trial without being able to make any proffer of what his trial testimony would be, having never spoken to Mr. Risen. The Government presents an interlocutory appeal to this Court based, again, on pure speculation regarding Mr. Risen's testimony. The Government's appeal serves to highlight the evidentiary gaps in its case against Mr. Sterling. Indeed, the Government concedes that without Mr. Risen's testimony, it cannot even establish venue. Accordingly, with respect to this portion of the Government's appeal, Mr. Sterling states only that the Government does not have any actual knowledge of what Mr. Risen's testimony would be were he compelled to reveal his source or sources, nor does it know how important such testimony would be in the context of the evidence adduced at trial, including the defenses, if any, put on by Mr. Sterling. This Court must consider the interlocutory appeal in that context.

2. The district court properly exercised its broad discretion in striking two of the Government's witnesses after the Government produced significant classified *Giglio* material related to those witnesses only three days and four days before the start of trial. This belated disclosure was a clear violation of the court's

discovery order, which required production of such material no later than five days before trial. More significantly, the Government was also bound by the due process requirements of the United States Constitution to disclose this material to Mr. Sterling in sufficient time for its effective use at trial. Independent of the court's discovery order, the Government's last minute disclosures were in blatant violation of this constitutional obligation.

As the court with the greatest familiarity with the procedural history of this case, the entire factual record and its own docket, a district court has wide discretion in fashioning the appropriate sanction when a party violates a discovery order. Here, the Government belatedly disclosed *Giglio* material about six government witnesses. The Government offered no reason for its delay. Mr. Sterling, in turn, was greatly prejudiced by the delay. Due to the necessary and time-consuming process required by the classified nature of the *Giglio* material, Mr. Sterling could not possibly have fully investigated and developed the belatedly-disclosed evidence prior to the start of trial, three to four days later. The court took all of these factors into consideration and applied the most appropriate sanction: it struck the two government witnesses about whom the most significant *Giglio* material related, and as to whom, therefore, the untimely disclosure was most prejudicial. Conversely, the court imposed no sanction whatsoever related to the late disclosure of *Giglio* pertaining to four other witnesses, whom, despite the

Government's violation of the court's discovery order, the Government remained free to call as witnesses at trial. This Court should defer to the district court's substantial discretion in making such rulings and uphold the court's decision.

3. There is no basis for the Government's assertion of jurisdiction for Section III of its interlocutory appeal. Neither 18 U.S.C. § 3731 nor CIPA § 7 grants this Court jurisdiction to entertain an interlocutory appeal of the district court's order that, while the Government could call witnesses without disclosing their identity to the public, it would be required to disclose the true names of the witnesses to Mr. Sterling and to the jury. None of the individual provisions of § 3731 apply to this ruling. And, CIPA grants interlocutory appeal rights only to decisions related to a defendant's attempted use of classified information. Here, the court's order did not pertain to such a request. Rather, the Government seeks appellate review of a pretrial decision related to its own election to call witnesses at trial that would result in a limited disclosure of classified information by the court to the defendant and the jury alone. As this Court has previously held in *United States v. Moussaoui*, 333 F.3d 509, 514 (4th Cir. 2003), CIPA applies to the disclosure of classified information by the defendant to the public at trial. And when CIPA is not directly applicable, § 7 does not authorize an interlocutory appeal. *Id.* at 515. Accordingly, this Court lacks jurisdiction over the Government's interlocutory appeal of this issue.

Even were the Court to determine it could exercise jurisdiction over this issue, it should uphold the district court's ruling. Having ruled that it was going to permit five government witnesses to testify without their identities being publicly disclosed, the district court was well within its discretion to order that the real names of these witnesses be disclosed to the Defendant and to the jury. The court had already granted the vast majority of the Government's security measure requests, over the defendant's objections and then exercised its discretion in making this ruling, balancing the need to preserve Mr. Sterling's constitutional rights to a fair trial with the Government's need to protect the identity of certain witnesses to the extent possible consistent with a public trial. The district court had wide discretion to make such a determination, and this Court should affirm.

ARGUMENT

I. MR. STERLING TAKES NO POSITION AS TO WHETHER MR. RISEN PROPERLY INVOKED ANY PRIVILEGE IN THIS CASE.

The Government has not interviewed Mr. Risen, and the grand jury that returned the indictment in December 2010 did not hear from Mr. Risen. Regardless of how many times the Government claims to know that Mr. Risen's testimony will inculpate Mr. Sterling, the fact is that the Government cannot

credibly or properly proffer Mr. Risen's imagined testimony.[1] However, that has not restrained the Government from purporting to do precisely that. For example, on page 3 of the Appellant Brief, the Government proffers that Mr. Risen is "the only eyewitness to the crime and the only person who could identify Sterling as the perpetrator." This statement merely summarizes the Government's aspirations as to what Mr. Risen might say. The Court must be careful to avoid believing that there is any basis in the record for this or the many other statements or claims the Government attributes to Mr. Risen and testimony that has never been provided. Indeed, all the Court needs to do is note that there are no record cites to even a single proffer of Mr. Risen's testimony. In short, to the extent the Government's Statement of Facts relies upon such assertions, it should be disregarded by this Court.

Throughout the trial proceedings in this case, Mr. Sterling has consistently declined to take a position regarding whether Mr. Risen properly invoked any "reporter's privilege" in the district court. While Mr. Sterling recognizes that this

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[1] Mr. Sterling takes exception to many of the "facts" set forth by the Government in the Appellant's Statement of Facts, but identifies them with particularity only to the extent they are material to the resolution of this appeal. Mr. Sterling specifically objects to the Government providing any *ex parte* information to the Court including the information apparently provided in the *ex parte* classified appendix. Appellant Brief p. 5, n.2.

is an issue of first impression in this Court, his view is simply that the privilege issue in this case should be resolved between Mr. Risen and the Government, as adjudicated by the courts. In the district court, the Government moved on several occasions to admit, *in limine*, the unknown testimony of Mr. Risen. *See, e.g.*, DE 105; JA 124-153. In various oppositions, Mr. Sterling focused on the absurdity of moving *in limine* to admit the testimony of a witness when the Government could not proffer what the testimony of that witness would be. *See, e.g.*, Def's Opposition (DE 187); JA 890-896.

In this appeal, the Government is forced to concede how many elements of the charged offenses it believes it simply cannot prove without Mr. Risen's imagined testimony. For example, it admits that "there are no recorded phone calls or recovered emails in which Sterling discloses classified information to Risen. The Government has evidence that Sterling and Risen called one another, but the contents of their conversations are unknown." Appellant Brief p. 41. Remarkably, the Government admits that without Mr. Risen's testimony, it cannot even prove venue. *Id.* at p. 38.

The Government's practical problem, however, is that Mr. Risen has publicly indicated that he will not answer any of the questions that the Government thinks he can answer. Thus, while Mr. Sterling takes no position on the privilege or First Amendment issues posed by this case, the record is clear that the

Government is speculating about Mr. Risen's anticipated testimony in a vain attempt to fill a gaping evidentiary void that has existed throughout its investigation and attempted prosecution of its case against Mr. Sterling.

And, because the Government cannot proffer Mr. Risen's testimony, it seeks to attribute the need for such evidence to defenses that have not yet been raised and may not ever be raised. For example, the Government posits that it may need Mr. Risen to rebut what it fears is the defense in the case. *Id.* at pp. 43-44. At the same time, it fails to acknowledge that Mr. Sterling is not obligated to put on any defense at all; the mere fact that he might put on a defense provides no support to the Government's position in this appeal. In this regard, the Court should bear in mind again that the Government is raising this issue in a complete factual vacuum. The Court should be reluctant to decide an issue on interlocutory appeal with no factual record, based purely on the Government's supposition about what a witness with whom it has never spoken might say, and how those statements may rebut a defense that may or may not ever be raised.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN STRIKING PROPOSED GOVERNMENT WITNESSES FOR WHOM THE GOVERNMENT HAD FAILED TO TIMELY PRODUCE SIGNIFICANT *GIGLIO* MATERIAL.

