~~CONFIDENTIAL~~//[redacted]

No. 11-5028

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JEFFREY ALEXANDER STERLING,

Defendant-Appellee,

and

JAMES RISEN,

Intervenor-Appellee.

On Appeal From The United States District Court For The Eastern District of Virginia (Brinkema, J.)

REPLY BRIEF FOR THE UNITED STATES (PUBLIC VERSION)

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I. THERE IS NO "REPORTER'S PRIVILEGE" THAT SHIELDS RISEN'S TESTIMONY IN THIS CASE.

There is no "reporter's privilege" that shields the identity of confidential sources in good-faith criminal proceedings. The Supreme Court so held in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and it has "never revisited the question." *In re Grand Jury Subpoena (Judith Miller)*, 438 F.3d 1141, 1147 (D.C. Cir. 2006). "Without doubt, that is the end of the matter." *Ibid.*

Risen and his *amici* simply do not accept that *Branzburg* is the law. Instead, they largely ignore the majority opinion in that case and rely on other sources to construct a constitutional or common law privilege. Their arguments are not persuasive and should be rejected.

A. This Court Has Jurisdiction Over The Government's Appeal.

Risen claims that the district court deferred deciding whether he must identify his source until the middle of trial, and thus the government's appeal is premature. That argument is factually and legally incorrect.

1. The district court held that Risen is protected by a constitutional "reporter's privilege" and cannot be questioned concerning the identity of his source, and it quashed the government's trial subpoena insofar as it sought that information. JA 717-718, 730-752. The government asked the court to

reconsider this decision, but it refused. JA 957 ("I'm not going to reconsider the legal findings that I made in my original opinion; that is, I'm still holding to the proposition that there is clearly a qualified newsman's privilege that protects Mr. Risen from having to testify to most of what the government wants him to testify to."); *id.* at 958 ("the factors which the government notes in its memorandum for reconsideration in my view do not change the *LaRouche* balancing" as to whether Risen must identify his source); *see also* JCA 146 (court will instruct jury "that I've ruled based on the law that Mr. Risen has a qualified reporter's privilege and that he cannot be compelled to disclose his source").

The court did agree to clarify whether Risen could be questioned on peripheral matters that did not require him to reveal his source, such as authenticating his book proposal or stating when he received classified information. JA 797-803. The court allowed questioning on some of these matters, but it rejected others because they were "too close to revealing the source." *Id.* at 978.

In light of the many restrictions placed on Risen's testimony, the district court agreed to allow the parties to *voir dire* Risen outside the presence of the jury during the second week of trial, before he was scheduled to testify. JA 984-986. The purpose of this *voir dire* was to screen the questions so that if "the government

asks an improper question, we can let them know they can't ask that in front of the jury." *Id.* at 986. The purpose was not to "redo the balancing of interests required under *LaRouche*," as Risen claims (Br. 27).

Nor did the district court ever state that it intended to reconsider its decision that Risen is protected by a "reporter's privilege" and cannot be questioned concerning the identity of his source. While the court acknowledged the "possibility that the defense case would change the balancing test," JA 987, it never suggested that this was realistic or likely. The court also withheld ruling on one discrete evidentiary issue that might be affected by the proof at trial (*i.e.*, whether Risen could be asked whether he was in the Eastern District of Virginia when he received classified information, which is relevant to establishing venue), but this had nothing to do with identifying Risen's source. *Id.* at 988-989.

2. The government may appeal any decision "suppressing or excluding evidence" in a criminal case before "the defendant has been put in jeopardy," an allowance that must be "liberally construed." 18 U.S.C. § 3731. Section 3731 is intended "'to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.'" *United States v. Siegel*, 536 F.3d 306, 315 (4th Cir. 2008) (quoting *United States v. Wilson*, 420 U.S. 332, 337 (1975)); *United States v. Flemmi*, 225 F.3d 78, 84 (1st Cir. 2000) ("[T]he language

of section 3731 makes pellucid Congress's desire that, as opposed to other jurisdiction-conferring statutes, this statute should be construed liberally.").

Courts have repeatedly held that Section 3731 permits the government to appeal rulings that have the practical effect of excluding evidence prior to trial, even though the district court might reconsider those rulings during trial. In *Siegel*, for example, this Court held that a pretrial decision to exclude evidence was appealable even though the district court "repeatedly indicated that its rulings were preliminary and could change as the trial progressed." 536 F.3d at 314. "To conclude otherwise would insulate the district court's ruling from appellate review" because the government cannot appeal once the jury is sworn and jeopardy attaches, "thus frustrating rather than furthering the purposes of § 3731." *Id.* at 315 (citing cases). *See also United States v. Janati*, 374 F.3d 263, 270 (4th Cir. 2004) (government may appeal a "preliminary, but not necessarily final, ruling" excluding evidence prior to trial, "because the government may not appeal after jeopardy has attached"); *In re Grand Jury Subpoena (Kent)*, 646 F.2d 963, 967-968 (5th Cir. 1981) (same); *United States v. Presser*, 844 F.2d 1275, 1280 n.6 (6th Cir. 1988) ("[a] district court cannot abort the government's right to an appeal simply by declining to rule on a matter" until trial).

The only issue the district court expressly reserved for trial concerned whether the government could ask Risen a specific question about his location when he received classified information. This does not affect the appealability of the court's rulings concerning the existence of the privilege and the government's inability to ask Risen to name his source. *See Flemmi*, 225 F.3d at 83-84 (pretrial rulings appealable even when "some aspects of the pending motions remain to be decided"). As for whether "something raised by the defense" might cause the district court to revisit its rulings (Risen Br. 28), that is irrelevant: Section 3731 permits the government to appeal pretrial rulings affecting its ability to use evidence "in opening statements" or "during its case-in-chief"; "jeopardy would have long since attached" by the time the defense puts on its case. *Siegel*, 536 F.3d at 315. Risen is effectively asking this Court to defer appellate review until it is too late for the government to appeal at all. That result is inconsistent with Section 3731.[1]

[1] The cases Risen cites are inapposite, for the simple reason that they did not involve pretrial rulings on the admissibility of evidence. *See United States v. Watson*, 386 F.3d 304, 311 (1st Cir. 2004) (court denied continuance); *United States v. Camisa*, 969 F.2d 1428, 1429-1430 (2d Cir. 1992) (court denied motion to disqualify defense counsel); *United States v. Stipe*, 653 F.2d 446, 448, 450 (10th Cir. 1981) (court ordered particular sequence of proof for government's case); *United States v. Kane*, 646 F.2d 4, 8 (1st Cir. 1981) (court issued discovery ruling "which may be enforced by any of a variety of sanctions, only one of which is exclusion of evidence").

