IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:10cr485 (LMB)
	)	
JEFFREY ALEXANDER STERLING	)	

UNITED STATES' RESPONSE TO THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

The United States, by and through its attorneys, hereby opposes defendant Sterling's motion for judgment of acquittal or, in the alternative, for a new trial. DE 438. Viewing the evidence in the light most favorable to the government, as the Court must, the record amply supports each of the defendant's nine counts of conviction, none of which warrant the drastic remedy of a post-trial judgment of acquittal. Likewise, because the Court's venue instruction was appropriate, and the verdict was not against the weight of the evidence, the defendant has failed to establish that there has been a miscarriage of justice warranting a new trial. The Court should reject the defendant's combined motion.[1]

[1] The defendant also renews two of his previous motions. Mot. at 1 & n.1. First, the defendant renews his motion to dismiss based on a violation of the Court's CIPA § 6(c) Order. DE 416. The Court originally denied this motion at the bench during trial, and the defendant provides no basis for the Court to revisit its decision. During the course of trial, the vast majority of the witnesses provided testimony that implicated the strictures of the § 6(c) Order, and yet the defendant identifies the errant comment of just one—and not, as he claims, two—of the government's witnesses as the basis for wholesale dismissal of the Indictment. He offers no legal support for the remedy he seeks, particularly where the fact that was inadvertently elicited was a fact the defendant previously sought to introduce at trial. Moreover, there was no bad faith on the part of the government, just as there was no bad faith when the defendant inadvertently ran afoul of the Court's Order during the Merlin deposition and cross-examination of one of the witnesses at trial. The Court should reject the renewed motion. As for the second renewed motion, DE 372,

I. There Is Sufficient Evidence to Support the Verdict

The defendant spends the bulk of his motion arguing, pursuant to Rule 29, that the evidence was insufficient to support the jury's verdict as to each of the nine counts of conviction. Mot. at 3-25. Although he challenges the sufficiency with respect to each count, his argument as to the substance of the charges breaks down into four general claims: there was insufficient evidence to (1) establish that the defendant was a source for James Risen; (2) support the government's causation and attempt theories for certain counts; (3) establish that the defendant had unauthorized possession of, or willfully retained, the letter reprinted in Chapter 9 of State of War; and (4) prove obstruction of justice. In addition to challenging the sufficiency as to the substantive offenses, the defendant also alleges, as to eight of the nine charges, that there was insufficient evidence of venue in the Eastern District of Virginia. Id. at 3-16.

As to each of his claims, the defendant ignores the applicable standard of review, downplays the evidence supporting the jury's verdict, and, as to venue, ignores the government's lower burden of proof.

A. The Rule 29 Standard

Rule 29 of the Federal Rules of Criminal Procedure permits a judgment of acquittal only if the government's evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29. In reviewing the sufficiency of the evidence, the Supreme Court has stressed that "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of

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concerning selective prosecution—itself a renewal of a motion the Court rejected in 2011—the government similarly opposes the motion (for the same reasons it opposed the original version) and has responded by separate pleading. DE 445.

insufficient evidence only if no rational trier of fact could have agreed with the jury." Coleman v. Johnson, 132 S. Ct. 2060, 2062 (2012) (per curiam) (internal quotation marks omitted) (emphasis added); see also United States v. Beidler, 110 F.3d 1064, 1067 (4th Cir. 1997) (noting that defendant challenging the sufficiency of the evidence "bears a heavy burden" (internal quotation marks omitted)).

In evaluating a motion for a judgment of acquittal, the Court must view the evidence in the light most favorable to the government, "consider circumstantial as well as direct evidence and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982). Likewise, "it is the province of the jury to weigh the credibility of competing witnesses." Perry v. New Hampshire, 132 S. Ct. 716, 723 (2012) (quoting Kansas v. Ventris, 556 U.S. 586, 594 n* (2009)). As such, a reviewing court is "not entitled to weigh the evidence or to assess the credibility of witnesses, but must assume that the jury resolved all contradictions in favor of the Government." United States v. Romer, 148 F.3d 359, 364 (4th Cir. 1998) (citations and internal quotation marks omitted); see also United States v. Hernandez, 433 F.3d 1328, 1334 (11th Cir. 2005) ("That [the defendant's] statements and behavior are subject to innocent explanations is . . . immaterial. A jury is free to choose among reasonable constructions of the evidence." (citations and internal quotation marks omitted)). Reversal of a conviction for insufficient evidence is "confined to cases where the prosecution's failure is clear." United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996) (en banc) (quoting Burks v. United States, 437 U.S. 1, 17 (1978)).

B. The Defendant Does Not Dispute That the Information and Letter at Issue Related to the National Defense or That He Had Reason to Believe Unauthorized Communication of Such Information Posed Potential Harm to the United States or Could Be Used to the Advantage of a Foreign Country

Before turning to the defendant's specific sufficiency claims, it is worth noting at the outset what he does not dispute. As the Court's jury instructions made clear, for purposes of six of the counts—Counts One, Two, and Four through Seven—a conviction under 18 U.S.C. § 793(d) & (e) required proof, among other elements, that the defendant possessed information or a document (i.e., the letter) "relating to the national defense" and that "the defendant had reason to believe that this national defense information could be used to the injury of the United States or to the advantage of any foreign nation."[2] DE 440 at 29. Although the defendant disputes his possession of the letter, e.g, Mot. at 19, he makes no attempt to dispute that the information and letter at issue in this case related to the national defense and that, as a trained CIA case officer, he knew all too well the potential harm that could arise from the disclosures in State of War.

To that end, the defendant fails to counter the voluminous evidence establishing the significance of Classified Program No. 1 and how important it was to national security that it remain a secret. For example, he does not dispute the testimony of Robert S. and other CIA employees that the CIA worked on developing and implementing the program for approximately a decade, including the two years Walter C. and other scientists at a national laboratory devoted to creating and testing the deliberately flawed fireset schematics that Merlin ultimately delivered to the Iranian Mission to the International Atomic Energy Association during the Vienna trip in February 2000. He also does not dispute the testimony of, among others, former National

[2] Unlike the other § 793 offenses, Count Three, which charged the defendant with willfully retaining the letter, did not require proof of the "reason to believe" element. DE 440 at 39.

Security Advisor Condoleezza Rice that disrupting the Iranian nuclear weapons program is one of the government's highest counterproliferation priorities.

Likewise, the defendant has no quarrel with the weight of the evidence adduced at trial—including testimony from Dr. Rice, Walter C., David Cohen, and David Shedd—that Classified Program No. 1 was one of the government's most closely held and sensitive programs, and that, as a result of its disclosure through publication of State of War in 2006, foreign adversaries, including Iran, became aware of the program's existence and Merlin's involvement in it. According to numerous witnesses, including Robert S. and Charles Seidel, the revelation of Classified Program No. 1 created significant potential harm to the United States, including the possibility that foreign allies would no longer entrust the United States with their secrets and that assets would not agree to work with the CIA for fear that the government could not protect their identities. Most palpably, the evidence established that the revelation of Classified Program No. 1 put the life of Merlin and his family in jeopardy, a fact Merlin and his wife imparted during their testimony. The defendant disputes none of this.

As a trained case officer employed by the CIA for approximately nine years, the defendant knew better than most just how damaging the disclosures at issue in this case could be. At bottom, the evidence established that the facts communicated to James Risen and then, ultimately, to the general public through Chapter 9 of State of War concerned a highly sensitive operation implicating a core priority of the United States' government, and the potential damage arising from such disclosure was well known to the defendant. Again, the defendant does not contest the sufficiency of this evidence. Nor could he.

C. Sufficient Evidence Supported the Defendant's Conviction as to All of the Counts of Conviction

1. There Was Sufficient Evidence That the Defendant Was a Source for James Risen

At the core of the defendant's challenge to the proof of the substantive charges is his argument that the government failed to prove that he communicated national defense information to James Risen, as alleged in Counts Four and Five. Mot. at 17-20. He bases his entire argument on the absence of direct evidence establishing his unlawful disclosure to Risen. In the defendant's view, id. at 18, absent an email or recorded phone call documenting the actual disclosure, or a subsequent admission that a disclosure occurred, he cannot be guilty of a crime under § 793. He is wrong.