A. Relevant Factual and Procedural Background

Due to the large volume of classified materials produced in discovery and

the covert status of many of the government's proposed trial witnesses, the case presented significant CIPA issues and other legal and practical hurdles to the defense in investigating the case. In May 2011, the Government wrote to defense counsel setting forth the parameters as to how the defense could interview witnesses as part of its investigation of the case. Letter of William M. Welch II to Edward B. MacMahon, Jr. (May 9, 2011), ¶ 4; JA 1016-18. Pursuant to that letter, prior to speaking to any witness, the defense would need to determine from the Classified Information Security Officer (CISO) assigned to the case whether the witness possessed a current clearance sufficient to be interviewed about the classified issues in the case. *Id.* If not, the defense could ask the CISO whether or not the witness could be cleared specifically for the purpose of a defense interview. *Id.* If and when an appropriate clearance was confirmed, the defense could interview a witness, only if the witness agreed to meet with the defense in a Secured Compartmentalized Information Facility (SCIF). *Id.* Even if the interview took place in a SCIF, it was the Government's position that the defense could not ask about the identity or background of a covert agent of the CIA. *Id.*

Due to the lengthy pre-indictment investigation of the case by the Government, as well as the substantial period of time the Government had to prepare for trial (which was then extended by over a month), the Government had an inordinate amount of lead time in identifying its trial witnesses. Two of those

witnesses were and . Oct. 14 Tr.; JCA 592 (court noting that the Government had known for some period of time that was going to be a witness; the Government did not disagree with this observation). Indeed, the Government knew at least from the time it indicted this case that it would call these two witnesses. The Government has characterized as "Classified Program No. 1" who would lay the foundation for half of the Government's trial exhibits and as Mr. Sterling's on Classified Program No. 1. *See* Appellant Brief at p. 53 n. 17. Not only did the Government view each witness as an important fact witness, but it had also designated each of these witnesses as an expert witness for the Government.

Since each witness had served as a covert CIA agent, each had held a security clearance. Accordingly, it was well known to the Government's experienced counsel that each would therefore have an extensive security file at the CIA that would need to be reviewed for potential *Brady/Giglio* material. The Government also knew that the CIA files would be classified, which would add an additional layer of delay occasioned by the need of the appropriate classification authority to review the information before it could be released, even to cleared counsel. Finally, the Government must also have known that, given the nature of the information at issue, once it was produced to the defendant, it would take a

considerable period of time before the defense would be able to make meaningful use of it.

On October 13, 2011, the court held a hearing relating to certain security measures for trial. October 13th was the day *after* the absolute latest deadline faced by the Government for producing *Giglio* material and more than a month after its original latest possible deadline for doing so. Minutes before the hearing was to commence, the Government handed letters to the defense disclosing, for the first time, certain *Giglio* information with respect to six of its trial witnesses, including and . Oct. 13 Letters; JCA 560-63. Specifically, the correspondence stated that a review of the respective security files demonstrated that had ; had , and that . *Id.* One went so far as to . *Id.* Additionally, one . *Id.* With respect to , the Government's review of his security file revealed he had been , and it was concluded that he had potentially , used his , and . *Id.*

The defense had no opportunity prior to the October 13, 2011 hearing meaningfully to review the Government's correspondence. After the hearing had concluded, the defense did so and immediately recognized the importance of the information disclosed. It promptly wrote to the Government asking it to provide the defense with a copy of the respective security files. Letter of Edward B. MacMahon, Jr. to William M. Welch II (Oct. 13, 2011); JSA 333.

Unbeknownst to the defense, on October 13, 2011, the Government had also filed an *ex parte* motion with the court disclosing additional potential impeachment material about both and , which it had not disclosed to the defense. Gov's *Ex Parte* Motion; JCA 557-563.

On October 14, 2011, the court held another hearing. This was the first opportunity the defense had to address the court regarding the disclosures made to the defense on October 13th; it was also the last business day before trial was scheduled to commence on Monday, October 17th. Unbeknownst to the defense, minutes before the October 14th hearing was to commence, the Government had sent an e-mail to the defense disclosing that, while it had reviewed the security files for the witnesses who were the subject of its October 13 disclosure, it had not been permitted by the CIA to retain a copy of those files and therefore could not produce a copy to the defense. Letter of William M. Welch II to Edward B. MacMahon, Jr. (Oct. 14, 2011); JSA 332. After the hearing began, the court

alerted the defense to the existence of the Government's *ex parte* filing and denied the Government's request that the motion be entertained *ex parte*, ordering the Government to serve a copy of its motion on the defense. Oct. 14 Tr.; JCA 571. The information the Government had filed *ex parte* revealed that the security files also demonstrated that [redacted] had a [redacted], had [redacted] and made [redacted]. Gov's *Ex Parte* Motion; JCA 557-563. The Government's review of [redacted]'s security file had also revealed [redacted], having [redacted]. *Id.*

Mr. Sterling objected to the late disclosures, specifically noting that not only did they violate the five-day limitation in the court's discovery order, but also this incomplete information was not produced sufficiently in advance of trial for the defense to make meaningful use of it. Oct. 14 Tr.; JCA 574. The district court asked counsel for the defendant what remedy was appropriate, given that it was now 1:15 p.m. on Friday afternoon for a trial scheduled to begin on Monday morning. *Id.*; JCA 575. The defense responded by noting two possible remedies: a continuance or striking the witnesses at issue. *Id.*

The Government's brief inaccurately suggests that Mr. Sterling did not object to the untimely disclosure, belatedly sought a continuance as the only remedy for the late disclosure, and that the court *sua sponte* proposed striking the

witnesses. Appellant Brief pp. 51-52. In fact, given the timing of the Government's disclosure, the defense did not have the opportunity to review it until after the conclusion of the hearing on October 13th. Even after that hearing, the defense remained unaware of the Government's additional disclosures in its *ex parte* filing or the Government's refusal to produce a copy of the security files. At the hearing the following day, the court, when informing the defense of the Government's *ex parte* filing, noted the impropriety of the Government's effort to proceed in that fashion on the eve of trial. Oct. 14 Tr.; JCA 568-569 ("[T]here's no reason why this motion would not have been provided to defense counsel, because you are asking the Court to restrict defense counsel's ability to raise certain issues. . . . [T]hat's not the proper process, not a motion like this, not on the eve of trial").

The defense, at the first opportunity to be heard about the prior day's disclosures (still not privy to the *ex parte* disclosures) argued that those disclosures did not occur sufficiently in advance of trial, because the defense would need to interview the sources of the negative information about the proposed government witnesses. *Id.*; JCA 571-572. Defense counsel explained that while "I'm glad that we got it" the defense was still severely prejudiced because, "I mean, we've got to investigate more of this." *Id.* It was only after the defense lodged the complaint about timeliness, that the court observed that the defense was being "awfully nice."

Id.; JCA 573 (quoted in Appellant Brief at p. 51). When the court asked the defense about remedies, the defense noted that there were *two* possible remedies, stating one, which the court would not like, was a continuance; before noting that the other was striking the witnesses, the court itself interjected to state that striking witnesses was the other possible remedy. *Id.*; JCA 575. Thus, the Government's suggestion that the defense did not object at the first possible opportunity to the late disclosure or that the defense offered only a continuance as a possible remedy, much less the most appropriate remedy, is simply inaccurate.

The district court, upon reviewing the material produced to Mr. Sterling on October 13th and 14th, concluded, particularly with respect to and ; that the impeachment material was significant. *Id.*; JCA 576-577 (With respect to : "

. I mean that's very bad. It certainly relates to among other things truth and veracity, reliability, and to be getting that kind of information at the last minute is a real problem." With respect to : " is very significant[.] I mean it is not impressive at all, and it undercuts a lot of the credibility of the government's case.").

The October 13th letters also disclosed significant impeachment material related to other proposed government witnesses. For example, the letter disclosed

that had taken

Oct. 13 Letters; JCA 561. Similarly, 's security file revealed that

Id.; JCA 563. As the trial court well knew, in the context of this case, these disclosures were particularly important. The Government had moved *in limine* to admit evidence at trial that it had found classified personnel records in Mr. Sterling's home. The records were from 1993, when Mr. Sterling first joined the CIA. Gov's Motion *in Limine* (DE 181); JA 867-889. None of these records related to Classified Program No. 1 or any other operation of the CIA, nor did the Government claim that any contained national defense information. *Id.* The Government argued, however, and the court accepted, that evidence that Mr. Sterling failed to secure a classified document was evidence under Rule 404(b) that he intentionally retained or disclosed the unrelated national defense information at issue in the indictment. Order (DE 225); JA 931.

What the Court did not know when ruling on this motion, and what the

The of the Government's witnesses would certainly have been relevant in assessing the reasonableness of the inference that the Government had already asked the court to draw and would ask the jury to draw: namely, if Mr. Sterling at one point mishandled classified non-operational material that was not national defense information, it is more likely that

he would have intentionally retained and disclosed national defense information. *See* Oct. 14 Tr.; JCA 588-89 (The court understood that the belatedly produced *Giglio* was not just impeachment material going to the witnesses' truth and veracity; the court specifically expressed its agreement with the defense argument: "The government is going to ask the jury to draw an inference of disclosure of national defense information against Mr. Sterling based on his procedures for handling information that does not relate to any classified program that is not national defense information, and yet they want to call somebody as one of their most crucial witnesses who's , and we have no opportunity to investigate any of that.").