B. There Is No First Amendment "Reporter's Privilege" Applicable To Criminal Prosecutions Brought In Good Faith.

1. Risen contends that *Branzburg* is merely a plurality opinion and that Justice Powell's brief concurring opinion recognizes a constitutional "reporter's privilege" that the opinion of the Court does not. This argument has been rejected by several courts of appeals. *See* Gov't Br. 26 n.10; *Judith Miller*, 438 F.3d at 1148 ("Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants."). Justice Powell joined the *Branzburg* majority in full and did not reject any of its reasoning, and the Court has consistently reaffirmed that *Branzburg* rejects a First Amendment "reporter's privilege" to refuse to disclose confidential sources in good-faith criminal proceedings. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *Univ. of Penn. v. EEOC*, 493 U.S. 182, 201 (1990).

In any event, Justice Powell's concurrence does not support the privilege Risen asserts. Justice Powell rejected Justice Stewart's dissent (which would have recognized a privilege to protect confidential sources) and refused to accept "the constitutional preconditions * * * that [the] dissenting opinion would impose as

heavy burdens of proof to be carried by the State," including requiring the government to prove relevance, necessity, and a compelling interest in a reporter's testimony—the same preconditions the district court imposed in this case. *Branzburg*, 408 U.S. at 710 n.*; *id.* at 743 (Stewart, J., dissenting).

Instead, Justice Powell emphasized the majority's view that "no harassment of newsmen will be tolerated," and explained that if an proceeding "is not being conducted in good faith"—if, for example, the government seeks "information bearing only a remote and tenuous relationship to the subject of the investigation, or if [a reporter] has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement"—a court may strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct" by issuing a protective order. *Branzburg*, 408 U.S. at 709-710; *accord id.* at 707-708 (majority opinion).

Nowhere did Justice Powell suggest that a promise of confidentiality alone is sufficient to trigger a "reporter's privilege." Nor did Justice Powell recognize special protections for reporters upon which other citizens could not rely, as he later confirmed. *See Saxbe v. Washington Post Co.*, 417 U.S. 843, 857 (1974) (Powell, J., dissenting) ("neither any news organization nor reporters as

individuals have constitutional rights superior to those enjoyed by ordinary citizens"); *Zurcher v. Stanford Daily*, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring) (*Branzburg* concurrence "expressed no doubt as to the applicability of the subpoena procedure to members of the press," and "noted only that in considering a motion to quash a subpoena directed to a newsman"—which is available in cases involving bad faith—a court "should balance the competing values of a free press and the societal interest in detecting and prosecuting crime");[2] *cf. Reporters Comm. for Freedom of the Press v. AT&T*, 593 F.2d 1030, 1061 n.107 (D.C. Cir. 1978) ("Although Justice Powell refers to case-by-case 'balancing,' it is clear he is actually referring to the availability of judicial case-by-case screening out of bad faith 'improper and prejudicial' interrogation.").[3]

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[2] Risen quotes Justice Powell's further statement in *Saxbe* that *Branzburg* "hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated," 417 U.S. at 859-860, but that simply restates *Branzburg*'s holding: absent bad faith, the public's interest in law enforcement overcomes a reporter's First Amendment interest in concealing his source. Indeed, the *Branzburg* majority explicitly observed that "news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted *other* than in good faith, would pose wholly different issues for resolution under the First Amendment." 408 U.S. at 707 (emphasis added). Justice Powell's concurrence is fully consistent with that principle.

[3] Risen's citation to cases involving prior restraints on speech (Br. 35 n.6) is inapt. The government has never questioned Risen's right to publish what he likes. The only question here is whether, having personally witnessed a crime,

2. Risen's claim (Br. 36) that this Court has "unequivocally held" that Justice Powell's concurrence "is the controlling decision in *Branzburg*," is incorrect. The only criminal case he cites, *In re Shain*, 978 F.2d 850 (4th Cir. 1992), quotes extensively from the *Branzburg* majority and notes that "Justice Powell, *who joined in the Court's opinion*, wrote a separate concurring opinion to emphasize *the Court's* admonishment against official harassment of the press." *Id.* at 852-853 (emphases added). "Justice Powell concluded that *when evidence is presented to question the good faith* of a request for information from the press, a 'proper balance' must be struck 'between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.'" *Id.* at 853 (emphasis added); *ibid.* ("only when evidence of harassment is presented do we balance the interests involved"). Far from driving a wedge between the *Branzburg* majority and concurrence, *Shain* recognizes that both opinions reject a "reporter's privilege" in good-faith criminal proceedings like this one.

The other opinions Risen cites—*LaRouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986), *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000), and *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976) (Winter, J., dissenting),

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Risen should be exempt from the ordinary obligation of citizens to testify in response to a valid subpoena. *See Branzburg*, 408 U.S. at 680-682 (noting distinction between prior restraint and reporter's privilege).

adopted en banc, 561 F.2d 539 (1977)—are civil cases that merely cite Justice Powell's concurrence for the general proposition that balancing may be appropriate in some contexts. They do not address criminal cases, nor do they suggest any disagreement between Justice Powell's opinion and the majority. Indeed, *Ashcraft* confirms that, under *Branzburg*, a "reporter, like [an] ordinary citizen, must respond to grand jury subpoenas and answer questions related to criminal conduct he personally observed and wrote about, regardless of any promises of confidentiality he gave to [the] subjects of stories." 218 F.3d at 287.

3. There is ample authority for the proposition that a promise of confidentiality is not a sufficient reason to invoke a "reporter's privilege" in criminal cases. Gov't Br. 29-33 (citing cases). Risen and his *amici* make no effort to respond to this authority. Instead, they argue that even if there is no "reporter's privilege" in grand jury proceedings, there should be one in criminal trials. There is no principled reason for such a distinction.

"[T]he *Branzburg* Court gave no indication that it meant to limit its holding to grand jury subpoenas." *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998). In fact, *Branzburg* repeatedly stated that its holding would apply equally to criminal trials. *See* 408 U.S. at 690-691 ("reporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury

proceeding or criminal trial"); *id.* at 691 (reporters are not "immune, on First Amendment grounds, from testifying against [their sources] before the grand jury or at a criminal trial"). This comports with the rule that claims of privilege in criminal cases are subject to the same strict limits whether they "shield information from a grand jury proceeding or a criminal trial," *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 384 (2004), and that the public's interest in accurately investigating and prosecuting crime applies with at least as much force in criminal trials as it does before grand juries. *See* Gov't Br. 34 (quoting *Rakas v. Illinois*, 439 U.S. 128, 137 (1978)); *Smith*, 135 F.3d at 971 ("Surely the public has as great an interest in convicting its criminals as it does in indicting them."). Indeed, the government's interest in a reporter's testimony is arguably stronger at trial because the government's burden of proof is higher and the stakes (loss of liberty or even life) are greater. *See* JA 557-558. Nor does Risen cite any other evidentiary privilege that would apply before grand juries but not at trial.