"As [the Fourth Circuit] ha[s] observed repeatedly, 'circumstantial evidence is not inherently less valuable or less probative than direct evidence' and may alone support a guilty verdict." United States v. Martin, 523 F.3d 281, 289 (4th Cir. 2008) (quoting United States v. Williams, 445 F.3d 724, 731 (4th Cir. 2006)) (emphasis added); United States v. Bonner, 648 F.3d 209, 213 (4th Cir. 2011) ("We consider both circumstantial as well as direct evidence, and a conviction may rely entirely on circumstantial evidence." (emphasis added)); United States v. Jackson, 863 F.2d 1168, 1173 (4th Cir 1989) ("Jackson and Deleveaux criticize the evidence presented by the government as being entirely circumstantial, but circumstantial evidence is treated no differently than direct evidence, and may be sufficient to support a guilty verdict even though it does not exclude every reasonable hypothesis consistent with innocence." (citing United States v. George, 568 F.2d 1064, 1069 (4th Cir. 1978)) (emphasis added)); see also Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003) (noting that "juries are routinely instructed that '[t]he law

makes no distinction between the weight or value to be given to either direct or circumstantial evidence'" (quoting 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 12.04 (5th ed. 2000))).

As such, "[t]he test for sufficiency of evidence is identical regardless of whether the evidence is direct or circumstantial, and no distinction is to be made between the weight given to either direct or circumstantial evidence." United States v. Kendrick, 682 F.3d 974, 984 (11th Cir. 2012) (citation omitted). During the jury charge, the Court instructed the jury on this exact principle: "Now, the law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence." DE 440 at 14-15. This instruction, and the law supporting it, leave no room for the defendant's argument that direct evidence is the only evidence that can sustain his guilt. Circumstantial evidence—without more—is enough.[3]

Throughout the trial, the government introduced sufficient circumstantial evidence to establish beyond a reasonable doubt that the defendant "communicated, delivered, [or] transmitted" information and a letter relating to the national defense to Risen—conduct specifically charged in Counts Four and Five. Id. at 25, 27. Viewed in the light most favorable to the government, the evidence established that the defendant knew the information in Chapter 9

[3] In resolving the interlocutory appeal in this matter, the Fourth Circuit rejected Risen's privilege assertion, holding, in part, that, even if it were appropriate to balance the government's interests against Risen's, the government was entitled to Risen's relevant, first-hand testimony. United States v. Sterling, 724 F.3d 482, 506-08 (4th Cir. 2013). The court based its privilege holding, in part, on the fact that direct evidence can be of a more compelling character to a jury than circumstantial evidence. This reasoning arose in a very different context (privilege analysis) than the one here (a sufficiency challenge), and, in rendering judgment, the court explicitly noted that circumstantial evidence alone may support a conviction. Id. at 506 ("It is true, of course, that a defendant cannot ordinarily overturn a conviction based solely upon the claim that the jury had only circumstantial evidence to consider.").

relating to Classified Program No. 1 and Merlin, he had a motive to disclose the information, and he had a pre-existing and ongoing relationship with Risen. Taken together, this overwhelming circumstantial evidence amply supports the jury's finding that the defendant communicated national defense information to Risen.

a. Chapter 9 contained national defense information known to Sterling

As an initial matter, the evidence at trial established that Chapter 9 of State of War contained numerous accurate, classified facts relating to Classified Program No. 1 and Merlin—all of which were known to the defendant. For example, the chapter accurately described that Classified Program No. 1 was designed to stunt the development of Tehran's nuclear program by sending Iran's weapons experts down the wrong technical path, wasting years trying to make flawed nuclear designs work instead of focusing on their existing nuclear program. GX 132 at 18. The chapter also correctly described the nature of the flawed plans, identifying the specific nuclear component as a TBA-480 high voltage block, or a firing set, for a Russian-designed nuclear weapon. Id. at 4. In addition, the book accurately sourced the original Russian intelligence to a Russian scientist who was working with the CIA—Human Asset No. 2—noting that the intelligence from this asset was sent to a national laboratory and scrutinized by a team of scientists. Id. at 19. According to the book, the same team was asked to implant flaws into the Russian design, which were supposed to be so clever and well hidden that no one would be able to detect their presence. Id. The evidence at trial established that these factual assertions were true.

Chapter 9 also contained several facts about Merlin. For example, the book accurately reflected that Merlin was a Russian scientist who had worked at the nuclear weapons facility known as Arzamas 16 in the former Soviet Union, and who had endured long debriefings in which

CIA experts and scientists from the national laboratories tried to drain him of everything he knew about the status of Russia's nuclear weapons program. Id. at 5, 7. As for Merlin's role in Classified Program No. 1, the book correctly stated that Merlin's job was to pose as an unemployed and greedy scientist, who would serve as a go-between for the other Russian scientist—the one with the greater technical knowledge. Id. at 6, 11. In order to develop viable Iranian contacts, the CIA instructed Merlin to send emails to Iranian scientists and scholars, and to attend scientific conferences. Id. at 9. Ultimately, Merlin communicated with an Iranian professor. Id. at 10. And later, when the CIA learned that another Iranian—this one a top official—was headed to the International Atomic Energy Association, or IAEA, in Vienna, the decision was made to send Merlin over with the fireset plans. Id. at 11. These facts about Merlin and his role in Classified Program No. 1 are all true. More importantly, there is no dispute that they were all known to the defendant.

In addition, the chapter also contained a number of additional details that point to the defendant specifically as a source for Risen. For example, the two most detailed events related to Classified Program No. 1 both took place during the defendant's time as Merlin's case officer: the meeting in San Francisco and the trip to Vienna.

As to the San Francisco meeting, Chapter 9 accurately reflected that Merlin was first shown the flawed fireset design in a hotel room during the trip. Id. at 6-7. It also mentioned that the "case officer"—the defendant—and the "senior case officer"—Robert S.—had a private conversation after Merlin raised initial concerns about the plans. Id. at 12. Robert S. verified that the private meeting was not documented in cable traffic. Chapter 9 also accurately described an excursion to Sonoma during the trip, id. at 7, which, again, was known to the defendant but not

documented in any cable. Likewise, much of Chapter 9 dealt with Merlin's attempt to deliver the flawed plans to the Iranian Mission to the IAEA, e.g., id. at 11-12, an event that occurred just before the defendant handed off Merlin to the next case officer, Steve Y. Notably, although Robert S. testified that Classified Program No. 1 continued after the defendant's involvement ended, the details of subsequent operations, which were not known to the defendant, did not appear in Risen's book, lending further support to the conclusion that the defendant was a source for Risen.

Moreover, only one individual received favorable treatment in Chapter 9—the defendant. Merlin was characterized as a bumbling and problematic asset, id. at 6, and Robert S. was characterized as being insensitive to Merlin's and the case officer's purported concerns, id. at 7, 12. According to Risen, the only individual worthy of any praise was the "case officer"—the same "case officer" who took his concerns to the Senate. Id. at 20. That case officer was the defendant.

Finally, Chapter 9 quoted a "secret CIA report" that referred to Merlin as "a known handling problem due to his demanding and overbearing nature." Id. at 6. According to the book, he was a "sensitive asset" who had been used in a "high priority" operation. Id. As the evidence at trial established, the language quoted in Chapter 9 came directly from the defendant's 2000 performance evaluation. GX 60 at 2-3. Notably, nothing in the performance evaluation identified Merlin as the asset or specified that that the "high priority" operation was Classified Program No. 1. A reasonable inference from this evidence is that Risen knew to connect the language in the performance evaluation to Merlin and Classified Program No. 1 because the person who had given him the document—the defendant—also told him they were connected.

b. The defendant had motive to disclose national defense information in a manner that would be most harmful to the CIA

In addition to this circumstantial evidence pointing to the defendant as a source for Risen, the government also introduced evidence that the defendant was the only individual who knew relevant facts contained in Chapter 9 and had any motive to disclose them. By the time Risen called Bill Harlow at the CIA in early April 2003, GX 106, the defendant had been embroiled in three years' worth of bitter litigation with the CIA, beginning when he filed a formal EEO complaint in August 2000, alleging race discrimination. GX 54. The complaint was rejected in May 2001. GX 63. The defendant subsequently filed a federal civil suit stemming from his allegations of discrimination. GX 65. In April 2003, he filed a second federal lawsuit, relating to the CIA's interference with the defendant's desire to publish a memoir. GX 99. Throughout his litigation, the defendant made repeated settlement demands, none of which the CIA accepted. E.g., GX 66, 95.