The court stated that it was inclined to strike and , "because those are the two with the most significant amount of *Giglio* material, and you just don't have enough time to, to research it." *Id.*; JCA 577. After hearing further argument, the court ordered these witnesses stricken. *Id.*; JCA 589-90.

The court noted that while preparing for trial in a case involving classified information presents complexities for the Government, it "brought this case in this court, you know the rules, and this case has been continued before. There is no reason this stuff was left until the last minute by the agency or whoever else gave you clearance." *Id.*; JCA 578-579. The court reiterated that the five-day deadline

in its discovery order was "the last point, but a smart prosecutor gets that stuff out earlier . . . to avoid this type of problem." *Id.*; JCA 578-579; *see also id.*; JCA 592 ("And the timing problem is not the defendant's fault. You-all have been on notice. This case was originally set for September, as I recall. I mean, it's been continued. So there's been plenty of time to get this stuff in order.").[2]

The defense argued the belated disclosures were "exactly the kind of material that separate and apart from the Court's discovery order, as a constitutional matter, we have every right to get in enough time to make meaningful use of it in advance of trial, and I don't understand how under any conception getting the information on Friday afternoon before a Monday trial can qualify." *Id.*; JCA 589. The Court agreed with this argument and ruled that the *Giglio* materials "should have been given to the defense way before this time." *Id.*; JCA 590. Accordingly, the court struck and as witnesses. *Id.*; JCA 589-590. In its exercise of its discretion, the court also weighed the Government's *Giglio* violations pertaining to the other four witnesses for whom it made belated disclosures, but concluded that the *Giglio* with respect to those

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[2] The court briefly explored whether a continuance would both allow for effective investigation by the defense and could be accommodated on the court and counsel's trial calendar, but rejected the notion that a continuance could resolve the problem the Government had created by its late disclosure. *Id.*; JCA 594-595.

witnesses was not significant enough to warrant any further sanction.

B. The Government's Belated *Giglio* Disclosures Violated Both the Trial Court's Discovery Order and the Government's Constitutional Obligations.

The district court, more than eight months before the original trial date set in this case, ordered the Government to produce *Giglio* material "*no later than* five calendar days before trial[.]" DE 15; JA 59 (emphasis added). This order did not, and could not, relieve the Government of its constitutional obligations to produce exculpatory material sufficiently in advance of trial to allow the defense to make meaningful use of it. Accordingly, the court's order could only be read to state that *Giglio* material must be produced in sufficient time to be of meaningful use to the defendant, and, in any event, no later than five days before trial. Despite the fact that the court granted a more than one-month continuance of the original trial date, the Government nonetheless failed to comply with *either* its constitutional obligation or the court's deadline of production five days before trial. Ignoring the former obligation altogether, and arguing that it did not violate the latter deadline by much, the Government asks this Court in an interlocutory appeal to usurp the broad discretion of the trial court to enforce its own orders, manage its trial calendar and hold the Government to its constitutional and other obligations.

The Supreme Court has again recently forcefully reiterated the fundamental principle of constitutional law that the Government must disclose to the defense

information that is favorable to the defense, including material that impeaches a government witness. *Smith v. Cain*, 565 U. S. ____, 132 S. Ct. 627 (2012). Or, as this Court just stated, "[e]vidence tending to impeach a witness for the State must be disclosed to the defendant if known to the prosecution." *Smith v. Branker*, No. 10-7417, 2012 U.S. App. LEXIS 799, at *4 (4th Cir. Jan 13, 2012); citing *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (The government is constitutionally obligated to produce to the defense information that would tend to impeach a government witness). There is no difference between the prosecution's constitutional obligation to disclose impeachment evidence and its obligation to disclose exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 ("The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence . . . This Court has rejected any such distinction between impeachment evidence and exculpatory evidence"); *see also United States v. Noel*, No. 3:08cr186-03, 2009 U.S. Dist. LEXIS 72448, at *1 n.2 (E.D. Va. Aug. 14, 2009) (since *Giglio* material is "simply a subset of *Brady* material, the disclosure of *Giglio* material is subject to precisely the same analytical structure as exculpatory evidence.").[3]

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[3] The Department of Justice also recognizes that its obligation to produce *Giglio* material is a constitutional obligation:

(footnote continued on next page)

In order for the Government to meet its constitutional obligation, the exculpatory or impeachment material must be disclosed sufficiently in advance of trial for the defendant to be able to make meaningful use of the information. *See Spicer v. Roxbury Correctional Inst.*, 194 F.3d 547, 556 (4th Cir. 1999) ("Evidence that can be used to impeach a witness is unquestionably subject to disclosure under *Brady*. . . . In fact, the Court has recognized that 'if disclosed and used effectively, [impeachment evidence] may make the difference between conviction and acquittal.'") (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)) (alteration original); *United States v. Elmore*, 423 F.2d 775, 779 (4th Cir. 1970) ("'[D]isclosure to be effective must be made at a time when the disclosure would be of value to the accused.' . . . Manifestly, a more lenient disclosure burden on the government would drain *Brady* of all vitality.") (internal citation omitted); *United*

(footnote continued from previous page)

> Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

United States Attorneys Manual, 9-5.001 B ("Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence").

States v. Coppa, 267 F.3d 132, 146 (2d Cir. 2001) ("[T]he Government 'suppresses' evidence within the meaning of *Brady* only if it fails to disclose *Brady* and *Giglio* material in time for its effective use at trial or at a plea proceeding"); *Noel*, 2009 U.S. Dist. LEXIS 72448 at *2-3 ("*Brady* material must be disclosed in sufficient time to be of meaningful use to the defendant."). Accordingly, when the Government in this case belatedly disclosed *Giglio* material, it not only directly violated the district court's discovery order, but, more importantly, it also violated the constitutional requirement that it produce *Giglio* material in time to be of meaningful use to Mr. Sterling.

As described above, Mr. Sterling did not receive the Government's complete summary of the *Giglio* material from the security files until October 14, 2011. Even at that late date, the Government did not produce the underlying material, but merely a description of it. Gov's *Ex Parte* Motion and Oct. 13 Letters; JCA 557-563. The Government's summary description of the underlying material disclosed the existence of multiple witnesses who it was reasonable to believe would have the ability to provide exculpatory testimony, but whom the defense could not interview without first locating them, learning their current security clearance, obtaining their consent to be interviewed in a SCIF, and, even then, litigating restrictions the Government had unilaterally imposed on the interviewing of witnesses with classified information. If and when those hurdles were cleared, the

defense would then have needed to make a CIPA § 5 notice and litigate the disclosure of classified information necessary to make use of the exculpatory testimony at trial.

Against this backdrop, the Government's chorus that its disclosure of *Giglio* material, at best, two business days before the start of trial was "only" 12 hours late rings hollow. As does the Government's observation that it volunteered on the Friday afternoon before a Monday trial to attempt to obtain the most recent known addresses for the sources of information located in the government witnesses' security files. Oct. 14 Tr.; JCA 591 ("if we can run down their last known addresses, meaning if we can run down where they're living today, we would give them to counsel"). The Government did not have current addresses of any of those witnesses and could not even tell the court that it would be able to provide "accurate addresses[.]" *Id.* After the Court ordered its *ex parte* filing disclosed to the defense, the Government designated that filing and its *Giglio* disclosure letters as classified. Gov's Motion; JCA 605-606. Thus, even if the Government had had current contact information for these witnesses and had provided it to the defense on the 13th or the 14th, that would only be the start, not the end, of the lengthy process that would have needed to ensue in order for the defense to make meaningful use of the information. Defense counsel could not have interviewed the witnesses without first meeting all of the hurdles discussed above.

By focusing solely on the fact that the Government missed the district court's five-day deadline, the Government attempts to deflect from the fact that it plainly did not give Mr. Sterling the *Giglio* material enough in advance of trial that he could make effective use of it. The court had broad discretion to fashion an appropriate sanction for the Government's clear violation. And, as the court with comprehensive knowledge of the facts and the history of the case, and in due consideration of all the arguments, the trial judge ruled that suppressing the testimony of the two witnesses to whom the most significant belatedly disclosed *Giglio* material related was most appropriate. There was nothing arbitrary or capricious about this ruling; to the contrary, it was amply supported by the record. This Court should defer to the district court's discretion, uphold its ruling and deny the Government's appeal.