Risen and his *amici* dutifully cite the cases in which courts have applied a "reporter's privilege" in the criminal context, but none is persuasive. Most of these cases concern requests by defendants for reporters' statements, notes, or outtakes in an effort to impeach other witnesses, which bears little relation to the facts and interests at issue in *Branzburg* and this case. They also adopt civil

privilege standards with little or no discussion of *Branzburg*, and sometimes with no reasoning at all. *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-1182 (1st Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139, 146-147 (3d Cir. 1980); *United States v. Pretzinger*, 542 F.2d 517, 520-521 (9th Cir. 1976). Many trace their roots to *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), an early case in which the Ninth Circuit simply asserted that the then-recent decision in *Branzburg* recognized a "limited or conditional" privilege in criminal cases, without citing any language from *Branzburg* to support that conclusion. *Id.* at 467-468.[4]

Other decisions are even less helpful to Risen's cause. In *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), for example, the court surveyed many of the decisions on which Risen relies and concluded that they are "skating on thin ice" because they "essentially ignore *Branzburg*" or "audaciously declare that *Branzburg* actually created a reporter's privilege," when in fact it did not. *Id.* at 532-533. In *Smith*, the Fifth Circuit observed that "a privilege against disclosing

[4] *Farr* further held that any such privilege "must yield" to the public interest in knowing the identity of individuals who violated a court order. 522 F.2d at 468. The same result should be true of Risen, the only eyewitness to a serious federal crime.

confidential source information [was] rejected in *Branzburg*," and it similarly rejected a privilege for non-confidential information because, "[s]hort of * * * harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen." 135 F.3d at 969, 971.[5] And in *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993), the Second Circuit noted that its decision in *Burke* was arguably inconsistent with *Branzburg*, and it limited *Burke* to its facts. *Id.* at 71-73. *Cutler* concluded that courts "must certainly follow *Branzburg*" in criminal trials where (as here) reporters "observed and wrote about" a defendant's criminal conduct. *Id.* at 73-74.[6]

Branzburg's holding is clear: when a reporter "undert[akes] not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question." 408 U.S. at 692. Risen and his *amici* disagree with the wisdom of this ruling, but it is the law.

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[5] Risen and his *amici* quote a sentence from *Smith* stating that confidentiality "is critical to the establishment of a privilege," but in context it is clear that the court was referring to the general rule for privileges in *civil* cases, "while we have before us a criminal prosecution." *Smith*, 135 F.3d at 972.

[6] As for *United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000), that decision summarily affirmed a district court ruling that the defendant "failed to carry his burden" when faced with a claim of reporter's privilege. *Id.* at 37. The court of appeals never reached the question of whether such a privilege existed. *See United States v. Libby*, 432 F. Supp. 2d 26, 45-46 (D.D.C. 2006).

C. There Is No Common Law "Reporter's Privilege."

Risen argues that, even if he has no First Amendment privilege, this Court should create a common law privilege. The district court rejected this argument, JA 732 n.3, and with good reason.

Branzburg refused to recognize a federal common law "reporter's privilege" in the grand jury context, which applies equally to criminal trials. *See* 408 U.S. at 685 ("At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury."); *id.* at 698 ("the common law recognized no such privilege"). *See also In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004) (*Branzburg* "flatly reject[s]" common law privilege); *In re Grand Jury Proceedings (Storer Commc'ns, Inc.)*, 810 F.2d 580, 584 (6th Cir. 1987) (same); *Lewis v. United States*, 517 F.2d 236, 238 (9th Cir. 1975) (same); *Judith Miller*, 438 F.3d at 1154 (Sentelle, J., concurring) (*Branzburg* is "as dispositive of the question of common law privilege as it is of a First Amendment privilege").[7]

[7] Every judge in *Judith Miller* concluded that neither a constitutional nor common law privilege shielded the reporters in that case. Judge Henderson found it unnecessary to decide whether a common law privilege exists because it would be overcome regardless. *See Judith Miller*, 438 F.3d at 1159 (Henderson, J., concurring). Judge Tatel would have recognized a qualified common law privilege but agreed that it was overcome. *Id.* at 1182 (Tatel, J., concurring).

Risen simply ignores *Branzburg* and instead argues that a common law privilege finds support in a footnote from the dissent in *Steelhammer* and in *Jaffee v. Redmond*, 518 U.S. 1 (1996), which recognized a testimonial privilege for psychotherapists. These arguments are unpersuasive. The *Steelhammer* footnote merely states, in dictum, that reporters "should be afforded a common law privilege not to testify in civil litigation between private parties." 539 F.2d at 377 n.*. Judge Winter found it unnecessary to "develop[ ] this point," however, because the reporters at issue were properly held in contempt. *Ibid.* An en banc majority agreed that the reporters "could properly be held in contempt * * * for the reason sufficiently stated in Judge Winter's dissenting panel opinion"; it did not adopt, or even mention, the dictum concerning a civil common law privilege, nor did it say anything about criminal cases. *Steelhammer*, 561 F.3d at 540.

As for *Jaffee*, that decision recognizes that testimonial privileges in criminal cases "are distinctly exceptional" and should be recognized only when necessary to serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." 518 U.S. at 9 (quotation marks omitted). The fact that the Court found in *Jaffee* that a psychotherapist-patient privilege met this stringent standard in no way undermines its conclusion in *Branzburg* that a "reporter's privilege" does not.

First, unlike the psychotherapist-patient privilege, a reporter's privilege was not among the nine privileges originally proposed for inclusion in Federal Rule of Evidence 501. *See* Proposed Rules, 56 F.R.D. 183, 230-258 (1973). This alone counsels against recognizing such a privilege under the common law. *Jaffee*, 518 U.S. at 14-15 (citing *United States v. Gillock*, 445 U.S. 360, 367-368 (1980)).[8]

Second, although Risen and his *amici* eloquently explain the public interest in a free press, they fail to demonstrate why that interest requires a privilege exempting reporters from the usual obligation of citizens to testify in criminal cases. As *Branzburg* explains, the lack of a "reporter's privilege" in no way calls into "question the significance of free speech, press, or assembly to the country's welfare," amounts to a "prior restraint," restricts "[t]he use of confidential sources," or requires reporters to "indiscriminately * * * disclose [their sources] upon request." 408 U.S. at 681-682. The reporters in *Branzburg*, like Risen and his *amici*, argued strenuously that "the flow of news will be diminished" in the absence of a privilege, but the Court rejected this argument as inconsistent with history and common sense. *Id.* at 693-695 & n.32, 698-699.