During that time, in August 2000, Sterling told Eileen Swicker, the Chief of Staff to the Deputy Director of Operation at the CIA, that he would "pursue his claims as long and as loud as possible inside and outside the agency." GX 52 at 1. Later, in January 2003, when he was fighting with the CIA's Publications Review Board about his memoir, he told Bruce Wells that he was "absolutely disgusted" with the CIA and that the Board's conduct was "absolutely reprehensible." GX 93. He claimed that he would be coming at the CIA with "everything at his disposal." Id.

This evidence established conclusively that the defendant wished to harm the CIA. He not only possessed the facts about Classified Program No. 1, he had a motive to spin them in a way

that would do maximum damage to the agency. That is exactly what the evidence reflects. Risen's spin on the program—i.e., that it was botched and risked enabling the Iranian nuclear program—is the same spin the defendant used when he met with Vicki Divoll and Donald Stone from the Senate Select Committee on Intelligence (SSCI) on March 5, 2003, GX 101, the day after he filed his second lawsuit, GX 99, and about a month after his last settlement offer expired. GX 96. Indeed, the only time anyone expressed the concerns Risen parroted in Chapter 9 was when Sterling went to SSCI.

The SSCI meeting took place more than three years after Merlin delivered the schematics in Vienna, and almost five years after the San Francisco trip, when, according to the defendant, Merlin identified the embedded flaws. Not once during the intervening years did the defendant raise any concerns, internally or externally, related to Classified Program No. 1—not in any cable traffic, not in any discussions with his management or colleagues, not when he complained about discrimination to the CIA Inspector General in 1999, and not even when he went to speak with Michael Sheehy and Wyndee Parker on the House Permanent Select Committee on Intelligence in August 2000. The undeniable inference from this evidence is that the defendant had a motive to fabricate unfounded concerns about Classified Program No. 1 and provide them to someone who would broadcast them to the world.

c. The defendant had a pre-existing and ongoing relationship with Risen

Finally, the government presented significant evidence, including direct evidence, of a pre-existing and ongoing relationship between the defendant and James Risen. The evidence established that the defendant's relationship to Risen potentially dated as far back as 2001. On November 4, 2001, Risen wrote an article citing unnamed sources for the fact that a CIA office in

New York had been destroyed during the 9/11 terrorist attacks. GX 75. That was five days after Jeffrey Sterling lost his appeal and was terminated by the CIA. GX 73. Carrie Newton Lyons testified that a couple months later the defendant bragged to her about having confirmed the office's destruction to a newspaper.

Later, on March 2, 2002, the New York Times published an article, written by Risen, about the defendant and his discrimination lawsuit against the CIA. GX 83. The article ran with the defendant's picture, and it was published about a month after the defendant refused to sign his final CIA security agreement during his exit interview with Gayle Scherlis. GX 79. This article alone provided the jury with significant, circumstantial evidence to support a finding that the defendant also was a source for Risen's story about Classified Program No. 1.

Not only did Risen quote extensively from the defendant in the article, he also quoted from another one of the defendant's performance appraisals: the 1999 appraisal. Specifically, the article noted that the defendant had received a positive performance evaluation, which stated that he "demonstrated good tradecraft in the handling of his assigned cases." Compare GX 59 at 2, with GX 83 at 2. The fact that Risen quoted one of the performance evaluations he had obtained from the defendant in the March 2002 article provides strong corroboration for the inference that the defendant also provided Risen with his 2000 appraisal, containing language that Risen connected with Merlin and Classified Program No. 1 when he reproduced it in Chapter 9.

The government also introduced evidence of numerous phone and email contacts between the defendant and Risen. GX 98, 163. The first documented call occurred on February 27, 2003, GX 98 at 1, two weeks after the defendant's final settlement offer lapsed, GX 96, and about a week before his meeting with SSCI staff members. GX 101. Between February 2003 and November

2005, there were 47 calls between the defendant and Risen. GX 98 at 1-14. These calls continued even after the defendant left Virginia and moved to Missouri. Id. at 3-14.

Email traffic provides additional evidence of their ongoing relationship. On March 10, 2003, the defendant emailed Risen a link to a CNN article titled "Report: Iran has 'extremely advanced' nuclear program." GX 102. In the body of the email, the defendant wrote, "I'm sure you've already seen this, but quite interesting, don't you think? All the more reason to wonder . . . J" Id. The defendant sent this email just five days after he went to SSCI and expressed concerns about whether Classified Program No. 1 may have aided the Iranians. The email and the news story provide further evidence that the defendant discussed his work concerning Iran and its nuclear program—the focus of Classified Program No. 1—with Risen.

More than three years after the defendant sent the email to Risen, the FBI obtained a search warrant for the defendant's email account. GX 141. Prior to execution of the warrant in October 2006, the FBI requested that the service provider create and preserve snapshots of the account. Two snapshots were generated: one in April and one in July. GX 137, 140. Review of the two snapshots, as well as the contents of the account in October when the warrant was executed, revealed that only the first production, from April 2006, contained the March 10, 2003, email. DE 432 at 12. Neither the July nor the October 2006 productions contained the email. In other words, the evidence adduced at trial established that the defendant maintained the email in his account for three years after sending it—only for it to disappear between April and July 2006.

Testimony from Special Agent Hunt established a reason for why the email went missing after all that time: in June 2006, between the April and July snapshots, she served the defendant with a target letter and a grand jury subpoena, alerting him to the existence of an FBI investigation

and calling for documents related to his work with the CIA. Id. at 14-16; GX 139. A reasonable inference from this evidence and testimony is that the defendant deleted the email to conceal his discussions with Risen regarding Iran and its nuclear weapons program—i.e., the focus of Sterling's most important work during his tenure with the CIA. This evidence provides further proof that defendant was a source for the unauthorized communications contained in Chapter 9.

Finally, the FBI was also able to recover additional deleted emails from a computer obtained from John and Lora Dawson, friends with whom the defendant lived when he first moved to Missouri in 2003. GX 117, 119, 120-124, 126. For example, on December 23, 2003, Risen asked the defendant, "[C]an we get together in early January?" GX 98 at 3. Later on May 8, 2004, Risen wrote to the defendant, "I want to call today. I'm trying to write the story," and "I need your phone number again." Id. at 6 (emphasis added). The next week, Risen told the defendant, "I am sorry if I have failed you so far. But I really enjoyed talking with you, and I would like to continue." Id. at 7 (emphasis added). And the next month, on June 10, 2004, Risen wrote to the defendant, "I can get it to you. [W]here can I send it?" Id. at 8. Risen's credit card records revealed that he sent a package by Federal Express on June 11, 2004. GX 125. A few months after this last email, Risen submitted a book proposal to Simon & Schuster. GX 128. That document contained Merlin's true first name, which, like the details contained in Chapter 9, was known to the defendant. Id. at 4-5.

This evidence—the 9/11 article, the New York Times profile of the defendant, and the email and phone traffic—all established that not only did the defendant and Risen have a relationship, they maintained that relationship over a period of years, leading up to the publication

of State of War. Tellingly, after the book came out, there were no additional documented calls between the two. GX 98 at 14.

In light of the weight of this significant circumstantial evidence, it comes as no surprise that the defendant would prefer not to engage with the basic legal principle that circumstantial evidence, and circumstantial evidence alone, is sufficient to sustain a conviction. The undisputed fact that the government introduced no direct evidence of the defendant's actual communication of national defense information to Risen is of no moment in the context of a sufficiency challenge. Put simply, there was more than ample evidence, viewed in the light most favorable to the government, to establish that the defendant was a source for Risen—i.e., that he "communicated, delivered, [or] transmitted" national defense information to Risen as alleged in Counts Four and Five.

2. There Was Sufficient Evidence to Support the Government's Causation and Attempt Theories

The defendant also challenges the government's causation theory as to Counts One, Two, and Nine, and the attempt theory as to Counts Six and Seven. Mot. at 13-14, 21-22. Once again, he ignores the sufficiency standard of review in favor of a cribbed and self-serving view of the record, and the Court should reject his challenges to these counts.

Counts One and Two allege that the defendant "caused national defense information . . . to be communicated, delivered, and transmitted to any person of the general public not entitled to receive this information, including foreign adversaries, through the publication, distribution, and delivery of State of War. DE 440 at 24, 26-27. As described above, Chapter 9 of State of War contained a significant volume of national defense information. There is no dispute that the book was published at the beginning of 2006, GX 167, 173, that copies of it were shipped by interstate

carrier to northern Virginia, GX 168, and that copies were sold to members of the general public at Barnes & Noble retail outlets. GX 131, 168. As such, there is no dispute that national defense information was "communicated, delivered, [or] transmitted" to the general public.