C. District Courts Have Wide Discretion in Imposing Discovery Sanctions.

"Rule 16 grants the district court substantial discretion in dealing with a violation of a discovery order." *United States v. Hammoud*, 381 F.3d 316, 336 (4th Cir. 2004)); *see also United States v. Day*, 524 F.3d 1361, 1372 (D.C. Cir. 2008) ("Trial courts have the discretion to weigh various options in deciding how to address a party's violation of a discovery rule. 'If a sanction is thought necessary [under Rule 16], it is for the court to decide whether to order a continuance, or to

prohibit the party from introducing in evidence the material not disclosed, or to make whatever other order it deems just under the circumstances.'" (quoting CHARLES ALAN WRIGHT, 2 FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 260, at 196-201 (3d ed. 2000) (footnotes omitted)).

As this Court has explained, such deference is necessary because, "[t]rial judges are much closer to the pulse of the trial than [the appellate court] can ever be, and broad discretion is necessarily accorded them[.]" *United States v. Fernandez*, 913 F.2d 148, 155 (4th Cir. 1990) (internal citations and quotation omitted). Accordingly, the Court has upheld a much harsher trial court remedy than that imposed by the district court below. In *Fernandez*, this Court affirmed dismissal of an indictment with prejudice, because the "trial court was immersed in the complicated facts of [the] case for several months, and its familiarity with the particulars of [the] prosecution far exceeds our own." *Id.*

In its opening brief, the Government cites three factors that a district court should weigh in determining which sanctions to impose: (1) the reason for the Government's delay; (2) the degree of prejudice to Mr. Sterling; and (3) whether any less severe sanction would remedy the sanction -- and claims that the district court did not properly consider them. Appellant Brief p. 54 (citing *Hammoud*, 381 F.3d at 336). However, while the district court may certainly consider these factors, they "merely guide the district court and do not dictate the bounds of the

district court's discretion." *United States v. Davis*, 244 F.3d 666, 670 (8th Cir. 2001) (citing *United States v. Russell*, 109 F.3d 1503 (10th Cir. 1997)).

In *Davis*, the Eighth Circuit upheld the trial court's exclusion of DNA evidence as a sanction against the government for having produced the report only three days before trial was scheduled to begin. *Id.* 667-68. The district court acknowledged that the evidence was highly probative of defendants' guilt, but noted its "firm duty to make sure the system worked fairly and that defendants had the right to fully confront and evaluate the evidence that will be used against them in a timely manner." *Id.* at 669. Accordingly, it denied the government's motion for a continuance, holding that while a continuance could address the untimely disclosure, it would not address "the district court's significant scheduling problems." *Id.* at 670.

The Eighth Circuit affirmed, reasoning that the government "was in charge of the prosecution of the case, and the orderly procurement of evidence" and, with more diligence, it could have complied with the discovery deadline. *Id.* at 671. Furthermore, while the district court did not make an express finding of prejudice, the defendant was clearly prejudiced by the production occurring "literally on the eve of trial, making it virtually impossible, absent a continuance, for defendants to evaluate and confront the evidence against them." *Id.* Finally, while alternative sanctions may have been adequate or appropriate, they would have been less

effective than the preclusion sanction. *Id.* at 673. Ultimately, the district court was justified in its decision "in order to maintain the integrity of the judicial process and respect the pressing scheduling problems of the district court." *Id.*

Likewise, in *United States v. Wicker*, 848 F.2d 1059 (10th Cir. 1988), the government missed a deadline for producing an expert report, disclosing it six days before trial was scheduled to begin. The Tenth Circuit stated that, while the three factors may guide the district court, in some instances, it "may need to suppress evidence that did not comply with discovery orders to maintain the integrity and schedule of the court even though the defendant may not be prejudiced." *Id.* at 1061.

Nor, as the Government argues (Appellant Brief p. 55), does a lack of bad faith on the part of the government preclude the trial court from imposing exclusion of evidence as a sanction for the violation of a discovery order. As the court in *Wicker* noted, even though "the district court *did not consider whether the government acted in bad faith*" it was "clearly justified in concluding that the government's reason was not sufficient to justify the delay." 848 F.2d. at 1061 (emphasis added). *See also United States v. Adams*, 271 F.3d 1236, 1244 (10th Cir. 2001) (holding that the "district court justifiably excluded the evidence on the basis of its unexplained untimeliness alone."); *United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979) (finding no "abuse of discretion where, as here, a

district judge for prophylactic purposes suppresses evidence that, under a valid discovery order, the government should have disclosed earlier, even if the nondisclosure did not prejudice the defendants."); *United States v. Robinson*, 44 F. Supp. 2d 1345, 1348 (N.D. Ga. 1997) (suppressing key prosecution evidence when failing to do so "would be to establish a precedent countenancing a disregard of discovery obligations which will assure either a snail like progression of the 800 felony cases filed in this court annually or a succession of trials in the United States Department of Justice is allowed to flaunt the law it exists to support and defend.").

D. A Consideration of the Three Factors Support the District Court's Order.

Even though the district court's discretion was not bound by the above-referenced three factors, a consideration of each demonstrates that the district court properly exercised its discretion in striking two government witnesses.

1. The Government's Untimely Disclosure Was Not Justified.

While the Government takes pains to emphasize repeatedly its view that its production occurred "12 hours after the expiry of the discovery deadline" (*see, e.g.*, Appellant Brief at p. 49), the Government offers no justification for its failure to meet the court's deadline. Indeed, the information the Government disclosed on the eve of trial, admittedly in violation of the court's discovery order, had been

available to the Government from the beginning of its investigation.

The Government began this investigation in 2003. According to a "302" produced to the defense in discovery, was first interviewed by the FBI in its investigation of the "leak" to Mr. Risen related to Classified Program No. 1 on April 11, 2003, days after the Government learned that Mr. Risen had information about the program. worked on Classified Program No. 1 and was Mr. Sterling's on the program. The Government called as a witness before the grand jury. Mr. Sterling was indicted in 2010, and trial was originally scheduled to begin on September 12, 2011. By September 2011, not only had the Government produced to the defense discovery that made it apparent that both and were likely Government trial witnesses, but the Government had also designated each as being expert witnesses as well as fact witnesses. *See* Letter of James L. Trump to Edward B. MacMahon, Jr. (Sep. 15, 2011) (designating and as fact witnesses who may also provide expert testimony and summarizing their qualifications). Under these circumstances alone, there is no legitimate reason for the Government's failure to meet the court's deadline for the production of all *Giglio* material, at the latest, by October 12, 2011.

Furthermore, the Government should have been carefully marshaling its documents and monitoring its disclosures due to the delays inherent in a CIPA

proceeding. As the Government acknowledged, it was required to review "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." Appellant Brief pp. 47-48. Being aware of these added complications in producing classified documents, the Government should have been undertaking this important process well in advance of the district court's latest possible applicable deadline.

The Government's delay is particularly inexcusable when the *Giglio* information was found in the security files of two important Government witnesses. The Government knew from the beginning that these two witnesses were central to its case. As the Government writes, was a Classified Program No. 1 and would lay the necessary foundation for nearly half of the government's trial exhibits" and would also provide "expert testimony on the potential harm" caused by Mr. Sterling's alleged disclosure. *Id.* at p. 53 n.17. was Mr. Sterling's while he worked on the Classified Program and would also provide "expert testimony on Sterling's training, experience, and ability to understand the potential harm caused by leaking the information." *Id.* There is simply no excuse for the Government's delay in researching the security backgrounds of their witnesses for *Brady* and *Giglio* disclosures. As the trial court observed, "[Y]ou should have protected your

key witnesses better than that." Oct. 14 Tr.; JCA 593.

The Government began producing discovery in January 2011. Appellant Brief p. 48. It could and should have been reviewing the security files for its known witnesses months before trial commenced, and it has offered no reason, much less a justifiable one, for its failure to do so. *See Davis, supra*, 244 F.3d at 669 (finding no reason for delay when defendants were arrested on January 7, DNA evidence was delivered to the crime lab on February 4, discovery was due February 28, and the Government did not request expedited testing until March 24 or produce the evidence to defendants until March 31); *see also* Oct. 14 Tr.; JCA 578-579 (As the court stated to the Government attorney, "[Y]ou brought this case in this court, you know the rules, and this case has been continued before. There is no reason this stuff was left until the last minute by the agency or whoever else gave you clearance.").[4]

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[4] It is of no moment whether this was a failing of the prosecutors or the agency with which it was working. *See Kyles v. Whitley*, 514 U.S. 419, 437 (U.S. 1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); *see also In Re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 896 (D.C. Cir. 1999) (finding *Brady* violation when prosecutor failed to conduct complete search of federal and local law enforcement agencies for *Brady* material); *United States v. Thornton*, 1 F.3d 149, 158 (3d Cir. 1993) ("The prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that had a potential connection with the witnesses.").