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[8] Although Rule 501 postdates *Branzburg*, it "left the law of privileges in its present state" and merely "provided that privileges shall continue to be developed by the courts." Fed. R. Evid. 501, note (1974). Rule 501 does not purport to undercut *Branzburg*'s rejection of a common law "reporter's privilege," which remains sound in any event. *See infra*.

That remains true today. There is no evidence that the possibility of a government subpoena seeking confidential source information—which is exceedingly rare—has chilled confidential source relationships or requires a testimonial privilege. *See* Randall D. Eliason, *The Problems With the Reporter's Privilege*, 57 Am. Univ. L. Rev. 1341, 1347, 1354-1359 (2008). Indeed, as Risen's *amici* demonstrate, confidential sources have continued to provide information to the press, and reporters have continued to keep promises of confidentiality within the bounds of the law, despite the fact that the Supreme Court and Congress have refused to recognize a "reporter's privilege." *See* ABC *et al.* Br. 23-27; Eliason, *supra*, at 1355 & n.57, 1357-1358 ("[t]he irony is that all of these stories were reported in the absence of a federal shield law"). "From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished." *Branzburg*, 408 U.S. at 698-699. There is simply no reason to believe that this will change unless this Court recognizes a common law "reporter's privilege" in criminal cases.

But even if some confidential informants would be deterred from speaking to the press in the absence of a "reporter's privilege," neither Risen nor his *amici* explain why this possibility overcomes the strong public interest in accurately investigating and prosecuting crime. *Branzburg*, 408 U.S. at 690-691. That public

interest is particularly strong—and a reporter's interest in concealing his source is particularly weak—when government officials commit crimes by leaking national defense information for personal gain or to discredit their adversaries, which is precisely what the grand jury alleges happened here. *Id.* at 696 ("agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy"); *Judith Miller*, 438 F.3d at 1183 (Tatel, J., concurring) ("While requiring [a reporter] to testify may discourage future leaks, discouraging leaks of this kind is precisely what the public interest requires."); Eliason, *supra* at 1361-1365 (same).

Third, a "reporter's privilege" would create "practical and conceptual difficulties of a high order." *Branzburg*, 408 U.S. at 704. "[L]iberty of the press is the right of the lonely pamphleteer * * * as much as of the large metropolitan publisher," and thus it is no easy task to determine who should benefit from the privilege. *Id.* at 704. *Branzburg*, for example, foresaw no way to create a privilege for "representatives of the organized press" that would not also apply to "lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.* at 704 & n.40 ("By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content."). These concerns are all the more pertinent today, when anyone with a blog,

Twitter account, or Facebook page may disseminate news. *See Judith Miller*, 438 F.3d at 1156-1157 (Sentelle, J., concurring); Eliason, *supra*, at 1366-1370. If Risen may shield the source of information he wrote about in a book (which a newspaper refused to publish), it is difficult to see how any writer in any medium could not also lay claim to the privilege.

Finally, there is no national consensus on the application of a "reporter's privilege" in cases of this sort. Risen contends that "49 states" recognize a reporter's privilege (Br. 54-55), but he lumps in several states that only recognize a privilege in civil cases as well as lower court decisions that do not definitively establish state law.[9] State laws also vary widely in identifying who is covered by a privilege and in what circumstances it can be invoked. *See, e.g.*, *Judith Miller*, 438 F.3d at 1157-1158 (Sentelle, J., concurring).

Congress, for its part, has rejected attempts to create a federal "reporter's privilege" amid concerns that it would be used in cases like this one, involving the illegal disclosure of national defense information (a concern that would almost never arise in the states). *See* Cong. Research Service, *Journalists' Privilege: Overview of the Law and Legislation in Recent Congresses* 4-12 (Jan. 19, 2011); W.

[9] For example, in support of his claim that Mississippi recognizes a "reporter's privilege," Risen cites a one-page order issued by a county circuit court in a civil case from 1983. *See* Risen Br., addendum.

Cory Reiss, *Crime That Plays: Shaping a Reporter's Shield to Cover National Security in an Insecure World*, 44 Wake Forest L. Rev. 641, 642-643 & nn.10-11 (2009). Courts are usually reluctant to achieve judicially what Congress has "deliberately refused to recommend and * * * to legislate into the law." *United States v. S. Buffalo Ry. Co.*, 333 U.S. 771, 779 (1948). The fact that Congress rejected a statutory privilege counsels against recognizing a common law one.[10]

D. Even If A Constitutional Or Common Law Privilege Did Apply In This Case, The Balance Of Interests Clearly Favors The Government.

1. Risen is the only person who knows the identity of the individual who illegally gave him information about Classified Program No. 1, and his receipt of that information is an indispensable component of the offenses charged in the indictment. Gov't Br. 38-41. There is simply no question that Risen's direct testimony—which will identify the perpetrator beyond any doubt—is superior to a mosaic of circumstantial evidence that requires the jury to draw

[10] Risen also cites the Department of Justice's policy on issuing subpoenas to members of the media as supporting a common law privilege. *See* 28 C.F.R. § 50.10 (f)(1). This policy does not "create or recognize any legally enforceable right in any person." *Id.* § 50.10(n); *Shain*, 978 F.2d at 853; *Judith Miller*, 438 F.3d at 1152-1153 (citing cases). Moreover, as *Branzburg* explains, the existence of DOJ's guidelines counsels *against* recognizing a privilege because it provides reporters with added protection against harassment or improper requests for information. *See* 408 U.S. at 706-707.

inferences about the source's identity. This is particularly true given Sterling's stated intention to claim that a variety of people with knowledge of Classified Program No. 1 could have been Risen's source. *Id.* at 40-41, 44. There is no physical evidence that directly identifies the perpetrator; Risen did not explicitly name his source to any other witness; and even if he had, there is no reason the jury would necessarily give such hearsay the same weight as Risen's direct testimony. *Id.* at 9-12, 41-43.

Risen does not respond to these facts on their merits. Instead, he simply denies them and argues (Br. 62-63) that the government "provided neither the district court nor counsel for the defendant or Mr. Risen with any evidence—through declaration or otherwise—demonstrating the need for Mr. Risen's testimony," and instead "made a strategic decision" to rely solely on the allegations of the indictment. That is incorrect.