Likewise, the record, viewed in the light most favorable to the government, established that the defendant, in fact, caused the unlawful communication, delivery, and transmission of this information to the general public. By the time of the book's publication, Risen, a prize-winning reporter for a major newspaper of international circulation, certainly was no stranger to the defendant. The defendant had previously served as a named source for the March 2, 2002, article that Risen wrote about him. GX 83. The New York Times published the defendant's story, broadcasting his dispute with the CIA for worldwide consumption. The logical inference from this prior interaction is that the defendant, having later disclosed classified information to the same reporter, expected—indeed wanted—the same outcome: broad public dissemination.

This is particularly true in light of the nature of the information at issue. The defendant did not disclose to Risen mundane, unclassified facts about his work—facts no one would expect to make their way into print. On the contrary, the defendant provided Risen with highly classified details of an extremely sensitive nuclear counterproliferation operation targeting one of the United States' greatest foreign adversaries. The true facts alone were sufficiently newsworthy to support the conclusion that the defendant caused their public dissemination. But the defendant did not stop there. Rather, the evidence at trial established that, in order to make the CIA appear reckless, the defendant put a negative spin on the accurate facts and affirmatively fabricated others (including the purpose of Merlin's letter to the Iranians)—in the process further enhancing the newsworthiness of his narrative.

Toll records and email evidence also lend support for the conclusion that the defendant caused the communication of national defense information to the public through State of War. Phone records reflect 47 calls between the defendant and Risen spanning the period February 2003 to November 2005. GX 98. The calls stopped just before State of War was published, suggesting that their work together was complete and that they no longer had a reason to communicate.

In addition, deleted emails from the Dawson's computer support the reasonable inference that the defendant knew Risen was working on a story and that he was helping the reporter. For example, on May 8, 2004, Risen wrote in an email that he wanted to call the defendant and that he was "trying to write the story." Id. at 6. The next week, on May 16, 2004, Risen followed up: "I am sorry if I have failed you so far. But I really enjoyed talking with you, and I would like to continue." Id. at 7 (emphasis added). A month later, on June 11, 2004, Risen told the defendant, "I can get it to you. [W]here can I send it?" Id. at 8. The jury reasonably could have inferred that when Risen, in fact, sent something via Federal Express the very next day, GX 125, he was sending a draft of "the story" to the defendant. Moreover, the defendant's phone contact with Risen continued even after Risen took a trip to Vienna and stayed at the Hotel Intercontinental, GX 129, the same hotel where Merlin had lodged in 2000. DE 435 at 27.

Taken as a whole, this evidence of the defendant's ongoing communication with Risen, including correspondence concerning Risen's "story," supports the jury's finding that the defendant caused the unlawful communication of national defense information related to Classified Program No. 1 and Merlin to the public through publication of State of War. He wanted the information, with his spin, to get out to the world, and that is exactly what happened

when Risen "wr[o]te the story," GX 98 at 6, and it made its way into the hands of the general public.

For the same reasons, the evidence supported the causation theory as to Count Nine, which charged the defendant with causing the unauthorized conveyance of government property—information related to Classified Program No. 1—to the general public through publication and distribution of State of War, in violation of 18 U.S.C. § 641. DE 440 at 38. The same evidence supporting the causation theory as to Counts One and Two supports the defendant's conviction as to Count Nine—i.e., that by providing national defense information to a reporter, the defendant knew he was setting in motion events that would lead to the public dissemination of such information and, in fact, intended that result. Rather than engage with this evidence and the reasonable inferences drawn from it, however, the defendant premises his entire challenge to Count Nine on the claim that the government somehow abandoned the causation theory altogether. Mot. at 15-16. His argument misreads the Court's clear instructions to the jury and distorts the government's representations concerning its theory of causation.

The Court instructed the jury on the causation theory alleged in Count Nine in its summary of the charge:

> Count 9 of the indictment charges that between on or about December 24, 2005, and on or about January 5, 2006, the defendant caused to be conveyed without authority property of the United States, namely, classified information about Classified Program No. 1, which had a value of more than $1,000, and came into the defendant's possession by virtue of his employment with the Central Intelligence Agency, to any member of the general public not entitled to receive said information, including foreign adversaries, through the publication, distribution, and delivery of the State of War for retail sale in the Eastern District of Virginia.

DE 440 at 38-39 (emphasis added). After reciting the statutory text, the Court continued with the elements of unlawful conveyance:

> First, that the defendant conveyed a thing of value of the United States;
> Second, that the defendant did not have the legal authority to do so;
> Third, that the thing of value referred to in the indictment was of a value greater than $1,000; and
> Four, that the defendant acted knowingly.

Id. at 39. The very next instruction defined the word "convey":

> The word "convey" means to transfer or deliver or caused to be transferred or delivered to another.

Id. (emphasis added). This definition was drawn from the government's proposed jury instructions, DE 258 at 43 (Instruction No. 30), to which the defendant did not object. DE 411 at 6 ("Instruction No. 30 – No objection."). In arguing that the jury was not instructed on the causation theory, the defendant ignores the definition entirely. This omission is fatal to his argument: the definition of "convey" read in conjunction with the elements of the offense establishes that the jury, in fact, was instructed on the causation theory alleged in Count Nine of the Indictment.

The defendant's argument that the government somehow abandoned the causation theory of liability as to Count Nine is also misplaced. Mot. at 21-22. At its core, the defendant's argument confuses aiding-and-abetting liability with causation liability. Only the latter is at issue in this case. Simply put, the government neither alleged nor sought to prove aiding-and-abetting liability, which arises under subsection (a) of 18 U.S.C. § 2. The fact that the government stated this position on the record during the charging conference is hardly a revelation. And yet the defendant repeatedly conflates an aiding-and-abetting theory, which requires third-party complicity in the offense, with a causation theory, which does not. The government's theory was

simply that the defendant caused third-parties to communicate or unlawfully convey national defense information to members of the general public.

Moreover, because § 793 already contained the word "cause" and the government had submitted a causation instruction as to those counts, DE 440 at 34-35 ("If a defendant willfully causes an act to be done by another, the defendant is responsible for those acts as though he personally committed them."), there was no need for an additional, duplicative § 2(b) instruction. Likewise, because the unlawful conveyance instruction for Count Nine, as discussed above, sufficiently incorporated the exact same causation theory concerning publication and distribution of State of War, any additional causation instruction would have been unnecessary. Cf. United States v. Hassouneh, 199 F.3d 175, 181 (4th Cir. 2000) (noting that reviewing court "accord[s] the District Court much discretion and will not reverse provided that the instructions, taken as a whole, adequately state the controlling law" (emphasis added) (internal quotation marks omitted)). As such, the jury was properly instructed as to causation for Count Nine—a theory the government never "abandoned"—and, for the same reasons discussed as to Counts One and Two, there was sufficient evidence, viewed in the light most favorable to the government, to establish that the defendant caused the unlawful conveyance charged in Count Nine.[4]

[4] Piggybacking on his claim that the government abandoned the causation theory of liability for Count Nine, the defendant argues that the charge also should be dismissed because it was brought beyond the applicable five-year statute of limitations. Mot. at 25-26. This argument is incorrect. There is no doubt that the Indictment alleged a crime that, if proven, occurred within five years of the date of presentment: Count Nine charged the defendant with causing the unauthorized conveyance to the general public "between on or about December 24, 2005, and January 5, 2006"—less than five years before the charging date of December 20, 2010. That is all the statute of limitations requires. See 18 U.S.C. § 3282(a) ("Except as otherwise expressly provided by law, no person shall be prosecuted . . . unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."). The offense at issue in Count Nine was the communication to members of the public of national defense

Finally, the evidence supports the attempt theory for Counts Six and Seven, which also track § 793's statutory language and charged that the defendant "attempted to communicate, deliver, and transmit national defense information . . . to any person of the general public not entitled to receive this information, including foreign adversaries, through the publication, distribution, and delivery of a New York Times article." DE 440 at 25. Bill Harlow testified that, over the course of multiple conversations with Risen in April 2003, Risen made it clear that he was drafting a story related to Classified Program No. 1 and Merlin. DE 418 at 4-29; GX 106, 108, 112-113. By the end of the month, after Risen had suggested he had a fully realized draft of the article, GX 112, then-National Security Advisor Condoleezza Rice took the drastic step of convening a meeting at the White House for the sole purpose of convincing the Times not to run the story. Id. at 46-62. Absent Rice's intervention, the Times would have run Risen's story, thereby acting as a conduit for the communication of national defense information to the public.