2. Mr. Sterling Was Prejudiced by the Government's Delay.

Mr. Sterling was undeniably prejudiced by the Government's unjustified delay. Because CIPA applies to this proceeding, once Mr. Sterling obtained the *Giglio* material, defense counsel could not simply review the documents, contact the sources and conduct the necessary interviews, all while preparing for opening statements and jury selection. To the contrary, Mr. Sterling was required to take multiple complex steps in order to assess and develop the information. Such steps required a significant amount of time and certainly were not possible to finish adequately within the short period of time between the Government's belated disclosure and the scheduled start of trial. *See* Oct. 14 Tr.; JCA 577 (court noting that and "are the two with the most significant amount of *Giglio* material, and you just don't have enough time to, to research it."); *id.*; JCA 592 (court noting that fully addressing the *Giglio* material was not possible: "These attorneys couldn't possibly do that plus be in trial all day getting ready for trial. That's unrealistic."); *cf. Davis*, 244 F.3d at 671 (in a case where CIPA did not apply, finding prejudice when the government's production of *Giglio* material produced three to four days before trial, "literally on the eve of trial," made it "virtually impossible, absent a continuance, for defendants to evaluate and confront the evidence against them.").

The Government argues that the defense suffered no prejudice as a result of its disclosure past any possible applicable discovery deadline and literally on the eve of trial. *See, e.g.*, Appellant Brief at pp. 56-58. The Government cites no case in support of this argument that is factually and procedurally similar to this case. Rather, the Government relies on cases that either do not involve CIPA or involved post-conviction challenges by a defendant who argued a discovery violation had occurred at trial. This case presents an interlocutory appeal of a pre-trial decision to which a trial court is afforded great deference.

The Government cites only a single case in which CIPA applied, *United States v. O'Hara*, 301 F.3d 563, 567 (7th Cir. 2002).[5] In that case, as in the majority of the non-CIPA cases on which the Government relies, the court was addressing a convicted defendant's motion for post-conviction relief based on a claim that the defendant's rights under *Brady* had been violated.[6]

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[5] CIPA is also briefly mentioned in *Hammoud*, 381 F.3d at 338, also cited by the Government, because the defendant was prohibited from questioning an expert witness about his employment with the FBI. However, this Court found that CIPA was not implicated. 381 F.3d at 338.

[6] An entirely different analytical framework applies to an appellate court's review of a post-conviction challenge than what the trial court applies in exercising its discretion with respect to pre-trial discovery rulings. *See United States v. Safavian*, 233 F.R.D., 12, 16 (D.D.C. 2005) ("Because the definition of 'materiality' discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the

(footnote continued on next page)

In post-conviction cases that address whether, as a result of *Brady*, *Giglio*, or some other discovery violation, a reversal of a conviction was warranted for a failure of the trial court to suppress evidence, the issue is whether the court so abused its discretion in *not* suppressing evidence that reversal is warranted. Here, on the other hand, the court is assessing whether the court so abused its discretion by striking two witnesses for which significant *Giglio* material was not produced in a timely manner, either under the court's discovery order or as a matter of the Government's constitutional obligations. Under either scenario, the trial court is entitled to great deference.

In addition to the deference owed to the trial court and the significant difference between what constitutes a timely disclosure to make meaningful use of information in the context of a CIPA case and what constitutes timeliness in a standard prosecution, the Government's cases are distinguishable in several other respects. For instance, in *United States v. Golyansky*, 291 F.3d 1245, 1248 (10th

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(footnote continued from previous page)
appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during trial) is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial") (internal citations omitted). It is the task of the district court to provide the defendant a fair trial, not to introduce the greatest possible error that would survive a post-conviction challenge. The trial court is afforded broad discretion in this regard.

Cir. 2002), the Tenth Circuit reversed the trial court's decision to suppress the testimony of an unclassified government witness when the government violated its *Giglio* obligations by failing to disclose unclassified evidence of the witness's mental health issues. However, the defendants received the *Giglio* material *nineteen days* before trial (*id.*), a significantly larger amount of time than the three to four days accorded Mr. Sterling. In *United States v. White*, 846 F.2d 678 (11th Cir. 1988), another case cited by the Government, the information belatedly disclosed was "a public document which was equally available to the Government and the defendant[,]" and other evidence that both the defendant and his attorney "should have known about[.]" *Id.* at 692. Plainly, the prejudice ensuing from a belated disclosure of information of which the defense should already have been aware cannot compare to the prejudice here, where the belated disclosure was of information in the security files of witnesses who worked for the CIA, information entirely unavailable to Mr. Sterling absent disclosure by the Government.

And, that prejudice is manifest. The Government argues that "the information at issue is not exculpatory and its impeachment value is slight." Appellant Brief p. 64. However, the material goes directly to the witnesses' veracity, which places it squarely within permissible impeachment evidence. *See* Fed. R. Evid. 608 ("A witness's credibility may be attacked . . . by testimony about the witness's reputation for having a character for truthfulness or untruthfulness.").

The *Giglio* material indicated, *inter alia*, that attempted to engage in a , potentially , and potentially . Oct. 13 Letters; JCA 560-561. The material further indicated that had , and had not properly. *Id.*; JCA 562-563. Indeed, far less egregious instances of prior employment misconduct have been ruled to be the proper subject of impeachment. *See, e.g., United States v. Cole*, 617 F.2d 151, 153 (5th Cir. 1980) (finding no error in the district court permitting the prosecutor to cross-examine defendant concerning his submission to a former employer of a false excuse for being absent from work).

The *Giglio* material at issue here is also substantive evidence going to the weight of the Government's case against Mr. Sterling. The Government has stated that it will put forth evidence under Fed. R. Evid. 404(b) that Mr. Sterling has mishandled classified documents in the past. Plainly, the significance of any evidence that Mr. Sterling did so diminishes rapidly with the concurrent evidence that the Government's own witnesses, including his

Thus, for this reason as well, the *Giglio* material was relevant to Mr. Sterling's defense, necessitating sufficient time for its meaningful use.

3. A Less Severe Sanction Would Not Have Cured the Prejudice.

Finally, the district court weighed the available sanctions and determined that striking two government witnesses would cure the prejudice to Mr. Sterling, maintain the integrity of the judicial process and respect the scheduling concerns of the court. *See* Oct. 14 Tr.; JCA 592-595. The trial had already been rescheduled from September 12th. Having the most familiarity with both the particularities of this case and its own criminal docket, the district court was well within its discretion to strike the Government's witnesses rather than continue the case.[7]

The cases the Government cites reversing a district court's suppression of evidence are again inapposite and do not support the Government's criticism that the sanction chosen by the district court was too severe. *United States v. Sarcinelli*, 667 F.2d 5, 5 (5th Cir. 1982), is distinguishable because, the court suppressed *all of the government's evidence*: "all physical evidence, all statements made by the defendants[,] and all electronic recordings or tape recordings previously ordered produced and not produced[.]" Here, the court struck only the

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[7] While this Court has observed that, "[t]he sanction of exclusion of testimony . . . 'is almost never imposed' absent a constitutional violation or statutory authority for the exclusion." (*see, e.g., United States v. Mullins*, 263 Fed. Appx. 342, 344 (4th Cir. 2008)), the district court found that a constitutional violation occurred in this case, in addition to a violation of the court's discovery order, when the Government failed to provide Mr. Sterling exculpatory material sufficiently in advance of trial for its effective use.

In sum, the district court properly exercised its discretion in striking two of the Government's witnesses. The court was not bound by the three factors that this Court and other Circuits have cited as guidance to a district court in making its determination. Nonetheless, a thorough application of those factors only further supports the district court's decision in this case. The district court properly exercised its broad discretion in the face of the Government's constitutional violation and its violation of the specific terms of the court's scheduling order. The district court's ruling should be affirmed.

III. THE DISTRICT COURT'S DECISION TO ORDER THE GOVERNMENT TO DISCLOSE TO MR. STERLING AND THE JURY THE NAMES OF GOVERNMENT WITNESSES IS NOT APPEALABLE AND, EVEN IF APPEALABLE, IS NOT AN ABUSE OF DISCRETION.