The government issued three subpoenas to Risen in this case: two seeking testimony before the grand jury, and one seeking testimony at trial. Gov't Br. 17-23. In response to Risen's motions to quash the grand jury subpoenas, the government submitted a 74-page declaration (the "Bruce Declaration") describing in detail the circumstantial evidence against Sterling and the many ways in which it was not an adequate substitute for Risen's testimony. GXCA 1-75. The

government provided Risen with an unclassified version of the declaration. JSA 103 (confirming this fact).[11] The district court relied heavily on this declaration in its findings of fact concerning the grand jury subpoenas. JA 524-535.

In response to Risen's motion to quash the trial subpoenas, the government again provided Risen with an unclassified version of the Bruce Declaration. JSA 1-74; JA 807 n.5 (confirming that declaration was provided to Risen's counsel on June 29, 2011). The government also submitted the indictment, which was the only new development since the court's rulings on the grand jury subpoenas. The district court expressly adopted its factual findings from the grand jury proceedings—again, based largely on the Bruce Declaration—as the basis for its order quashing the trial subpoena. JA 722 n.1.

Nonetheless, at the end of its opinion, the district court faulted the government for not providing "a summary of its trial evidence" identifying the "holes that could only be filled with Risen's testimony." JA 748. The government filed a motion for reconsideration in which it confirmed that the Bruce Declaration provided "an accurate and fair summary of the anticipated trial evidence in this case." *Id.* at 807 & n.5. The government also explained again

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[11] The declaration was redacted because Risen and his attorneys are not cleared to receive classified information. The district court was provided with the full, unredacted declaration. JA 807 n.5.

the ways in which circumstantial evidence was not an adequate substitute for Risen's direct testimony, and reconfirmed that there was no other direct evidence in the case. *Id.* at 807-809, 853-858. Far from rejecting this proffer, the district court stated that it had "considered with care" the arguments in the motion for reconsideration and simply concluded that the balance had not "shifted [so] dramatically" to warrant a different result. *Id.* at 957.

Risen apparently believes that because the government did not formally move to reintroduce the record of the grand jury subpoenas in opposing his motion to quash the trial subpoena, that record disappeared and had to be purged from the minds of all involved. He cites no authority for such a rule, nor are we aware of any.[12] In any event, the government provided the Bruce Declaration and other information to the district court and Risen in the proceedings on the grand jury and trial subpoenas; the court adopted the factual findings concerning the grand jury subpoenas in its opinion quashing the trial subpoena; and the court confirmed that it had considered the government's proof on reconsideration. To the extent Risen claims otherwise, he is wrong.

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[12] Indeed, Risen argued below that the grand jury proceedings definitively resolved factual and legal issues related to the trial subpoena, JSA 144-145, so it is strange for him now to claim that the grand jury record had to be ignored.

2. Contrary to Risen's claim (Br. 70-75), the "newsworthiness" of the information has no bearing on whether he should be required to disclose his source. The district court rejected this argument because it "would have the Court serve as editor-in-chief, unilaterally determining whether reporting is sufficiently accurate or newsworthy as to be deserving of First Amendment protection. Neither the Fourth Circuit nor any other court has ever recognized such factors as pertinent to the reporter's privilege." JA 737. This conclusion is firmly rooted in *Branzburg*, which explicitly cautioned courts not to become "involved in distinguishing between the value of enforcing different criminal laws." 408 U.S. at 705-706. Even if all of Risen's conclusions in *State of War* were accurate (which is not what the grand jury found, *see* Gov't Br. 13), it would not change the fact that Congress has criminalized disclosures of this sort. The "newsworthiness" of the information is irrelevant to whether Sterling committed a crime, and it is irrelevant to whether Risen, like any other citizen, must testify concerning his knowledge of that crime.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY STRIKING WITNESSES.

In determining whether to impose a sanction for a discovery violation, a district court "'*must* weigh the reasons for the government's delay and whether it acted intentionally or in bad faith; the degree of prejudice, if any, suffered by the defendant; and whether any less severe sanction will remedy the prejudice and the wrongdoing of the government,'" and it "*must* impose the least severe sanction" that will remedy the violation. *United States v. Hammoud*, 381 F.3d 316, 336 (4th Cir. 2004) (en banc) (quoting *United States v. Hastings*, 126 F.3d 310, 317 (4th Cir. 1997)) (emphasis added). The suppression of evidence is a sanction of last resort; absent bad faith, "[a] continuance is the preferred sanction." *Ibid.*; *United States v. White*, 846 F.2d 678, 692 (11th Cir. 1988) ("suppressing the evidence, rather than granting a continuance, works against" the purposes of discovery); Gov't Br. 54-55, 61-62 (citing cases).

Sterling does not dispute that (a) he agreed to receive *Giglio* disclosures up to five days before trial; (b) the government's final disclosure in this case was only 12 hours beyond that deadline, which the government explained was unintentional and due to the need to ensure compliance with laws governing the disclosure of classified information; and (c) the district court found no bad faith.

See JCA 578-580. Sterling also does not dispute that the district court did not consider granting a continuance or some other lesser sanction before striking two of the government's witnesses and effectively terminating the prosecution. Instead, Sterling argues that consideration of lesser sanctions is optional and, in any event, the district court would have been justified in denying a continuance (if it had considered one) based on his assertions of prejudice. He is wrong.

A. The District Court Was Required To Consider Less Severe Sanctions, Including Granting A Continuance.

A district court does not have discretion to suppress evidence as a sanction for late disclosure without considering any lesser sanction such as a continuance, particularly in a case (like this one) where the defendant's assertions of prejudice are strictly temporal. This rule is clear from *Hammoud* and the other cases cited in the government's brief, and from the cases on which Sterling relies. *See, e.g.*, *United States v. Wicker*, 848 F.2d 1059, 1060-1062 (10th Cir. 1988) (district court must impose "the 'least severe sanction'" that will remedy a violation, and because "[a] continuance may normally be the most desirable remedy for the government's failure to comply with a discovery order," a court should consider "the feasibility of curing the prejudice with a continuance" in selecting the least severe sanction). Courts may, of course, consider other factors relevant to particular cases, *id.* at 1061, but this does not permit district courts to impose

more severe sanctions than necessary.

Sterling cites dictum from *Wicker* stating that "[o]n occasion the 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." 848 F.2d at 1061. *Wicker* recognizes, however, that this is rare, and the only case it cites in which such an order was issued involved a much different violation than that here. *See United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979) (government disclosed defendant's prior statements the day before trial, two-and-a-half years after discovery deadline; although defendant was not prejudiced and continuance was not necessary, magnitude of violation warranted suppression "for prophylactic purposes").