Again, the defendant knew Risen was a reporter for the Times and that it was his job to research, draft, and publish articles for public consumption. As a result, it is beyond dispute that the defendant's communication of national defense information to a newspaper reporter was a substantial step[5] toward the unlawful communication of such information to the public via a newspaper article.

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information, which undoubtedly occurred when the book was sold in early in 2006. Even crediting the defendant's argument that the government abandoned a causation theory, the result would be a lack of proof that the defendant personally committed the offense—i.e., personally communicated the national defense information to the public via the book—not that the offense was somehow untimely. In short, a failure of proof is not the same thing as failure to allege a timely offense.

[5] Attempt crimes require proof of a "substantial step" toward completion of the offense. United States v. Neal, 78 F.2d 901, 906 (4th Cir. 1996) (defendant must possess criminal intent and take a

3. There Was Sufficient Evidence That the Defendant Possessed and Retained a Copy of the Letter Reproduced in State of War

The defendant also attempts to undermine the evidence that he was in unauthorized possession of the letter reproduced in Chapter 9 of State of War, as alleged in Counts Two, Five, and Seven. In his view, because the government failed to prove possession, it likewise failed to prove that he unlawfully retained the documented, as alleged in Count Three. The Court should reject this argument.

The evidence at trial established that over a period of months, the defendant, Robert S., and Merlin worked on drafting and editing a letter for Merlin to provide to the Iranians. See, e.g., DE 435 at 22-23. The document went through multiple drafts. On January 12, 2000, the defendant sent a cable containing the then-current version of the letter. GX 35. Two days later, on January 14, 2000, Robert S. responded in another cable, requesting certain changes, including that the letter make explicit that the schematics were being provided for "free." GX 36 at 1. There were no additional changes reflected in any cable traffic. The version of the letter that appears in Chapter 9 is the January 12, 2000, formulation, with Robert S.'s suggested changes from January 14 incorporated into the document—i.e., the final version. Compare GX 35 at 2, and GX 36 at 102, with GX 132 at 13-14.

During his under-oath deposition, Merlin testified that he drafted and made edits to the letter on his computer. DE 435 at 23. He also testified that it was his practice to provide hard copies of the drafts to the defendant, which the defendant usually would keep. Id. at 23 ("Q: And you left the paper copy with Jeff? A. Yes, but not always. Sometimes I, we made, made some

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"substantial step towards the completion of the crime that strongly corroborates that intent").

changes, and I took it back and edit the letter."). On cross-examination, Merlin was asked about the final version of the letter:

> Q: So you never gave a copy of the final letter to Mr. — excuse me, to Bob or to Mr. Sterling, correct?
> A. I did before leaving. I cannot go without final version of letter. So Jeff got it.
> Q. Okay. When did he get it? What is your testimony as to when he got it?
> A. Maybe two weeks before or — I don't, I don't remember exact date.
> Q. All right. Was Bob present at that meeting?
> A. No.
> Q. You have a specific recollection sitting here now of, of giving that letter to Mr. Sterling and not Mr. — not Bob sometime is years ago, correct?
> A. Yeah, I have it.
> Q. And it's a different letter from the one that's in the book, isn't it?
> A. No. It's, it's the same letter.
> Q. It's the exact same letter?
> A. Yeah, or very similar.
> Q. That's all you can say is that it's similar?
> A. Yes.

Id. at 60-61 (emphasis added).

This testimony—standing alone—is sufficient for Rule 29 purposes to establish that the defendant possessed a hard copy of the letter, irrespective of whether this fact was documented in any cable traffic.[6] That is true because "the uncorroborated testimony of one witness . . . may be sufficient to sustain a conviction." United States v. Wilson, 115 F.3d 1185, 1190 (4th Cir. 1997); United States v. Arrington, 719 F.2d 701, 705 (4th Cir. 1983) (uncorroborated testimony of one witness sufficient to support conviction); United States v. Snow, 2015 WL 43916 at *2 (4th Cir. Jan. 2, 2015) (unpublished) (affirming conviction based on uncorroborated testimony).

[6] It would be entirely reasonable for a jury to conclude that an individual, who was terminated for failure to perform his assigned duties, GX 62 at 1, might also fail to properly document all of his contacts with an asset.

In addition, the evidence also sufficiently established that the defendant maintained possession of the letter after he was read out of Classified Program No. 1. As the defendant's New York coworkers and supervisors explained, CIA employees could remove documents from the secure CIA space without detection. The primary check against this sort of improper conduct was an employee's continuing obligation to protect and maintain classified information, as codified in the standard secrecy agreement. See, e.g., GX 1. For his part, the defendant refused to sign his final security debriefing acknowledging the continuing strictures of his secrecy agreement when he was terminated in January 2002. GX 79 at 2 ("EMPLOYEE REFUSED TO SIGN"). More specifically, he refused to sign a "Security Exit Form," which stated, in relevant part: "I give my assurance that there is no classified material in my possession, custody, or control at this time." Id. at 3. The jury was free to infer that the defendant did not sign the form for the simple reason that, in fact, he still possessed classified material, including the letter.

Later, in April 2003, Risen told Bill Harlow that he had seen "documents," GX 112 ("I asked him . . . . if he was telling me that he has documents with some of this stuff . . . and he said 'yes.'"), and during the meeting with Condoleezza Rice on April 30, 2003, Risen "implied that he had seen a letter to the Iranians from the Russian." GX 113 (emphasis added).[7] Based on the significant evidence of a source-reporter relationship between the defendant and Risen, as well as the defendant's penchant for holding onto CIA material, GX 142-145, the jury reasonably could conclude that the defendant kept the hard copy Merlin gave him, removed it from CIA space when

[7] This evidence also defeats the defendant's challenge to Count Seven on the alternative basis that there was no evidence that Risen obtained the letter in advance of the attempted publication of his original Times article. Mot. at 20-21. On the contrary, Harlow's testimony and memorialization of the Rice meeting, GX 113, which occurred before the newspaper decided not to run Risen's story, GX 115, provided sufficient circumstantial evidence that Risen had already seen the document.

he was transferred back to Washington, and provided it to Risen for ultimate reproduction in Chapter 9. As a result, the evidence was sufficient to establish that the defendant was in unauthorized possession of the letter for purposes of Counts Two, Five, and Seven, and likewise willfully retained the document for purposes of Count Three.

4. There Was Sufficient Evidence That the Defendant Obstructed Justice

The defendant also challenges his conviction on Count Ten, which charged that "the defendant knowingly and corruptly destroyed the March 10, 2003, e-mail he sent from himself to James Risen that had a link to a CNN article about the Iranian nuclear weapons program . . . with the intent to impair the e-mail's integrity and availability for use in an investigation before a federal grand jury." DE 440 at 41. Viewing the evidence in the light most favorable to the government, the record contains more than enough support to sustain the defendant's conviction on this count.

Special Agent Hunt testified that only the April 2006 snapshot of the defendant's MSN Hotmail account contained the March 10, 2003, email to Risen. Three months later, when the service provider made a second snapshot in July 2006, the email had gone missing—after residing in the defendant's mailbox for over three years. Three months later, in October 2006, there was still no trace of the email in the defendant's account.

The evidence at trial revealed that during the period between the April snapshot, when the email still existed, and the July snapshot, when it did not, the FBI served a target letter and grand jury subpoena on the defendant at his home in Missouri. Specifically, as of June 16, 2006, the defendant was put on notice of the existence of the FBI's continuing investigation, and the subpoena made clear that the grand jury sought records related to the defendant's work at the CIA

and his contacts with third parties. See GX 139 at 2 (calling for "[a]ny and all correspondence between you and any person not employed by the CIA concerning the CIA or any of its operations, sources, assets, or methods"). The logical inference arising from this evidence is that the defendant, knowing that he was a target of an investigation into the unauthorized disclosed of national defense information, deleted the March 10, 2003, email to Risen about Iran's nuclear weapons program—the subject of the defendant's most sensitive work at the CIA. The defendant admits as much:

> There are two obvious explanations for the appearance of the 2003 email in the April 2006 snapshot and its failure to appear in the July 2006 snapshot. One is that Mr. Sterling deleted the email during that period, as the government contends. The other is that Hotmail deleted the email.

