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Date 8/2/13

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.)

# PETITION FOR REHEARING EN BANC

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Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 2 of 21

REDACTED / CLEARED FOR PUBLIC RELEASE

# TABLE OF CONTENTS

Page

RULE 35 STATEMENT OF BASIS FOR THE PETITION AND LOCAL RULE 40(b) STATEMENT OF PURPOSE ........ 1

FACTUAL AND PROCEDURAL BACKGROUND ........ 3

A. Investigation and Pretrial Proceedings ........ 3

B. Decision of the Panel ........ 9

ARGUMENT ........ 12

A. The Panel Opinion Conflicts with Decisions of Other Panels of this Court ........ 13

B. The Panel Opinion Conflicts with Other Circuits ........ 14

CONCLUSION ........ 15

REDACTED / CLEARED FOR PUBLIC RELEASE

Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 3 of 21

REDACTED / CLEARED FOR PUBLIC RELEASE

# TABLE OF AUTHORITIES

Page(s)

## CASES

*Giglio v. United States*,
405 U.S. 150 (1972) ........ *passim*

*James v. Jacobson*,
6 F.3d 233 (4th Cir. 1993) ........ 9

*L.J. v. Wilbon*,
633 F.3d 297 (4th Cir. 2011) ........ 9

*United States v. Barile*,
286 F.3d 749 (4th Cir. 2002) ........ 2, 13-14

*United States v. Campagnuolo*,
592 F.2d 852 (5th Cir. 1979) ........ 2, 15

*United States v. Davis*,
244 F.3d 666 (8th Cir. 2001) ........ 2, 14

*United States v. Elmore*,
423 F.2d 775 (4th Cir. 1970) ........ 3

*United States v. Fernandez*,
913 F.2d 148 (4th Cir. 1990) ........ 2, 14

*United States v. Hedgepath*,
418 F.3d 411 (4th Cir. 2005) ........ 9

*United States v. Srivastava*,
411 Fed. App'x. 671 (4th Cir. 2011) ........ 2, 13

*United States v. Sterling*,
2013 U.S. App. LEXIS 14646 (4th Cir. July 19, 2013) ........ *passim*

*United States v. Wicker*,
848 F.2d 1059 (10th Cir. 1988) ........ 2, 14



REDACTED / CLEARED FOR PUBLIC RELEASE

Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 4 of 21



*United States v. Young*,
248 F.3d 260 (4th Cir. 2001) ........................................ 2, 14

**STATUTES**

18 U.S.C. § 793 ........................................ 3

**OTHER AUTHORITIES**

Fourth Circuit Local Rule 40 ........................................ 1, 3

Fed. R. App. P. 35 ........................................ 1, 2

Fed. R. App. P. 40 ........................................ 1

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# RULE 35 STATEMENT OF BASIS FOR THE PETITION AND LOCAL RULE 40(b) STATEMENT OF PURPOSE

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Fourth Circuit Local Rule 40(a), Appellee Jeffrey A. Sterling petitions for rehearing en banc. The panel opinion in this case, *United States v. Sterling*, 2013 U.S. App. LEXIS 14646 (4th Cir. July 19, 2013) ("Op.") reversed a measured sanction imposed by the district court in the face of numerous significant and unexcused violations by the government of its obligations to disclose exculpatory information in a timely manner. The panel substituted its judgment for that of the district court in concluding that a lesser sanction would have sufficed.

As the panel recognized, both the decision to impose a sanction and the type of sanction imposed are reviewed only for abuse of discretion. Op. at 64. And as the panel correctly articulated the standard, "A district court abuses its discretion only where it has acted arbitrarily or irrationally, has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises." *Id.* (citations and internal quotations omitted).