The other cases Sterling cites are likewise distinguishable, not least because the courts expressly considered granting continuances. *See Wicker*, 848 F.2d at 1061-1062 (district court suppressed expert whose report was submitted several weeks after discovery deadline because jury had already been selected, defense was unable to find rebuttal expert, and continuance would conflict with other trials and prejudice other defendants); *United States v. Adams*, 271 F.3d 1236, 1243-1244 (10th Cir. 2001) (same; court of appeals determined that continuance would have ""significantly delay[ed] the trial" because government needed four

months to conduct psychological examination of defendant under Fed. R. Crim. P. 12.2(c)); *United States v. Davis*, 244 F.3d 666, 670-673 (8th Cir. 2001) (court suppressed DNA evidence based on government's "reckless misconduct" in disclosing "highly technical" evidence to defense on eve of trial, over a month after deadline, and rejected continuance because it would conflict with trials in other cases).[13]

That these decisions found no abuse of discretion on their facts does not support the district court's decision in this case, which concerned the disclosure of impeachment information 12 hours after the deadline, no compelling prejudice, and no consideration of a continuance or any other lesser sanction. If Sterling were correct, and the mere fact of a violation of a discovery order is enough to warrant suppression for "integrity" purposes without having to consider a less severe sanction, there would be little point to appellate review of such orders. That is not the law.

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[13] Chief Judge Wollman dissented in *Davis*, finding that even in the extraordinary circumstances of that case the district court should have granted a continuance rather than suppressing evidence. *See* 244 F.3d at 674 ("[t]he exclusion of critical evidence is a sanction that should be imposed only if the government has been guilty of flagrant misconduct resulting in substantial prejudice to the defendant").

B. Sterling's Claims Are Factually Incorrect.

Sterling makes three principal claims in defense of the district court's order: (1) that the government was dilatory in reviewing the witnesses' security files; (2) that he needed an unusually long time to make effective use of the information at trial; and (3) that the information strongly impeached the two witnesses at issue [redacted]. None of this establishes that striking the witnesses was necessary or that a continuance would not have been an appropriate sanction. But more fundamentally, Sterling's claims are untrue.

1. Sterling chastises the government for not making its final disclosure of alleged *Giglio* information sooner and suggests that the government was negligent in not reviewing the witnesses' security files at the outset of discovery. This argument is meritless. As Sterling is well aware, the government identified, reviewed, and produced a significant amount of classified and unclassified material on a rolling basis between January and October 2011. Gov't Br. 48. Many of these documents (including cables, interview notes, prior statements, e-mails, and telephone records) were potential sources of *Brady* or *Giglio* material, which the government produced well in advance of the discovery deadline. *See, e.g.*, JCA 83, 151-152, 221-224 (discussing production of documents).

The government attempted to prioritize sources based on the likelihood that they would contain discoverable information directly relevant to Classified Program No. 1 and the investigation of the leak, or would be responsive to specific defense discovery demands; the witness security files were neither. Indeed, with Sterling's consent, the discovery order itself imposed earlier deadlines for non-impeachment information. JA 56-61. Sterling's insinuation that the government was somehow ignoring its discovery obligations and saving everything for the last minute is simply false.[14]

In any event, Sterling's criticism of the government's discovery priorities, made entirely in hindsight, is beside the point. The district court found no evidence of bad faith in the government's disclosure, and there is simply no reason why Sterling's receipt of this information several days before trial merits the severest sanction of evidence suppression.

2. Sterling claims that the disclosures concerning [redacted] and [redacted] required an inordinate amount of time to investigate because counsel needed to track down rebuttal witnesses and go through complicated

[14] Indeed, at the request of *both* parties, the district court had earlier continued the trial date by one month "due to the complex pretrial discovery issues" in the case. JA 663-664.

CIPA procedures before using the information.[15] That is not true, but even if it were, it would simply underscore the propriety of granting a continuance.

Sterling's reliance on CIPA is a red herring. Early in this case, defense counsel was explicitly told that they did *not* need to rely on CIPA or seek any special permission to interview witnesses. *See* JCA 684-686, 694-697, 699. While it is true that discussions of classified information would have to be conducted in a SCIF, that merely affects the choice of room—and defense counsel has always had access to a SCIF, including outside of normal business hours. *Id.* at 684, 686, 700-701. Sterling knows how to contact [redacted] and [redacted], and the government repeatedly offered to help him contact the individuals [redacted] who questioned [redacted]. *See* JCA 579-580, 591-592.

Even if Sterling was unable to interview these witnesses on his own (if they refused to speak with him, for example), he could simply have subpoenaed them

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[15] Sterling devotes a considerable portion of his brief to arguing that other information disclosed in the government's *Giglio* letters (*i.e.*, that three other witnesses [redacted] at some point in their careers, *see* Gov't Br. 49) may be useful as rebuttal evidence at trial. Even if this were a proper use of *Giglio* information, it is irrelevant: Sterling has not argued that he needs to further investigate these disclosures, he has not alleged a discovery violation with respect to these witnesses, they have not been struck, and they are not subjects of this appeal.

and questioned them about the alleged *Giglio* information in a *voir dire* outside the presence of the jury. Sterling would have had ample time to do this: the court scheduled trial for only four days a week and explicitly built extra time into the schedule to handle unanticipated interruptions. JCA 231. Sterling could also have recalled [redacted] and [redacted] during his case and conducted a *voir dire* then. *Id.* at 579-580. With the possible exception of a routine request to close the hearing, nothing about this process would have required resort to CIPA.

If Sterling decided to use any classified information to impeach [redacted] or [redacted] at trial, he would have to provide notice pursuant to CIPA § 5. This is not an onerous requirement. *See ibid.* (defendant need only provide "a brief description of the classified information" at issue). And while the government might object to the admissibility of some of the information at issue, there would be no need for a lengthy CIPA procedure to resolve those objections. For example, the government's objections regarding the [redacted] information concern relevance and prejudice, not the fact the information is classified. As for the allegation that [redacted], the government may object to questions that could improperly elicit other classified information, but those objections would be resolved using the streamlined trial procedure of CIPA § 8(c), which is essentially the same

procedure used to resolve any other trial objection.

Nor is there any merit to Sterling's suggestion that the trial would have been unreasonably delayed by his need to further "investigate" the disclosures. As explained (JCA 572-574, 588-589), the investigation Sterling wished to conduct principally involved locating and subpoenaing [redacted], [redacted], and [redacted] in the hope that they would provide opinion testimony about [redacted] under Fed. R. Evid. 608(a). That testimony (if deemed relevant) would not have been admissible until the defense presented its case more than two weeks later. *See* Gov't Br. 57-58. For the reasons explained *supra*, there is simply no reason why Sterling could not have interviewed these witnesses within the existing trial schedule, let alone with a continuance.