A. This Court Does Not Have Jurisdiction Over the Government's Interlocutory Appeal.

Appellate jurisdiction is generally governed by 28 U.S.C. § 1291, which provides that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." This order is plainly not a final order that is appealable under this statute, and thus § 1291 does not apply. Instead, the Government turns to 18 U.S.C. § 3731 and CIPA § 7 for its jurisdiction, both of which apply only under limited circumstances which are not present here. Both prudential and constitutional concerns mandate that "the

two government witnesses to whom the belated *Giglio* disclosures were most significant. While the Government might make the judgment that without these two witnesses it lacks sufficient evidence to proceed with its prosecution, that observation merely reinforces why the Government should have undertaken more care to produce the *Giglio* related to them in a timely manner, as the district judge noted. It does not mean, however, that the district court's sanction was ill-considered. The district court did not impose a sanction that wholesale precluded the Government from introducing evidence. The court excluded two witnesses while allowing the Government to call four other witnesses for whom its disclosures violated the court's order. Using a scalpel and not a cleaver, the district court properly excluded no more than, but no less than, that testimony to which the most egregious violations related. This testimony, had the court allowed it, would have caused prejudice to Mr. Sterling by depriving him of a meaningful exercise of his full rights to confrontation, due process and effective assistance of counsel.[8]

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[8] The Government also mischaracterizes *United States v. Shafer*, 987 F.2d 1054 (4th Cir. 1993) as "instructive." Appellant Brief p. 63. *Shafer* involved a completely different issue: whether the district court abused its discretion in declaring a mistrial over the defendant's objection. 987 F.2d at 1055. An entirely different standard applied ("a mistrial may be granted over the defendant's objection only when required by 'manifest necessity'" *id.* at 1057), and its holding is of little precedential value with respect to the facts presented here.

prosecution lacks appellate authority absent express legislative authorization to the contrary." *Arizona v. Manypenny*, 451 U.S. 232, 246 (1981). Otherwise, the Government could obtain unfettered rights to appeal any pretrial decision of a district court with which it disagrees. Because neither 18 U.S.C. § 3731 nor CIPA § 7 provides any basis for this interlocutory appeal, the Court should decline to consider the argument raised by Appellant in Section III of its brief.

The Government never explains how any provision of 18 U.S.C. § 3731 confers jurisdiction upon this Court, because it cannot. In ruling that the Government could not use all of its proposed security measures, the district court did not suppress any evidence; did not dismiss the indictment or any counts of the indictment; did not affect any terms of Mr. Sterling's pre-trial release; and did not order any seized property returned to anybody. As such, no provision of 18 U.S.C. § 3731 provides jurisdiction for Section III.

The Government, therefore, relies solely on CIPA as its jurisdictional basis. This effort must fail as well. As this Court explained in *United States v. Fernandez*, 913 F.2d 148, 151 (4th Cir. 1990), CIPA § 7 allows appeals from adverse § 6(a) and (c)(1) rulings. *See also United States v. Rosen*, 557 F.3d 192, 195 (4th Cir. 2009). Thus, the Government may appeal an adverse decision by the district court when determining the "use, relevance, or admissibility of classified information" by the defendant and, upon making such ruling, the government's

subsequent request to use substitutions in place of the classified information that court has held the defendant may use. No such ruling is the subject of this appeal.

CIPA simply does not provide the Government with any rights to obtain pretrial rulings -- much less interlocutory appeals -- of orders relating to information that it deems necessary to prove its case or orders that govern the manner in which the government's witnesses must testify. *See Rosen*, 557 F. 3d at 199 ("Although we possess jurisdiction to review the district court's evidentiary rulings under CIPA, as articulated in the CIPA § 6 Order, the Government's attempt to piggyback a pretrial review of the court's interpretation of § 793 is improper at this juncture."). CIPA was not intended to provide the government with these rights because, frankly, the government cannot "graymail" itself.

Rather, CIPA establishes procedures for determining before trial the admissibility of classified information that *the defense* reasonably expects to disclose. *See United States v. Yunis*, 867 F.2d 617, 622 (D.C. Cir. 1989) ("CIPA, on the other hand, as noted above, provides procedures governing the defendant's access to classified information sought to be discovered from the government."); *see also Fernandez, supra*, 913 F.2d at 151 (describing procedures); *United States v. North*, 910 F.2d 843, 898-99 (D.C. Cir. 1990) (same), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990). And, the statute is intended to permit this determination without placing the defendant in a worse position than he would be

in if the case did not involve classified information. *See, e.g., United States v. Poindexter*, 698 F. Supp. 316, 320 (D.D.C. 1988).

The determination of admissibility under CIPA involves four principal steps, each involving potential disclosures by the defendant, not the government. First, the defense must file a notice briefly describing the classified information that it "reasonably expects to disclose or to cause the disclosure of" at trial. CIPA § 5(a). Classified information that the defense reasonably expects to disclose but does not list on the CIPA § 5 Notice may be precluded from use at trial. *Id.* at § 5(b). No similar obligation is imposed on the government, which must decide on its own what it needs to disclose in a particular case.

Second, at the prosecution's request, the district court must hold a pretrial hearing at which the court determines the "use, relevance, or admissibility" of classified information listed in the defendant's CIPA § 5 Notice. *Id.* at § 6(a). At the request of the Attorney General, the hearing must be held in secret. Following the hearing, the district court must "set forth in writing" the basis for its ruling as to each item of classified information at issue in the hearing. *Id.* Again, the district court is not required to hold any such hearing when the government wants to disclose classified information in its case.

Third, as to any classified information for which the district court authorizes disclosure requested by the defense, the government may move to replace the

information with a statement admitting relevant facts that the information would tend to prove, or to substitute a summary of the information. The district court shall grant the government's motion if it finds that the statement or summary would "provide the defendant with substantially the same ability to make his defense as would disclosure" of the classified information. *Id.* at § 6(c)(1). Here, the court did not authorize Mr. Sterling to disclose the classified information at issue, and therefore there is no basis for the Government to offer an admission or a substitute *in lieu* of the defense evidence.

Fourth, if the district court denies the government's motion for a statement or substitution, the court shall, upon objection by the Attorney General, prohibit the defendant from disclosing the classified information and impose sanctions on the prosecution, including (where appropriate) dismissal of the indictment or specified counts. *Id.* at § 6(e). As to any classified information that the district court determines may be disclosed at trial, the court "shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information." *Id.* § at 6(f). Here, the court has not rejected a government-proposed substitution for classified information the defense seeks to introduce at trial.

None of these events are at issue in this case. Mr. Sterling has never provided any CIPA notice that he intends to disclose the names of any CIA covert

agents or contractors to anyone under CIPA § 5. Rather, the Government intends to call certain witnesses, and the district court determined, as a matter of common law and its own inherent authority, the procedure under which these government witnesses will testify. CIPA, as a statute designed to prevent "graymail" by defendants, confers no rights -- much less interlocutory appellate rights -- upon the Government when it elects to call a witness who, by virtue of being called by the Government as a witness, results in the court disclosing classified information to the defendant and the jury. In that regard, the Government can simply elect to comply (and call the witness in the manner prescribed by the court, pursuant to which the witness's identity would remain hidden from the public, but not the defendant or jury) or not (by deciding not to call the witness). It cannot use CIPA to obtain an interlocutory appeal.[9]

Thus, by its own terms, CIPA is not implicated in any way by the district court's common sense decision to require the Government to provide the true names of witnesses to the jury and the defense in this case. At best, CIPA applies to this issue only by analogy, as the Government seems to concede. Appellant Brief p. 69, n.24. The district court, in reliance upon its experience as the

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[9] The legal basis for this result is amplified by the unrestricted power the government retains to classify and to de-classify information.

Moussaoui trial judge, was uniquely aware of this Court's prior holding that CIPA's procedures can be applied by analogy. As this Court noted, the Act "provides useful guidance in determining the nature of remedies that may be available." *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004). The fact that CIPA may be applied by analogy, however, is not dispositive of the jurisdictional issue here. Indeed, the legal issue presented is whether, when CIPA is implicated solely by analogy, the Government then gets the benefit of interlocutory appellate rights that can only be granted to it by statute. The answer to that question is plainly no.

