

**No. 11-5028**

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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UNITED STATES OF AMERICA,

*Plaintiff-Appellant,*

v.

JEFFREY ALEXANDER STERLING,

*Defendant-Appellee,*

and

JAMES RISEN,

*Intervenor-Appellee.*

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

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**RESPONSE TO INTERVENOR'S MOTION TO STAY THE MANDATE**

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Intervenor James Risen has filed a motion to stay issuance of the mandate in this case through January 13, 2014, in order to permit him to file a petition for a writ of certiorari in the Supreme Court. On October 24, 2013, this Court directed the United States to file a response to that motion.

The United States does not oppose Risen's motion. As Risen explains, a stay would maximize the efficient use of judicial resources by permitting the exhaustion of appeal on the issues presented before the case proceeds to trial. *See* Mot. 1-3.

Some circuits require a movant seeking a stay of the mandate to show a reasonable probability that the Supreme Court will grant certiorari and reverse. *See, e.g., Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007). Risen contends (Mot. 3-18) that he is likely to succeed in obtaining Supreme Court review if such a requirement were applied here. The government disagrees with that assertion for the reasons stated in its response to Risen's petition for rehearing en banc: the panel's decision was a straightforward application of *Branzburg v. Hayes*, 408 U.S. 665 (1972); there is no actual disagreement among the circuits on the application of *Branzburg* to cases of this sort; and, even if a qualified privilege did exist, Risen still would not be entitled to relief in light of the panel's factual determination that the government's law-enforcement interests would overcome that privilege in the circumstances of this case. *See* slip op. at 47-59.

But this Court has not expressly interpreted its local rules to inflexibly require a movant to show a likelihood of success before the Supreme Court as a prerequisite to a stay of the mandate. *See, e.g., Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852, 862 (4th Cir. 2002) (granting a 30-day stay for the filing of a petition for a writ of certiorari without analyzing whether the Supreme Court would grant certiorari or reverse).<sup>1</sup> And here, where the

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<sup>1</sup> Justice Breyer recently granted a stay in a case presenting similar issues, even though the Supreme Court ultimately denied certiorari. *See Maloney v.*

government does not oppose a stay, and allowing Risen to pursue a certiorari petition before the mandate issues would facilitate the conduct of the trial and preserve judicial resources, the government believes that the stay should be granted.<sup>2</sup>

Respectfully submitted,

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*United States*, 133 S. Ct. 9 (2012) (Justice Breyer's order granting stay); *Maloney*, 133 S. Ct. at 1796 (Court's order denying certiorari).

<sup>2</sup> Risen represents in his motion that Sterling does not consent to a stay and has "indicated that he wants to move forward with trial." Mot. 1 n.2. In view of the defendant's interests in proceeding to trial, and given Risen's thorough briefing of the issues, the Court may wish to consider staying the mandate for 60 days, rather than 90, in order to expedite consideration of this case.

**CERTIFICATE OF SERVICE**

I hereby certify that on November 4, 2013, I filed the foregoing Response to Intervenor's Motion to Stay the Mandate 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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