Nor would Sterling need to conduct a lengthy investigation to uncover extrinsic evidence corroborating any specific instances of alleged misconduct, for the simple reason that such evidence would be inadmissible. Fed. R. Evid. 608(b) (extrinsic evidence inadmissible for impeachment); *United States v. Bynum*, 3 F.3d 769, 772 (4th Cir. 1993) ("A cross-examiner may inquire into specific instances of conduct" in an attempt to impeach a witness, but he "does so at the peril of not being able to rebut the witness's denials."); *United States v. Wilson*, 605 F.3d 985, 396-397 (D.C. Cir. 2010). Sterling could have questioned the witnesses

concerning the specific instances of conduct disclosed in the government's letters (if otherwise admissible), but he could *not* have used any other evidence.

There is, quite simply, no basis for concluding that Sterling was unable "to make effective use" of the information at trial, *United States v. Russell*, 971 F.2d 1098, 1112 (4th Cir. 1992), with or without a continuance.

3. Finally, Sterling grossly exaggerates the impeachment value of the information at issue. Some of the disclosures (such as the fact that [redacted] are not proper bases for impeachment. Gov't Br. 50, 65 (citing cases). [redacted] *Id.* at 49, 65-66. Statements by three of [redacted] may be probative of truthfulness to some degree, but they were not deemed significant enough at the time to [redacted] and [redacted] decades have since passed. *Id.* at 50, 66 (citing cases).

As for the allegation that [redacted] may have [redacted]

[redacted], Sterling presumes that this information is true, but that is not what the government's disclosure states. *See* JCA 560-561 [redacted]. The impeachment value is therefore minimal. Gov't Br. 66-67 (citing cases). Regardless, as explained, Sterling can easily question [redacted] about these allegations, including in a sworn *voir dire* if necessary, without delaying the trial at all.

III. THE DISTRICT COURT'S DECISION TO DISCLOSE THE TRUE NAMES OF COVERT WITNESSES TO THE DEFENDANT AND THE JURY WAS AN ABUSE OF DISCRETION.

A. This Court Has Jurisdiction Over The Government's Appeal.

Sterling argues that CIPA does not permit a government appeal in this case. That argument is meritless. *See* JA 813-826.

Under CIPA § 7(a), the government may bring an interlocutory appeal "from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States

to prevent the disclosure of classified information." This section plainly authorizes an appeal from the district court's decision, which denied the government's request to protect classified information from disclosure pursuant to CIPA § 6 and directed that the information be disclosed to the defendant and the jury.[16]

Sterling's argument rests on his belief that CIPA's procedures apply only to requests by *defendants* to disclose classified information pursuant to CIPA § 5. In *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), however, this Court held that CIPA also applies to requests by the government to prevent the disclosure of classified information it intends to use to prove guilt. *Id.* at 255 ("[i]f classified information is to be relied upon as evidence of guilt, the district court may consider steps to protect some or all of the information from unnecessary public disclosure * * * in accordance with CIPA, which specifically contemplates such methods as redactions and substitutions").

This is consistent with the plain language of the statute. For example, CIPA § 6 (under which the government proceeded here) provides that, at the government's request, the court shall convene a pretrial hearing to make "*all*

[16] Indeed, the district court repeatedly stated that it believed its order was immediately appealable. JCA 595-596, 598.

determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding," including information that "has not previously [been] made * * * available to the defendant." CIPA § 6(a)-(b) (emphasis added). Other sections likewise encompass the government's use of classified information. *See id.* § 4 (court may permit government to delete or substitute classified information in discoverable documents); *id.* § 8(b) (court may redact evidence admitted at trial "to prevent unnecessary disclosure of classified information").

Sterling's argument is also belied by CIPA's legislative history. Sterling correctly notes that one of Congress's principal purposes in enacting the statute was to combat "graymail" by defendants, *see Abu Ali*, 528 F.3d at 245, but Congress was also concerned with "cases where the government expects to disclose some classified items in presenting *its* case," and created procedures that would relieve pressure on the government to "forego[ ] prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information." S. Rep. No. 96-823 at 4 (1980) (emphasis added) ("Senate Report"); *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996) ("[t]he risk of graymail can arise in various circumstances," including where "'the government expects to disclose some classified items in presenting its case'"). Congress

authorized government appeals from "orders relating to the disclosure of [classified] information" at trial to "remedy[ ] the present situation in which the Government, even when faced with a district court ruling it believes to be wrong, must either compromise the national security information by permitting its disclosure at trial or withhold the information and jeopardize the prosecution." Senate Report at 5, 10. That is precisely the case where a court orders the government to either disclose classified information or forego the use of evidence relevant to proving a defendant's guilt.[17]

In any event, even if this Court were to conclude that CIPA § 7(a) does not apply, an appeal would be permitted under 18 U.S.C. § 3731. As Sterling concedes (Br. 49), the district court's order requires the government to choose between disclosing the information and not calling the witnesses. Section 3731 permits the government to appeal when the district court "evidenc[es] an intent to exclude government evidence if the government does not comply with its

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[17] *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003), is not to the contrary. That decision merely held that CIPA § 7(a) does not permit the government to appeal an order concerning "the *pretrial* disclosure of classified information" in defense depositions. *Id.* at 514 (emphasis added). The Court explained that the government could appeal if the defendant gave notice under CIPA § 5 that he intended to use any of that information at trial and the district court denied the government's request for a protective order, but this does not suggest that an appeal is only authorized in those circumstances. *Ibid.*

discovery order." *Presser*, 844 F.2d at 1280.

B. The District Court Abused Its Discretion.

1. The true names of covert U.S. intelligence officers are closely guarded secrets that have been classified to protect the safety of the officers, their families and sources, and national security. Gov't Br. 74-75 (citing cases and statutes). This information is presumptively privileged and may only be disclosed if the defendant proves, "with something more than speculation," that "the information is at least essential to the defense, necessary to the defense, and neither merely cumulative nor corroborative, nor speculative." *United States v. Smith*, 780 F.2d 1102, 1108-1110 (4th Cir. 1985) (en banc) ; *Abu Ali*, 528 F.3d at 248. There must also be "'no adequate substitution'" that would preserve the defendant's rights while avoiding disclosure. *Abu Ali*, 528 F.3d at 248.