The jurisdictional holding in *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003), which dismissed an improvident interlocutory appeal, is directly on point. There, this Court explained that because CIPA was enacted to "combat the problem of 'graymail,' an attempt by a defendant to derail a criminal trial by threatening to disclose classified information" the statute required a criminal defendant who planned to disclose classified information at his trial to notify the district court prior to trial. *Id.* at 514. The government may then request a hearing, and once the district court has made a ruling, the government is entitled to take an interlocutory appeal. *Id.* This Court disagreed with the government that the order of a district court "directing the deposition of the enemy combatant witness is a decision or order . . . authorizing the disclosure of classified information from

which it may take an immediate appeal." *Id.* (internal citations and quotation omitted). This Court emphasized that CIPA § 6 "is concerned with the disclosure of classified information *by the defendant to the public* at a trial or pretrial proceeding." *Id.* (emphasis added). Thus, the district court was correct that "CIPA applies here only by analogy." *Id.* at 514-15. And, because "CIPA is not directly applicable, §7 does not authorize an interlocutory appeal." *Id.* at 515. Here, there is no ruling concerned with the disclosure of classified information by Mr. Sterling to the public. Rather, the court ruled that, if the Government called certain witnesses whose identities would not be publicly disclosed, the court would disclose the true identities of those witnesses to Mr. Sterling and to the jury, but not to the public. CIPA, therefore, applies "only be analogy" and "§7 does not authorize an interlocutory appeal." *Id.* at 514-15. This appeal should be dismissed for lack of jurisdiction.

B. The District Court's Order Requiring Disclosure to Mr. Sterling and the Jury Was Proper and Not an Abuse of Discretion.

Were the Court to nonetheless exercise its jurisdiction, it should uphold the district court's order. Throughout the pretrial proceedings in this case, Mr. Sterling consistently objected to the various and plentiful security measures that the Government insisted, often in *ex parte* filings, were necessary for the protection of covert CIA agents it wanted to call as witnesses to obtain a conviction. In addition

to the public trial and confrontation clause issues raised by these extraordinary requests, Mr. Sterling was always mindful that a key issue for the jury was whether the information published in *State of War* was, as a matter of fact or law, "national defense information" as defined under 18 U.S.C. § 793 ("Section 793"). Mr. Sterling consistently argued to the district court that the Government's security measures all carried the risk that the jury would be prejudiced by the enactment of such measures and would therefore conclude that the information at issue must be national defense information. *See* Def's Opp; JCA 469. Simply stated, Mr. Sterling's argument was that he was not going to get a fair trial if those government witnesses were testifying anonymously, behind screens, and with false names. The district court allowed, over objection, virtually every request that the Government made -- banning courtroom sketch artists, placing witnesses behind a screen, allowing witnesses to use a non-public entrance to the courtroom, not revealing the name of the witness to the public -- but drew the line at the Government's request to withhold from the defense and the jury the names of five potential witnesses. Oct. 14 Tr.; JCA 598. This ruling -- supported, if not required, by the confrontation clause -- prevented further prejudice to Mr. Sterling in the jury's consideration of one of the elements of Section 793. It was an entirely appropriate exercise of the trial court's discretion, and it should be affirmed.

1. The Confrontation Clause, and Not CIPA, Applies.

The Government repeats the canard that it somehow was granted rights under CIPA to withhold or substitute information from the jury in its case in chief. Appellant Brief pp. 67-69. As described above, the Government has no rights under CIPA and cannot invoke its provisions when it will not or cannot accept the consequence of disclosing classified information occasioned by calling its own witnesses. Argument by analogy is similarly unpersuasive, particularly when there is ample constitutional case law directly on point.[10]

Rather than CIPA, the correct starting point is the Confrontation Clause in the Sixth Amendment to the United States Constitution. As this Court recently held, the "Confrontation Clause guarantees a defendant the right to question an adverse witness about identifying information, including his full name and address." *United States v. Ramos-Cruz*, No. 08-4647, 2012 U.S. App. LEXIS 946, * 31-32 (4th Cir. Jan. 18, 2012); *see also Smith v. Illinois*, 390 U.S. 129, 131 (1968) ("[T]he very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and

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[10] The Government has not cited the Court to a single case wherein an interlocutory appeal was granted regarding the pre-trial decision to require the government to disclose the identity of a government witness under any circumstances.

where he lives.") (internal citation and quotations omitted). Of course, this right is not absolute, but "[w]hen the government seeks to withhold a witness's true name, address or place of employment, it bears the burden of demonstrating that the threat to the witness [is] actual and not a result of conjecture." *Ramos-Cruz* 2012 U.S. App. LEXIS 946 at *32 (citation and internal quotations omitted) (alteration original). If the government makes the requisite showing of actual threat, "the district court still has discretion to review relevant information and determine whether disclosure of the witness's identifying information is necessary to allow effective cross-examination." *Id.* Under this standard, the district court did not abuse its discretion in requiring that the jury and Mr. Sterling know the true names of CIA agents or contractors whom it was going to permit to testify in the case without being publicly identified.

Each case cited by the Government involved only one or two witnesses, and none implicated the elements of Section 793. Here, practically all of the Government's witnesses required some security measure that improperly, both individually and cumulatively, prejudiced Mr. Sterling. The judge was well within her discretion to draw the line where she did.

2. Mr. Sterling Consistently Objected to the Government's Security Measures.

The Government's recitation of the facts is grossly and self-servingly selective. Mr. Sterling and the Government had been engaged in a running dispute over the Government's intended use of anonymous witnesses, including experts. Mr. Sterling, at every turn, argued that the cumulative effect of all of the security measures that the Government was requesting was the prejudicial appearance that national security information is at issue in the case. Thus, the Government's portrayal of the court's exercise of her discretion as an "eleventh-hour decision to reverse course and require closure 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" (Appellant Brief pp. 76-77) is a clear mischaracterization of the record.

First, in *ex parte* CIPA filings that the defense has never seen, the court apparently allowed the Government to redact the true names of CIA officers and contractors from discovery in this case. *Id.* at p. 70. While, as a matter of fact and law, the defense could not participate in those *ex parte* hearings, the Government is entirely incorrect when it states that Mr. Sterling has never objected to this procedure. For instance, Mr. Sterling has always objected to the use of pseudonyms or incomplete names for expert witness. *See, e.g.*, Def's Reply in

Support of His Motion *in Limine* Regarding Expert Witnesses Proffered by the United States (DE 195) (arguing that the use of anonymous experts violated the Confrontation Clause and Rule 16 of the Federal Rules of Criminal Procedure ("Rule 16")). With respect to Rule 16, Mr. Sterling noted that "[w]ith this limited information, provided less than one month from the trial, the defense cannot investigate the background of 'classified witnesses' without violating the protective order entered in this case and thus cannot confront the witnesses in the same manner as the Government surely will try to do" with defense experts. *Id.* at 2-3.[11]

Mr. Sterling also reiterated his objections to all of the Government's proposed security measures in his Opposition to the Government's Motion for Reconsideration of the Court's Ruling Regarding Certain Security Measures for a Limited Number of Government Witnesses. Def's Opp; JCA 465. In that Opposition, Mr. Sterling noted that the Government was seeking special security measures for almost every significant witness in the case (*id.*; JCA 467-468) and that the security measures impermissibly suggested that there was national defense information disclosed in *State of War* and that Mr. Sterling was responsible for

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[11] At this time, of course, the defense was unaware that the CIA was withholding substantial impeachment evidence regarding most of these witnesses.

risking the lives of CIA agents (*id.*; JCA 469). Accordingly, the Government's claims that Mr. Sterling did not object and that the court was not informed by these arguments in making her ruling is simply not supported by the record.

3. The Court's Order Disclosing the Names to Mr. Sterling and to the Jury of Witnesses Whom It Was Permitting to Testify Without Being Publicly Identified Was Not An Abuse of Its Discretion.

The Government falsely portrays the district judge as disinterested in the safety of CIA agents and obsessed with cutting the number of government trial witnesses. This obviously unfair portrayal is made to obscure the fact that the district judge granted literally every security request that the Government requested and only balked at the Government's request to conceal from Mr. Sterling and the jury the names of witnesses.[12] Rather than abuse her discretion, the trial judge balanced the Government's claimed security needs with Mr. Sterling's fair trial rights. The Government proposes a rule that, unless the CIA obtains every security measure it seeks, any ruling to the contrary is an abuse of discretion. The law forbids such a rigid rule which, in fact, would permit no

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[12] Mr. Sterling does not waive his objections to the district court's orders pertaining to security measures and, if necessary, may raise them on direct appeal. However, once the court permitted witnesses to testify under extraordinary security measures and without being publicly identified, it plainly was not impermissible for it to require that the defendant and the jury know the identity of the witnesses both to allow confrontation and to prevent further prejudice to Mr. Sterling.

discretion at all and would allow the CIA to run an Article III trial.