Mot. at 23. For purposes of the Rule 29 inquiry, the Court must credit the one "obvious explanation" that supports the defendant's guilt at to Count Ten, and the defendant has failed to establish that "no rational trier of fact" could find him guilty of obstruction.[8]

D. There Was Sufficient Evidence of Venue

Aside from his various challenges to the evidence supporting the substantive offenses, the defendant also claims that there was insufficient evidence to support venue in the Eastern District of Virginia for Counts One through Seven and Nine.[9] Mot. at 3-15. Viewed in the light most

[8] The remainder of the defendant's argument, Mot. at 24-25, which engages in confusing hypotheticals concerning MSN Hotmail's retention policy, the types of information produced by service providers to law enforcement, and what happens when a user deletes an email from his computer, merely underscores the defendant's inability to view the evidence through the appropriate lens. For purposes of Rule 29, it is not necessary that the evidence exclude all innocent explanations for the defendant's conduct; rather, so long as the evidence, viewed in the light most favorable to the government, supports the defendant's guilt, that is enough. See Tresvant, 677 F.2d at 1021.

[9] The defendant does not challenge venue as to Count Ten, the obstruction of justice charge.

favorable to the government, however, the record is sufficient to sustain the jury's reasoned finding as to venue.

"As a general proposition, venue is proper in any district where the subject crime was committed." United States v. Ebersole, 411 F.3d 517, 524 (4th Cir. 2005) (citing United States v. Wilson, 262 F.3d 305, 320 (4th Cir. 2001)). Where Congress does not include a venue provision in a particular criminal statute, venue generally is "determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Cabrales, 524 U.S. 1, 6-7 (1998) (quoting United States v. Anderson, 328 U.S. 699, 703 (1946)). As such, the venue inquiry focuses on the "essential conduct elements" of the charged offense. United States v. Bowens, 224 F.3d 302, 311 (4th Cir. 2000) (holding "that the place where a criminal offense is committed is determined solely by the essential conduct elements of that offense"). "The venue determination also is guided by the general venue provisions for federal criminal offenses, set forth in 18 U.S.C. §§ 3231-3244." Ebersole, 411 F.3d at 524. Section 3237 establishes venue for so-called "continuing offenses," providing that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a).

Venue "is not a substantive element of a crime." United States v. Griley, 814 F.2d 967, 973 (4th Cir. 1987). The Fourth Circuit has "recognized that venue is a question of fact in which the burden of proof rests with the government, but unlike other facts in the government's case, it may be proven by mere preponderance of the evidence. United States v. Engle, 676 F.3d 405, 412 (4th Cir. 2012) (emphasis added). In other words, venue is appropriate if the government

establishes that it was more likely than not that the essential conduct occurred in the charged district. See United States v. Manigan, 592 F.3d 621, 631 (4th Cir. 2010) ("The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." (quoting Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622, (1993) (internal quotation marks omitted))).

Moreover, contrary to the defendant's entire argument, direct evidence of the location of the essential conduct is not required to establish venue; rather, "circumstantial evidence can be sufficient to establish proper venue." Engle, 676 F.3d at 412 (citing Griley, 814 F.2d at 973); see also United States v. Martinez, 901 F.2d 374, 376 (4th Cir. 1990) ("The proof of venue may be by direct evidence or even by circumstantial evidence alone." (emphasis added)). For purposes of the defendant's sufficiency challenge in this case, the inquiry, then, is whether, viewing the evidence in the light most favorable to the government, there was sufficient direct or circumstantial evidence to establish that it was more likely than not that the crimes occurred in the Eastern District of Virginia. This is an exceedingly low burden under Rule 29, and the record supports venue as to each count, notwithstanding the defendant's protests to the contrary.

1. Venue Was Proper as to Counts One, Two, and Nine

As noted, Counts One, Two, and Nine were premised on the dissemination of national defense information to the general public through publication and distribution of State of War. Specifically, Counts One and Two alleged that the defendant caused information and the letter related to Classified Program 1 and Merlin to be communicated, transmitted, or delivered to the general public through publication and delivery of State of War in the Eastern District of Virginia.

Count Nine alleged similarly that the defendant caused the unlawful conveyance of the same material to the same audience—the general public—through the same mechanism—the publication and delivery of the book. In other words, the essential conduct was the communication, transmission, delivery, or conveyance of national defense information to the general public via the book. Because it is undisputed that the book contained national defense information and was delivered to the Eastern District of Virginia and sold to the general public, including Julia Perriello, venue is proper as to these counts under the lower preponderance standard.

For his part, the defendant attempts to sidestep this straightforward venue analysis by claiming that venue for Counts One, Two, and Nine can only be determined based on Risen's conduct. Mot. at 13. He provides no basis for this theory, which would require a reviewing court to ignore the language of the challenged counts in favor of focusing on the conduct of an individual who is not even mentioned in the charges. There is no support in the law for analyzing venue based exclusively on uncharged conduct. Communication to Risen simply is not at issue for these counts, and, as a result, where he was located when he came into possession of, or disseminated, the relevant information is irrelevant.

According to the defendant, focusing on the actual charged conduct—communication to the public—would improperly establish venue in potentially any district where the book was sold. Again, he provides no support for why this theory would be improper. So long as the government can establish that that national defense information was communicated, delivered, transmitted, or conveyed without authorization to members of the general public, venue would be proper in any

district in which such conduct occurred. That was the conduct at issue in Counts One, Two, and Nine, and the government proved it—and certainly by a preponderance of the evidence.

In this respect, the defendant's charged conduct is no different than if he had provided national defense information to someone who maintained a publicly accessible website. There is no doubt that venue for a charge related to the public dissemination of the information would be proper in any district in which the general public accessed the website and the information. In the defendant's view, however, the venue inquiry could only focus on the conduct of the website administrator, who received the information initially from the defendant. Again, there is no basis for this theory, and other courts have rejected this sort of cribbed view of criminal venue in the modern age. See, e.g., United States v. Royer, 549 F.3d 886, 895 (2d Cir. 2008) (rejecting challenge to venue in criminal prosecution under Securities and Exchange Act, where "at a minimum, the jury could infer by a preponderance that the subscribers [to the defendant's website] in the Eastern District of New York received information about the[] stocks"); United States v. Rowe, 414 F.3d 271, 279-80 (2d Cir. 2005) (rejecting venue challenge in prosecution under 18 U.S.C. § 2251(c) for advertising for child pornography, where the defendant "must have known or contemplated that the advertisement would be transmitted by computer to anyone the whole world over who logged onto the site and entered the chat room," including individuals in the Southern District of New York); United States v. Thomas, 74 F.3d 701, 705, 709 (6th Cir. 1996) (upholding venue finding where postal inspector accessed website in charging district and noting that "there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent" (quoting United States v. Bagnell, 679 F.2d 826, 830 (11th Cir. 1982))). Here, the only difference is that the means of dissemination was physical (State of

War) as opposed to digital (a website). As such, the appropriate, and common sense, venue inquiry for Counts One, Two, and Nine focuses on what was actually charged—communication, delivery, transmission, or conveyance to the general public via publication and delivery of the book, which conduct indisputably occurred in the Eastern District of Virginia.

2. Venue Was Proper as to Counts Three Through Seven

In addition, the evidence, viewed in the light most favorable to the government, also established venue in the Eastern District of Virginia for Counts Three through Seven. The record reflects that, during the time Risen was contacting the CIA and describing details of Classified Program No. 1 and Merlin in the spring of 2003, the defendant resided in the Eastern District of Virginia. DE 432 at 38, 48. In February and March 2003, phone records reveal seven calls between the defendant's landline in the Eastern District of Virginia and James Risen's home phone number. GX 98 at 2. During this period, the defendant, who was unemployed, DE 432 at 48, emailed to Risen a link to the CNN article concerning the state of the Iranian nuclear weapons program. GX 102.

Moreover, the Eastern District of Virginia was the first place the defendant lived after he departed New York, DE 432 at 38, where, according to Merlin, the defendant obtained a hard copy of the letter that appears in Chapter 9. DE 435 at 60-61. When the defendant's home was searched in Missouri in 2006, the FBI located classified CIA material, including one document, GX 145, that was generated in 1993, approximately thirteen years earlier. A reasonable inference from this evidence is that the defendant had a practice of maintaining CIA material at his home, moving it from one residence to the next.