The panel did not identify any judicially recognized factor the district court failed to consider nor did it remand to allow the district court the opportunity to consider any such factor. Likewise, the panel did not identify any faulty factual or legal premise on which the district court based its decision or remand for the



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Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 6 of 21



district court to consider the matter under a corrected factual or legal premise. Accordingly, the panel's conclusion that the district court abused its discretion in determining what sanction to impose, and its reversal ordering that a different sanction be imposed, can only be read as a conclusion that the district court acted arbitrarily or irrationally in choosing the sanction it did. As discussed below, a review of the record demonstrates that this conclusion cannot be supported based on the manner in which other panels of this Court have applied the abuse of discretion standard. *See United States v. Srivastava*, 411 Fed. App'x. 671, 684 (4th Cir. 2011); *United States v. Barile*, 286 F.3d 749, 758-59 (4th Cir. 2002); *United States v. Young*, 248 F.3d 260, 269-70 (4th Cir. 2001); *United States v. Fernandez*, 913 F.2d 148, 155 (4th Cir. 1990). Rather, the panel in this case employed a standard far less deferential to the district court. Because the panel's decision conflicts with other Fourth Circuit decisions applying the abuse of discretion standard, "consideration by the full court" is "necessary to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(1)(A).

Furthermore, as also discussed below, the panel's opinion is in conflict with decisions of other courts of appeals. *See, e.g.*, *United States v. Davis*, 244 F.3d 666, 671-73 (8th Cir. 2001); *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988); *United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979). The

Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 7 of 21



full court should hear this case since the panel opinion failed to address this conflict with the law of other Circuits. Fourth Circuit Local Rule 40(b).

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Investigation and Pretrial Proceedings

The government's investigation of this case began in 2003 when it learned that James Risen, a reporter for the New York Times, had obtained what the government considered to be national defense information relating to a covert CIA operation conducted in 2000. *See* Government's Motion *in Limine* (DE 105-1); JA 154. The case was indicted in December 2010, charging Jeffrey Sterling, a former CIA employee, with, *inter alia*, violating the Espionage Act, 18 U.S.C. § 793, by disclosing national defense information to Mr. Risen. After an earlier continuance, trial was scheduled for October 17, 2011. Order (DE 128); JA 663-64.

The district court ordered the government to produce material subject to *Giglio v. United States*, 405 U.S. 150 (1972), "*no later than* five calendar days before trial[.]" Discovery Order (DE 15); JA 59 (emphasis added). This Order did not purport to, nor could it, relieve the government of its constitutional obligation to produce exculpatory material sufficiently in advance of trial to allow the defense to make meaningful use of it. *See*, *e.g.*, *United States v. Elmore*, 423 F.2d 775, 779 (4th Cir. 1970). 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, or October 12, 2011.

On October 13 and 14, 2011, the defense for the first time was provided significant *Giglio* material related to six of the government's trial witnesses. Letters of William M. Welch II to Edward B. MacMahon, Jr. (Oct 13, 2011); JCA 560-63; Government's *Ex Parte* and Sealed Motion Regarding Witnesses (filed *ex parte* on October 13, 2011 and produced to the defendant on October 14, 2011); JCA 557-563. This information came from the classified CIA personnel files of the six witnesses, all of whom were current or former CIA employees.

The *Giglio* materials disclosed on October 13th revealed that a fellow CIA employee did not believe government witness Robert            to be an honest person, and two other CIA colleagues of Mr.            had recommended against him receiving a renewal of his security clearance based on his dishonesty. JCA 562-63. One went so far as to question his mental stability. *Id.* at JCA 563. Another stated that Mr.            had mishandled classified information.[1] *Id.* This information

[1] This information standing alone was highly significant not just as impeachment, since the government intended to introduce evidence under Federal Rule of Evidence 404(b) that Mr. Sterling had previously mishandled classified information. The weight the jury would attach to the mishandling of unrelated classified information by Mr. Sterling as evidence that Mr. Sterling was Mr. Risen's source for the alleged national defense information would plainly be impacted if it learned that one of the government's own witnesses had likewise mishandled classified information. The government also disclosed on October 13 that government witnesses Scott Koch, David Shedd, David Cohen, and

plainly warranted further investigation by the defense, including interviews of all three witnesses to determine the reasons for their opinions and then, likely, further investigation to corroborate the facts on which those opinions were based.[2]

The *Giglio* materials also disclosed significant information about another government witness, Charles Seidel. JCA 560-561. His personnel file reflected that he had been investigated for numerous violations, including multiple government reporting violations, used his position for private gain, and traded on non-public information. *Id.* As summarized by the district court: "He went to a foreign location, attempted to sell an airplane and armored car to foreign nationals. They allegedly represented a private company." JCA 576. Even at this eleventh hour before trial, the government did not produce the relevant portions of the personnel files, but merely the government's summary. Letter of William M. Welch, II to Edward B. MacMahon, Jr. (Oct. 14, 2011); JSA 332.