The district court's oral ruling authorizing disclosure of the true names of seven covert CIA officers and contractors to the defendant and jury does not satisfy this standard. The district court had previously approved the use of pseudonyms to identify these covert witnesses in discovery and at trial because that substitution (a) would not affect Sterling's defense, and (b) would prevent a serious risk of harm if the witnesses' identities were revealed. Gov't Br. 70-72; JA 81-82; JCA 91-92, 109. In ordering that the information nonetheless be

disclosed to the jury, the court relied solely on its belief that the jurors would be unlikely to remember the information or disclose it. JCA 597-598. There are significant reasons to doubt this conclusion, *see* Gov't Br. 84, but more fundamentally, the standard for determining whether classified information must be revealed at trial is necessity, not harmlessness. The district court never explained why it was necessary for the jury to know the true names of witnesses who were otherwise testifying using pseudonyms.

Sterling cites the court's earlier statement—made while ruling on a different issue—that the government's proposed security measures could unintentionally suggest that Classified Program No. 1 was related to "national defense" within the meaning of 18 U.S.C. § 793, which could be a contested issue at trial. JCA 584. But the court *agreed* that the covert witnesses at issue here should nonetheless testify behind a screen using pseudonyms, and it further agreed to instruct the jury that the witness security measures bore no relation to the question of Sterling's guilt. *Id.* at 98, 480, 585. The court never explained what further purpose would be served by providing the jury with a "key card" disclosing the witnesses' true names. A general desire to avoid secrecy is simply not a reason to disclose classified information to the jury absent proof that the

information is necessary to a fair trial.[18]

As for disclosing the information to Sterling, the district court largely relied on its belief that Sterling did not pose a danger to the witnesses and providing him with the true names of witnesses he does not already know would be harmless. JCA 596-597. This conclusion is inconsistent with the grand jury's finding of probable cause to believe that Sterling illegally disclosed classified information—including the identity of a covert CIA asset—with the intent that it be published. Gov't Br. 83-84. The government submitted declarations explaining in detail the dangers to which these witnesses could be exposed—and the potential damage to national security that could result—if their true names were revealed to anyone, and Sterling is a particularly acute risk. *Id.* at 70-72.

Moreover, as this Court recently explained in *United States v. Ramos-Cruz*, --- F.3d ---, 2012 WL 130705 (4th Cir. 2012), it does not matter "whether the threat

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[18] Sterling's claim (Br. 56) that the witnesses' true names would already have been disclosed during jury selection is incorrect. The court concluded that a list of the names of all potential witnesses for the prosecution and defense would be shown to prospective jurors during *voir dire* so the jurors could determine whether they might be acquainted with a witness. JCA 156-157. As Sterling is well aware, however, the names of covert witnesses would be interspersed among those of dozens of other witnesses, with no indication that any of them were connected to the CIA. *Id.* at 156-157, 603. This procedure does not disclose any classified information; providing the jurors with a "key card" listing the true full names of individuals identified as covert CIA officers does.

to the witness comes directly from a defendant or from another source"; the government need only establish that the witnesses would be exposed to a "heightened level of danger" if their identities were revealed to justify not disclosing that information to the defendant and jury. *Id.* at *11 (quotation marks omitted). The government surely established such danger here; indeed, the district court previously found that the grave risks described in the government's declarations were real and compelling. JCA 91-92, 109. And in any event, the alleged harmlessness of the disclosure does not establish that this privileged, classified information is necessary to Sterling's defense.

The district court's only attempt to establish necessity was its conclusion that Sterling might "know things about [a] witness, [and] he can then turn to counsel and say: Hey ask him about such-and-such on cross-examination." JCA 487-488. Sterling argues that the Confrontation Clause thus requires that he be provided the names of the witnesses. But this is precisely the sort of speculative reasoning that is prohibited, and it is simply not true that a defendant has a right to obtain privileged, classified information that may expose witnesses to harm based solely on the hypothetical possibility that he could use it to his advantage. Gov't Br. 76, 78-82 (citing cases).

The district court's reasoning is particularly misplaced on the facts of this case. As explained in our opening brief (at 73, 77-78), of the seven covert witnesses at issue, Sterling already knows the true names of two of them because they were designated as government experts, and he is acquainted with at least three others from his time at the CIA. He has also been provided with full discovery concerning all of the witnesses—including prior statements, interview reports, cables, and other documents—in which the witnesses are identified using their true first names and last initials (a substitution to which Sterling has never objected).[19] The likelihood that Sterling would be able to use the true names of the two witnesses he does not already know (and whom he apparently has never met) to recall something about them that has not already been disclosed in discovery and that has exculpatory or impeachment value is exceedingly remote and does not establish necessity.

The district court also stated that its ruling was intended, at least in part, to encourage the government not to call the covert witnesses and thus shorten the trial, and it directed the government to carefully consider whether the witnesses' testimony was worth the "potential risks" to their safety once their identities were

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[19] Sterling contends (Br. 53-55) that he "consistently objected" to the use of pseudonyms, but that is not true. Sterling objected to the use of pseudonyms at trial; he never objected to the use of pseudonyms in discovery.

revealed. Gov't Br. 74, 82-83. This is not a proper reason to order the disclosure of classified information, and it has nothing to do with whether the information is necessary to a fair trial.

2. Sterling notes that the cases the government cites involved district courts that granted requests to shield witnesses' true names, but that simply underscores the district court's error in this case. As this Court recently explained in *Ramos-Cruz*, once the government demonstrates that there is an "actual threat" and "heightened level of danger" associated with disclosing a witness's true name—whether or not the defendant is the source of the danger—the government may shield the witness's identity from the defendant and the jury unless the district court finds that the information "is necessary to allow effective cross-examination." 2012 WL 130705, at *10-11. A witness's true name is not necessary where the defendant has enough other information about the witness (such as prior statements) to allow effective cross-examination. *Ibid.*; *United States v. Zelaya*, 336 F. App'x 355, 357-358 (4th Cir. 2009) (same witnesses).

This rule is particularly strong in cases involving classified information, which is presumptively privileged. As explained, several courts have shielded the names of covert intelligence officers from defendants and juries where, as here, the witnesses' names were classified to protect their safety and national security

and the defendants had enough other information to mount an effective cross-examination. Gov't Br. 80-82. The government urged the district court to follow suit, but it refused—not because it disagreed with the reasoning of these cases (which it did not address), but because they involved either foreign intelligence agents or a military court martial (which nonetheless applied Article III precedent). JCA 596-597. These are not relevant distinctions, and the results of those prior cases are correct. This Court should follow them.

CONCLUSION

For the foregoing reasons and the reasons stated in the government's opening brief, the district court's judgments should be reversed.

Respectfully submitted,

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February 28, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to this Court's order dated February 17, 2012, I hereby certify that this brief contains 10,478 words (excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure) and has been prepared in a proportionally spaced, 14-point typeface using WordPerfect X4.

s/ Robert A. Parker
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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2012, I filed the foregoing Reply Brief for the United States (Public Version) with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to the following registered users:

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