As a result, viewing the evidence in the light most favorable to the government, this circumstantial evidence was sufficient to establish that it was more likely than not that the essential conduct of Count Three through Seven occurred in this district—i.e., that the defendant communicated, delivered, or transmitted national defense information, including the letter, to Risen in this district (Counts Four and Five), that he attempted to communicate, deliver, or transmit such material to the public through the unpublished Times article in this district (Counts Six and Seven), and that he willfully retained the letter reproduced in State of War in this district (Count Three). Cf. United States v. Leong, 536 F.2d 993, 996 (2d Cir. 1976) (holding that for venue purposes defendant's "residency in Manhattan would be sufficient circumstantial evidence, if not of the receipt of the heroin in the Southern District, certainly of his possession of it in that District"). In other words, the defendant cannot show that no rational trier of fact could have found that the essential conduct of these offenses occurred in the Eastern District of Virginia.

II. There Is No Basis for a New Trial

As an alternative to his sufficiency challenge, the defendant asks the Court to take the similarly extraordinary step of setting aside the jury's considered verdict and granting him a new trial under Rule 33. He bases his motion on a perceived flaw in the Court's venue instruction, as well as his view that the verdict was against the weight of the evidence. Because the defendant cannot meet the exacting standard of review under Rule 33, the Court should deny his motion.

A. The Rule 33 Standard

Under Rule 33 of the Federal Rules of Criminal Procedure, the district court, upon a defendant's motion, may vacate a jury's verdict of guilt and order a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). The defendant's burden under Rule 33 is

substantial, and a district court "should exercise its discretion to grant a new trial sparingly." United States v. Perry, 335 F.3d 316, 320 (4th Cir. 2003) (internal quotation marks omitted); see United States v. Gambino, 59 F.3d 353, 364 (2d Cir. 1995) ("[T]he standard for granting [a Rule 33] motion is strict.").

The question under Rule 33 is whether the court's evaluation of the evidence adduced at trial "weighs so heavily against the verdict that it would be unjust to enter judgment." United States v. Arrington, 757 F.2d 1484, 1485 (4th Cir. 1985)). "The test is whether it would be a manifest injustice to let the guilty verdict stand." United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992) (emphasis added). In other words, to grant relief under Rule 33 the district court must conclude that it would be a "miscarriage of justice" not to overturn the jury's determination of guilt. United States v. Shipp, 409 F.2d 33, 36-37 (4th Cir. 1969); United States v. Kellington, 217 F.3d 1084, 1097 (9th Cir. 2000) (focus of Rule 33 inquiry is whether evidence "preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred" (internal quotation marks omitted)); see also United States v. Canova, 412 F.3d 331, 349 (2d Cir. 2005) (reiterating that to grant a Rule 33 motion "[t]here must be a real concern that an innocent person may have been convicted" (emphasis added)).

B. The Court's Venue Instruction Was Proper

The defendant first challenges the wording of the Court's venue instruction, claiming that it was an improper formulation of controlling venue law and that, as a result, the verdict should be set aside as to Counts One through Seven and Nine. Mot. at 26-30. In particular, the defendant takes issue with the instruction that venue is proper where "at least one act in furtherance of th[e] offense occurred." In the defendant's view, this language does not reflect the legal principle that

"that the place where a criminal offense is committed is determined solely by the essential conduct elements of that offense." Bowens, 224 F.3d at 311. Controlling precedent proves him wrong.

Although the defendant claims otherwise, Mot. at 5, 27-28, the offenses at issue in Counts One through Seven and Nine are properly construed as continuing offenses—i.e., crimes that involve conduct susceptible to prosecution in more than one judicial district. 18 U.S.C. § 3237(a). As the Supreme Court has made clear, "where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." United States v. Rodriguez-Moreno, 526 U.S. 275, 282 (1999) (quoting United States v. Lombardo, 241 U.S. 73, 77 (1916)); see also United States v. Johnson, 323 U.S. at 275 (holding that venue is proper in any district "through which force propelled by an offender operates"). This principle is codified in the venue provision for continuing offenses: "Congress has provided that continuing offenses can be tried 'in any district in which such offense was begun, continued, or completed.'" Rodriguez-Moreno, 526 U.S. at 282 (quoting 18 U.S.C. § 3237(a)).[10]

To determine the appropriate venue, the Fourth Circuit has "commonly focused on the verbs employed in the statute defining the offense." United States v. Blecker, 657 F.2d 629, 632 (4th Cir. 1981). For purposes of Counts One through Seven, the operative verbs in § 793 are "communicate," "transmit," "deliver," and "retain." While venue no doubt lies in any district

[10] The defendant's reliance, Mot. at 5, on the Supreme Court's continuing-offense analysis of the Federal Denture Act in United States v. Johnson, 323 U.S. 273 (1944), is misplaced. In Johnson, the Court held that the Act, which prohibited shipment of dentures made by unlicensed vendors, was not a continuing offense, and that venue was proper only where the unlawful goods were sent, as opposed to where there were received or any intervening districts. Id. at 277-78. Although, the general venue principles espoused in Johnson remain good law, its specific reasoning does not because Congress responded to the decision by passing what is now 18 U.S.C. § 3237(a), the continuing offense statute. See United States v. Morgan, 393 F.3d 192, 199 (D.C. Cir. 2004).

where the charged communication, transmission, delivery, or retention occurred, this conduct does not necessarily occur in a single district.[11] For example, where a defendant communicates national defense information to another individual in a different judicial district by means of sending an email, venue would be proper in the district from which transmission was initiated, in any district through which it was communicated, or in the district in which it ultimately was delivered to the recipient. In addition, an individual who willfully retains national defense material and transports it with him through various districts is susceptible to prosecution in any district through which he passed.[12] As a result, the offenses charged under § 793 are properly construed as continuing offenses because the essential conduct can be "begun, continued, or completed" in multiple venues. Indeed, the Fourth Circuit has reached the same conclusion as to other criminal statutes containing similar verbs. See, e.g., Ebersole, 411 F.3d at 527 (identifying wire fraud, 18 U.S.C. § 1343, which applies to an individual who "transmits or causes to be transmitted by means of wire," as continuing offense); Blecker, 657 F.2d at 632 (holding that

[11] In this respect, the holding in United States v. Truong, 629 F.2d 908 (4th Cir. 1980), that venue was proper in a prosecution under the Espionage Act where "the proscribed act, the act of transmission, took place," id. at 919 n.11, cannot bear the weight of the defendant's argument. Mot. at 15. The fact that venue was proper where the transmission occurred does not mean that the Eastern District of Virginia was the only permissible venue. Indeed, had Krall, the go-between in Truong, delivered the national defense information to the Vietnamese somewhere else in the United States (rather than in Paris), the district in which the "delivery" occurred also would have been a proper venue, lending further support for the conclusion that § 793 offenses involve continuing-offense conduct.

[12] As to Count Three, the Court, in response to a jury question, provided a supplemental instruction on venue for the charge of willful retention. Specifically, the Court instructed that, as to Count Three, the jury "must be satisfied that the government has proven . . . that the willful retention occurred in the Eastern District of Virginia by a preponderance of the evidence." DE 441 at 11 (emphasis added). As such, this supplemental instruction cured any error as to the original venue instruction, at least as to Count Three, a fact the defendant concedes. Mot. at 28 n.9.

violation of the false claims statute, 18 U.S.C. § 287, which applies to anyone who "makes or presents" a false claim to a federal agency, properly treated as "continuing offense" under 18 U.S.C. § 3237(a)); United States v. Barsanti, 943 F.2d 428,434-35 (4th Cir. 1991) (citing Blecker and holding that violation of 18 U.S.C. § 1001, which applies to "mak[ing]" false statements, properly treated as continuing offense).[13] Indeed, where, as here, the statute at issue employs multiple verbs in the disjunctive, courts are more disposed to conclude that the law establishes a continuing offense. See United States v. Salinas, 373 F.3d 161, 167 (1st Cir. 2004) (noting that false claims statute is continuing offense as "a direct result of the statute's disjunctive phrasing").