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may have mishandled classified information as well. *Id.* at JCA 560-563. As set forth below, the district court imposed no sanctions for the belated disclosures relating to these four witnesses.

[2] The district court recognized that further investigation was required and that the government's offer on the eve of trial to try to provide the last known addresses of the people whose opinions were reflected in the personnel file was, standing alone, of little value to the defense. JCA 591 ("Now again, this is, I recognize, 15 or 20 years ago, so whether they could track her down or not, what was it that led her to tell the people in the background investigation that she didn't believe he was an honest person?")

Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 10 of 21



The *ex parte* filing by the government on October 13, which the defense did not receive until October 14, disclosed further *Giglio* related to Messrs. and Seidel, reflecting opinions that had a poor management style, had anger management issues, and made crude inappropriate sexual comments, including about his own daughter. This disclosure also revealed that Seidel had misused government property. JCA 557-563. Again, these disclosures were summaries and did not include copies of the underlying personnel file documents. The summaries would require defense investigation to determine the reasons that various people had formed these opinions about the government witnesses and the facts upon which those opinions were based.

Throughout the litigation, the government took the position that, given the classified nature of the subject matter, the defense was required to follow certain procedures in its investigation of the case. Letter of James L. Trump to Edward B. MacMahon, Jr. (May 9, 2011) (DE 296-1); JA 1016-18. Specifically, if the defense wanted to interview a witness, it would first need to have a Classified Information Security Officer (CISO) make a determination whether or not the witness possessed a current security clearance that would allow for the witness to be interviewed. If not, the defense could ask the CISO if the witness could be cleared for the interview. If clearance was obtained, an interview could take place, but only in a Secured Compartmentalized Information Facility (SCIF). Even there,

the defense could not ask about the identity or background of a covert agent of the CIA. Given these constraints, it was apparent that the defense could not possibly perform an adequate investigation of the new information in the handful of days remaining before trial and therefore could not make meaningful use of it.

Faced with an impending trial date that had already previously been continued, the government's provision of classified *Giglio* material at a stage in the proceedings at which no meaningful use of it could be made with the existing trial date, and the government's violation of the Court's discovery order requiring all *Giglio* material be produced no later than five days before trial, the district court carefully weighed its options. In doing so, the district court considered: the government had a lengthy period of time to review and produce *Giglio* material; the material at issue came from an obvious potential source of *Giglio* material – government personnel files of government witnesses; the belated disclosures involved six different government witnesses; and the government offered no reason whatsoever why its review of *Giglio* material had not commenced sooner or why adequate resources had not been devoted to identifying and producing *Giglio* in a timely manner. *See* JCA 578-79 ("There is no reason this stuff was left until the last minute by the agency or whoever else gave you clearance."); JCA 592 ("And the timing problem is not the defendant's fault. You all have been on notice. This case was originally set for [trial in] September, as I recall. I mean, it's been

Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 12 of 21



continued. So there's been plenty of time to get this stuff in order.") The district court also assessed the materiality of the *Giglio* material with respect to each of the six witnesses and the resulting prejudice to the defense with respect to each witness based on its inability to perform an adequate investigation so it could use the information effectively in cross-examination.

In performing this analysis, the district court found that with respect to two of the witnesses, Messrs. Seidel and , the previously undisclosed *Giglio* material was particularly significant. JCA 576-77. With respect to the *Giglio* for Mr. Seidel, the court said, "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." *Id.* With respect to Mr. , the court said, the *Giglio* "is very significant[.] . . . [I]t undercuts a lot of the credibility of the government's case. . . ." JCA 577. The district court concluded, "those are the two [witnesses] with the most significant amount of *Giglio* material, and [the defense] just [doesn't] have enough time to, to research it." *Id.* The district court also considered the age of the case and that it had previously been continued. JCA 578 ("this case has been continued before"); JCA 592.