The Government also pretends that the names of these witnesses would never otherwise have been given to Mr. Sterling or the jury. That is untrue. The Government proposed disclosing the names of all of the witnesses, except Human Asset No. 1 and , to the jury as part of voir dire.[13] That process is clearly required so that potential jurors could know if they recognized any of the names and could properly serve as jurors in the first place. Thus, even under the Government's proposed voir dire procedures, there was never any chance that the names were not going to be disclosed to the jury or Mr. Sterling during the trial.

Moreover, Mr. Sterling has a constitutional right to the names of the witnesses. That right can only be impeded if the Government can show some danger to the witnesses or threat to some "other legitimate interest in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Here, the court carefully considered the Government's argument of danger and rejected it. Oct. 14 Tr.; JCA 596-597. The trial judge properly rejected the notion that Mr. Sterling

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[13] The Indictment refers to an individual paid informant who worked on Classified Program No. 1 as Human Asset No. 1. While the Government indicated repeatedly that it likely would not call Human Asset No. 1 as a witness at trial, it requested that if it called either Human Asset No. 1 or , it would wish to do so anonymously. The district court's order with respect to Human Asset No. 1 and is not at issue in this appeal.

was a threat to any witness. *Id.*; JCA 597. The court recognized that Mr. Sterling, by the Government's own admission, already knew eight of the ten witnesses, and that there was no evidence of any risk arising from him learning the names of the other two. *Id.* ("[I]f Mr. Sterling were such a danger or a threat, I would have expected you-all would have him in custody. He's been sitting in this courtroom, he's on bond, and there's some degree of presumption of guilt by making that statement, but in any case, the argument that if Mr. Sterling knows the name of the person and their position with the agency, that that in and if itself is a risk, I think under the facts of this case is a no brainer.").

In this regard, the district judge is entirely correct. Mr. Sterling has not worked at the CIA for over eleven years. The Government proffered no evidence, other than the allegations in the indictment, which have been denied, that Mr. Sterling posed any threat to any CIA witness. Indeed, since this case was indicted, Mr. Sterling has enjoyed almost complete access to the SCIF and all of the classified information located there. Other than an unsupported presumption of dangerousness that the Government posits, there is no evidence in the record to support any claim of danger as to any witness by Mr. Sterling. Indeed, as the district court noted, in bringing these charges, the Government itself revealed Mr. Sterling as a former covert agent. And, it offers him no protection from all of the dangers to which it claims others are now exposed, due to its own prosecution.

Regardless, Mr. Sterling and counsel have been barred under the CIPA orders entered in the case, which carry criminal penalties, from disclosing the identity of any protected witness to anyone at any time, and they never have.

The court also properly rejected the claim that the jury could not be trusted with the same information. As the court stated, the jury was going to receive substantial classified information in this case, and the Government was prepared to make those disclosures. Furthermore, the jury would already have received a voir dire list of witnesses that included all of the witness names. In finding that it would allow the jury to know the names of the testifying witnesses by use of a key, the court stressed again that none of the proceedings would be for public consumption, and the jurors would be instructed not to write down the names of the witnesses. Oct. 14 Tr.; JCA 598.

The district court was also correct to find that Mr. Sterling needed to know the identity of these witnesses in order to have the "opportunity to place the witnesses in his proper setting and put the weight of his testimony and his credibility to a test." *Smith*, 390 U.S. at 132. Mr. Sterling was not given the green light to disclose any of these names publicly; he was given the right to know who certain witnesses were so that he could assist his counsel in preparing a defense through cross-examination. Such a simple and common ruling is hardly an abuse of discretion.

Finally, the Government protests that the district court did not accept as binding any of the authorities it provided at the final hearing. None of those cases, however, are even on point. None of them are interlocutory appeals of pre-trial rulings that were unfavorable to the government and none deal with the legal issue here. Again, the court granted the Government the right to use pseudonyms for almost every witness in this case. Under that ruling, there will be no public disclosure of any covert agent's name.

United States v Marzook, 412 F. Supp. 913, 923-924 (N.D. Ill. 2006), hardly stands for the proposition that this ruling should be reversed. There, the district court recognized that the witnesses were Israeli intelligence agents whose identities were entirely unknown to the defendant. *Id.* at 913. The same is true for *United States v. Abu Ali*, 395 F. Supp. 2d 338, 334 (E.D. Va. 2005), where the defendant did not know the true names of any of the foreign agents at issue and there was no jury since it was a suppression motion. In neither case did the district court make an express finding, as was done here, that there was no risk to the testifying witnesses from the limited disclosure authorized here. The court also correctly noted that these cases involve foreign agents and not agents working for the same sovereign that was bringing the charges. Oct. 14 Tr.; JCA 596. The district court did not, as the Government wryly suggests, state that CIA agents are entitled to less protection than foreign agents. Rather, the court merely recognized that this

case does not present the need for comity to a foreign sovereign.

Similarly, in *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), the court martial defendant had already been convicted and was appealing, in part, the trial decision to withhold the name of a witness for the prosecution. There, Judge Sentelle did find that there was no error since the "accused needed nothing more than he had in order to place John Doe 'in his proper setting' and to 'identify the witness with his environment.'" 35 M.J. at 41 (citing *Alford v. United States*, 282 U.S. 687, 692 (1931)). The court upheld the trial court's broad discretion in conducting its own proceedings. Here, the court exercised its discretion based upon a different set of facts and merely came to a different conclusion.

The district court, in the end, was charged with protecting national security against the backdrop of serious criminal charges against a man who has plead not guilty and is presumed to be not guilty. In weighing the Government's claims, the court ruled for the Government at every turn except for these five witnesses. The court noted Mr. Sterling's constitutional arguments, stating "[t]he defendant's concern, which they have stated many times before, is the more and more of this cloak and dagger stuff we put in this case, almost just by inference, it, it established the NDI ("national defense information") nature of what's going on here, which is very hard for a defendant to rebut." Oct. 14 Tr.; JCA 584-585. The court then struck what it believed was the most appropriate balance between Mr.

Sterling's rights and the Government's security needs. This Court should uphold the ruling.

CONCLUSION

For these reasons, Mr. Sterling respectfully requests this Court uphold the rulings of the Eastern District of Virginia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2012, I filed the foregoing Brief of Defendant-Appellee with the designated Classified Information Security Officer. Copies of the foregoing Brief will be forwarded to the following counsel of record by the Classified Information Security Officer after classification reviews are performed. The Defendant-Appellee has filed only an unredacted Brief and is not allowed to serve that Brief by electronic case filing. A redacted and unclassified brief will be publicly filed electronically when such a document is provided to counsel.

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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's order dated November 28, 2011, I hereby certify that this brief contains 14,945 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 Microsoft Word version 2003.

s/ Edward B. MacMahon, Jr.
Edward B. MacMahon, Jr.

STATUTORY ADDENDUM

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18 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

18 U.S.C. § 3731

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

18 U.S.C. app. 3 ("Classified Information Procedures Act")

§ 1. Definitions

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

§ 2. Pretrial conference

At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any matters which relate to classified information or which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

§ 3. Protective orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

§ 4. Discovery of classified information by defendant

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to

substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

§ 5. Notice of defendant's intention to disclose classified information

(a) Notice by defendant. If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) Failure to comply. If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

§ 6. Procedure for cases involving classified information

(a) Motion for hearing. Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any

hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice.

(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative procedure for disclosure of classified information.

(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order--

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

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. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of

classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of records of in camera hearings. If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure.

(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to--

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

(f) Reciprocity. Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to

rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

§ 7. Interlocutory appeal

(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within fourteen days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, excluding intermediate weekends and holidays, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, excluding intermediate weekends and holidays, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

18 U.S.C. § 793

§ 793. Gathering, transmitting, or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine,

telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter [18 USCS §§ 792 et seq.]; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the

officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer--

Shall be fined under this title or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

(h) (1) Any person convicted of a violation of this section shall forfeit to the United States, irrespective of any provision of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, from any foreign government, or any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, as the result of such violation. For the purposes of this subsection, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1) of this subsection.

(3) The provisions of subsections (b), (c), and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853(b), (c), and (e)-(p)) shall apply to--

(A) property subject to forfeiture under this subsection;

(B) any seizure or disposition of such property; and

(C) any administrative or judicial proceeding in relation to such property,

if not inconsistent with this subsection.

(4) Notwithstanding section 524(c) of title 28, there shall be deposited in the Crime Victims Fund in the Treasury all amounts from the forfeiture of property under this subsection remaining after the payment of expenses for forfeiture and sale authorized by law.