Notably, the defendant has previously conceded that § 793 charges contemplate conduct in more than one judicial district. In his proposed venue instruction, he requested the following language: "The Government must prove by a preponderance of the evidence that Mr. Sterling was in the Eastern District of Virginia when he disclosed national defense information to Mr. Risen or that Mr. Risen was in the Eastern District of Virginia when he received national defense information from Mr. Sterling." DE 251 at 4 (emphasis added). The defendant did not take the position that § 793 was a single-location offense, requiring proof that all of the relevant conduct—e.g., communication, transmission, delivery—occurred in a single district. Nor could

[13] The defendant cites United States v. Oceanpro Indus., Ltd., 674 F.3d 323 (4th Cir. 2012), for the proposition that § 1001 is not a sufficient analog for § 793. Mot. at 13. The opposite is true. In Oceanpro, the Fourth Circuit reiterated that, because § 1001 requires materiality, venue is proper for a false statement offense in the district where the statement is received by the relevant agency. Id. 329-30. This was true notwithstanding that the statute does not contain a corresponding "receipt" verb—e.g., "submits," "presents," "receives." Id. In other words, even though the statute did not contain a verb reflecting the relevant essential conduct, courts nevertheless have read one into the law. Section 793, by contrast, actually contains the analogous verb, criminalizing not merely "communicat[ion]" or "transmi[ssion]," but also "deliver[y]." As such, the Fourth Circuit's construction of § 1001 as a continuing offense in the absence of the relevant verb lends even greater support to the conclusion that § 793, which does contain the relevant language, is also a continuing offense.

he. Rather, his formulation acknowledged that the "disloc[ing]" and "receiv[ing]" could happen in different places. By way of illustration, if the defendant communicated national defense information during one of the documented phone calls from his landline in the Eastern District of Virginia to Risen's home phone in the District of Maryland, venue would be appropriate in either district. As such, where, as here, the essential conduct of the charged offense clearly implicates criminal acts potentially occurring across district lines, the offense is properly construed as a continuing offense.

A similar analysis applies to Count Nine, which charges the essential conduct of unauthorized conveyance pursuant to 18 U.S.C. § 641. As noted, the jury instructions stated that "convey" "means to transfer or deliver or caused to be transferred or delivered to another." DE 440 at 38. In much the same way that the relevant verbs in § 793 implicate conduct in multiple place, "convey" similarly entails the movement of property from one place to another. Indeed, the evidence at trial bore this out: the government property at issue (national defense information related to Classified Program No. 1) was conveyed to the public through distribution of State of War, copies of which were shipped from New Jersey for sale at Barnes & Noble retail locations in the Eastern District of Virginia. Cf. Engle, 676 F.3d at 417 (holding that "as a factual matter, we conclude that venue is also proper under the first paragraph of § 3237(a), which provides that any offense 'begun in one district and completed in another, or committed in more than one district' may be prosecuted 'in any district in which such offense was begun, continued, or completed.'" (emphasis added)). As a result, the § 641 offense charged in Count Nine, as with the offenses arising under § 793, is a continuing offense. Cf. United States v. Blizzard, 27 F.3d 100, 101 (4th Cir. 1994) (holding that for purposes of § 641 the offense of "concealing and retaining stolen

government property is a continuing offense"); United States v. Redfearn, 906 F.2d 352, 353-54 (8th Cir. 1990) (holding that 20 U.S.C. § 1097(a), which applies to "[a]ny person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property," was a continuing offense).

Moreover, in the continuing-offense context, courts have employed the "act in furtherance" language when articulating the appropriate venue standard. See, e.g., Ebersole, 411 F.3d at 525 (approving instruction that venue for wire fraud was proper "if any act in furtherance of the wire fraud allegations occurred in the Eastern District of Virginia"); id. at 530-32 (approving instruction that venue for false claim charges was proper if "any act in furtherance of the crime . . . occurred within the Eastern District of Virginia"); United States v. Day, 700 F.3d 713, 727 (4th Cir. 2012) (noting that venue for crime of conspiracy is appropriate in judicial district where "defendant committed an overt act in furtherance of the charged conspiracy"); cf. United States v. Rounds, 749 F.3d 326, 335 (5th Cir. 2014) (noting that venue for continuing offense is appropriate based on "evidence showing the commission of any single act that was part of the beginning, continuation, or completion of the crime" occurred in relevant district (internal quotation marks omitted)).

The Fourth Circuit's decision in United States v. Ebersole—which the defendant fails to cite—provides clear guidance. 411 F.3d 517. In Ebersole, the court rejected challenges to this Court's jury instructions on venue for the continuing offenses of wire fraud and false claims, in violation of 18 U.S.C. § 1343 & 287, respectively. Both instructions were worded similarly, and both contained the phrase "act in furtherance." To that end, "the court instructed the jury that venue was proper on the wire fraud counts 'if any act in furtherance of the wire fraud allegations

occurred in the Eastern District of Virginia.'" Id. at 525. Likewise, "[t]he instruction explained that venue was proper on th[e] [false claims] counts if 'any act in furtherance of the crime . . . occurred within the Eastern District of Virginia." Id. at 530. The Fourth Circuit endorsed both instructions and affirmed the defendant's conviction. Id. at 527 ("[W]e reject Ebersole's 'continuing offense' contention [as to the wire fraud charges] and approve the venue instruction given by the court."); id. at 531 (concluding as to false claim venue instruction that "the court's venue instruction correctly stated the law and, thus, did not constitute an abuse of discretion). As a result, Ebersole makes clear that the inclusion of the "act in furtherance"[14] language in the Court's venue instruction is wholly consistent with the principle that the venue "assessment must focus on the 'essential conduct elements' of the charged offense." Id. at 524 (citing Bowens, 224 F.3d at 311).[15] Because there was no error in the Court's instruction, the defendant has failed to establish the he is entitled to a new trial under Rule 33.

Moreover, even if the inclusion of the "act in furtherance" language were erroneous, the defendant still cannot establish that permitting the verdict to stand would be unjust under the exacting Rule 33 standard. As described above, the record contains ample evidence to establish

[14] This language is also consistent with the standard for establishing venue for inchoate offenses, such as the attempt charges in Counts Six and Seven. See United States v. Davis, 689 F.3d 179, 187 (2d Cir. 2012) (noting that venue is appropriate for attempt offense where substantial step in furtherance of crime occurred in relevant district).

[15] To the extent the defendant's complaint is that the Court should have used the phrase "act constituting the offense" instead of "act in furtherance of the offense," at least one court has directly addressed this distinction and found that it is immaterial. See United States v. Svoboda, 347 F.3d 471, 484 (2d Cir. 2003) (holding, in prosecution under the Securities Exchange Act, that as-given venue instruction requiring proof of "an act in furtherance" of the crime was equivalent to applicable statutory venue provision, which provided for venue in any district where "any act or transaction constituting the violation occurred").

venue by a preponderance of the evidence in the Eastern District of Virginia, regardless of the venue formulation. The conduct charged in Counts One, Two, and Nine—communication, transmission, delivery, and conveyance to the general public—indisputably occurred in this district. Moreover, circumstantial evidence—e.g., the defendant's place of residence, his practice of keeping CIA material at his home, and his documented contact with Risen from the district—established that it was more likely than not that the essential conduct at issue in Counts Three through Seven occurred in the Eastern District of Virginia as well. As such, the defendant cannot establish the requisite miscarriage of justice required to overturn the jury's verdict, irrespective of the wording of the challenged venue instruction.

C. The Verdict Was Not Against the Weight of the Evidence

Finally, the defendant claims that the Court should grant him a new trial because the verdict was "against the cumulative weight of that evidence." Mot. at 29. Once again, he misconstrues the appropriate standard, which, under Rule 33, requires that district courts grant new trials "sparingly" and only when the evidence "weighs so heavily against the verdict that it would be unjust to enter judgment." Arrington, 757 F.2d at 1485 (emphasis added). That is not the case here.

As the foregoing has made clear, the defendant's guilt was established by significant documentary evidence and credible witness testimony. The government proved that Chapter 9 of State of War contained national defense information, including a reproduction of the letter to the Iranians. The government also proved that not only did the defendant know all of the accurate details contained in Chapter 9 (and earlier conveyed by Risen to Bill Harlow in the lead up to the attempted publication of a story in the Times), the defendant was the only person with both a clear

motive to divulge national defense information and a preexisting and ongoing relationship with the reporter. This circumstantial evidence proved overwhelmingly that the defendant was a source for Risen and that, as a result, the defendant caused, and attempted, the communication and unauthorized conveyance of national defense information to the public. Likewise, the record amply supported the defendant's conviction for obstruction of justice based on his deletion in 2006 of an email he sent to Risen over three years earlier. The fact that the deletion occurred around the time that the defendant received a target letter and a grand jury subpoena was no coincidence. It was a crime. In short, there has been no miscarriage of justice, an innocent man has not been convicted, and there is no basis under Rule 33, or any rule, to set aside the jury's reasoned verdict in favor of a new trial.

III. Conclusion

For the foregoing reasons, the Court should deny the defendant's motion for judgment of acquittal or, in the alternative, for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2015, I caused an electronic copy of the foregoing to be filed and served via ECF on Edward B. MacMahon, Jr., and Barry J. Pollack, counsel for the defendant.

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