After consideration of all of this information, the district court fashioned a sanction for the government's unexcused failure to meet its obligations for timely disclosure of *Giglio* for six of its trial witnesses. The district court declined to

Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 13 of 21



grant another continuance. Rather, it ordered that the two witnesses for whom the belated *Giglio* disclosures were most significant – Messrs. Seidel and , both of whom the government had long known it intended to call at trial and had offered no excuse for its untimely disclosures -- be stricken as trial witnesses. JCA 589-90. For the other four witnesses, the district court concluded no sanction was required. The government took an interlocutory appeal.

B. Decision of the Panel

The panel recognized that the type of sanction chosen by the district court falls within its discretion and can be reversed only if there is an abuse of discretion, *i.e.*, if the court acted "arbitrarily or irrationally." Op. at 64-65 (citing *L.J. v. Wilbon*, 633 F.3d 297, 304 (4th Cir. 2011) (quoting *United States v. Hedgepath*, 418 F.3d 411, 419 (4th Cir. 2005)) and *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993)). The panel stated that the district court was required to consider several factors in exercising its discretion: the reason for the government's delay; whether the government acted intentionally or in bad faith; the degree of prejudice suffered by the defendant; and whether a less severe sanction would remedy the prejudice and deter future wrongdoing by the government. Op. at 65.

With respect to the first factor, the panel conceded that the government had no legitimate reason for its delay; rather, it simply failed "to recognize the necessity of reviewing the personnel files of likely witnesses at an earlier stage of

Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 14 of 21

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the discovery process." Op. at 66. As the panel stated: "We cannot, of course, condone the Government's oversight; as Sterling points out, the Government had many months to examine the relevant records, and the evidence at issue here would have been an obvious source for potential *Giglio* material." *Id.*

With respect to the second factor, the panel concluded that the government did not act intentionally or in bad faith. *Id.* However, the panel did not hold that the district court neglected to consider this fact. *Id.*

With respect to the third factor, prejudice to the defendant, the panel concluded that even if the *Giglio* material had been provided a day or two earlier and thus was disclosed five days before trial, Mr. Sterling still would not have been able to make meaningful use of it. Therefore, the panel attached little significance to the "brief delay" in disclosure. Op. at 66-67. However, the fact that disclosing the information a day or two earlier in order to comply with the five-day provision of the discovery order likewise would not have allowed meaningful use of the material by Mr. Sterling is a reason why the government's violation of its obligation for timely provision of *Giglio* material was particularly egregious, not a reason for a lesser sanction. In any event, it was not a factor that the district court ignored, but rather one that it explicitly considered. JCA 578-79; 589-590 (five days before trial was "the last point" anything could be disclosed, but given the



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nature of the material at issue, it "should have been given to the defense way before this time").[3]

The panel failed to include any discussion of the district court's analysis of prejudice or even acknowledge that the district court had engaged in such an analysis. Specifically, the panel confined its discussion to the two witnesses who were stricken without noting that the district court evaluated prejudice with respect to six witnesses, not two. The district court found that prejudice particularly severe with respect to two witnesses and less severe for the other four. Accordingly, it ordered the former two witnesses stricken while allowing the latter four to testify, despite the government's discovery violation pertaining to those four witnesses.

Instead, the panel noted that the prejudice to Mr. Sterling could have been addressed by granting a continuance. Op. at 67. The panel failed to acknowledge, however, that the district court had taken the age of the case and that it had previously been continued into account in rejecting continuance as a sanction.

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[3] In stating that the government "was not obligated to accelerate its production in advance of the deadline" in the district court's discovery order (Op. at 68), the panel ignored what the district court explicitly recognized: both the language of the order and the government's constitutional obligation to produce exculpatory material sufficiently in advance of trial that the defense can make meaningful use of it *did* obligate the government to produce classified information that needed further investigation and that had the potential to severely undermine the government's case well in advance of trial.

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Finally, the panel simply asserted that the government "has been adequately chastened" and therefore its dilatory conduct was "unlikely to be repeated." Op. at 68. Accordingly, the panel concluded that the sanction of a continuance would have been adequate and reversed the district's sanction of striking two witnesses.

In doing so, the panel never explicitly held that the district court acted "arbitrarily or irrationally" in imposing the sanction of striking two witnesses. Nor did the panel hold that the district court had failed to consider any of the appropriate factors. Rather, the panel made a different judgment than the district court and concluded that an additional continuance was a preferable sanction to striking two government witnesses.

## ARGUMENT

The district court in this case was faced with numerous significant unexcused, untimely disclosures by the government. These disclosures were untimely based both on the government's constitutional obligations and based on the last possible time for disclosure set forth in the court's discovery order. As a result of these unexcused late disclosures, the district court was faced with an unenviable choice. It could grant another continuance in a case that had been pending nearly a year, had previously been continued, and involved conduct that had occurred more than a decade earlier. Or, it could proceed to trial as scheduled.


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After carefully analyzing the government's lack of bad faith, but likewise its lack of any justification for its numerous late disclosures, the prejudice to the defendant, and the age of the case, the district court exercised its discretion and decided that the case should proceed to trial as scheduled, that the two witnesses to which the most egregious belated disclosures related should be stricken, and that the remaining four witnesses for which the government also violated its disclosure obligations would be permitted to testify. Plainly, this was not the only course the district court could have chosen, but it was a reasonable course to take under the circumstances and the district court settled on this approach after weighing all of the correct considerations.

A. <u>The Panel Opinion Conflicts with Decisions of other Panels of this Court</u>

The district court's decision, regardless of whether or not the panel agreed with it and would have made the same decision were it the trier of fact, was anything but irrational and arbitrary. By substituting its own judgment, the panel failed to accord to the district court the considerable deference that other panels of this Court have afforded district courts under an abuse of discretion standard. *See United States v. Srivastava*, 411 Fed. App'x. 671, 684 (4th Cir. 2011) ("We review decisions to admit or exclude evidence for abuse of discretion. Under that standard, we may not substitute our judgment for that of the district court") (quotations and citations omitted); *United States v. Barile*, 286 F.3d 749, 758-59


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(4th Cir. 2002) (noting that "[u]pon finding a violation of Rule 16, the district court has discretion . . . to determine the proper remedy" and holding that district court's exclusion of testimony was "an acceptable remedy under the rule"); *United States v. Young*, 248 F.3d 260, 269-70 (4th Cir. 2001) (district court did not abuse its discretion in excluding evidence as sanction for violation of the court's discovery order); *United States v. Fernandez*, 913 F.2d 148, 155 (4th Cir. 1990) (substantial deference is warranted because "[t]rial judges are much closer to the pulse of the trial than [the appellate court] can ever be").

B. The Panel Opinion Conflicts with Other Circuits

The panel's decision is also at odds with the law of other Circuits. *See*, *e.g.*, *United States v. Davis*, 244 F.3d 666, 671-73 (8th Cir. 2001) (affirming suppression of evidence based on discovery violation, noting that with more diligence "[t]he government could have easily complied with the discovery deadline" and deferring to the district court despite the availability of a continuance as an alternative sanction, because the district court was justified in making its sanction decision "in order to maintain the integrity of the judicial process"); *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988) (the district court properly exercised its discretion where there was lack of bad faith by the government in its failure to make timely disclosures, but also no justification for the delay, noting sometimes a district court "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"); *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 nondisclosure did not prejudice the defendants").

The full Court should hear this case to establish uniformity within this Circuit in the application of the standard of appellate review of sanctions imposed by the district court for failures to meet discovery obligations. Moreover, if the Fourth Circuit is to part company with its sister Circuits, it should do so explicitly and such a decision should be made by the full Court.

## CONCLUSION

For the foregoing reasons, the Court should hear this case en banc and affirm the district court's decision striking two witnesses as a sanction for the government's significant belated *Giglio* disclosures related to those witnesses.

Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 20 of 21

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Respectfully submitted,

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Appeal: 11-5028 Doc: 89 Filed: 08/02/2013 Pg: 21 of 21

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# CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2013, I filed the foregoing Petition for Rehearing En Banc with the designated Classified Information Security Officer. Copies of the foregoing Petition will be forwarded to the following counsel of record by the Classified Information Security Officer after classification reviews are performed. The undersigned has filed only an unredacted Petition and is not allowed to serve that Petition by electronic case filing. A redacted and unclassified Petition will be publicly filed electronically when such a document is provided to counsel.

/s/ Barry J. Pollack

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