No. 15-4297

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JEFFREY ALEXANDER STERLING,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia
No. 1:10-cr-00485-LMB-1

REPLY BRIEF OF DEFENDANT-APPELLANT JEFFREY ALEXANDER STERLING

Lawrence S. Robbins
William J. Trunk
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
wtrunk@robbinsrussell.com

Counsel for Defendant-Appellant Jeffrey Alexander Sterling

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

Rules

INTRODUCTION

The government obviously thinks Jeffrey Sterling was guilty as charged. But its partisan factual account cannot explain away the fundamental errors that afflicted Sterling's trial. On *those* issues, the government's responses are insubstantial. Sterling's conviction should be reversed.

First, the government never proved venue for the non-obstruction counts. It concedes that venue was proper only where Sterling committed essential criminal conduct. It also concedes that preparatory acts, such as planning or traveling to commit a crime, cannot sustain venue. Case closed. The only evidence connecting Sterling to the Eastern District of Virginia—his residence and travel within the District, and four minutes of telephone calls—does not suffice. Nor does the happenstance that Risen's book ultimately made its way to bookstores in the District.

Second, the district court's venue instruction was erroneous. Not only did it misstate the law, but it allowed the jury to find venue based on virtually any contact between Sterling and the Eastern District of Virginia—intrastate residence, travel, telephone calls, you name it. So long as an act "in furtherance of" the crime occurred in the District, the jury could find venue. The government concedes that this is not the law. Because the jury never did (and never could) make a proper venue finding, the error was not harmless.

Third, the government never proved obstruction. The government does not dispute that Sterling could commit obstruction only by *intentionally* impeding the grand jury's investigation. Nor does it dispute that Sterling was unaware of that investigation before June 16, 2006, when he received a subpoena. Yet the government's only evidence of obstruction was that Hotmail had a copy of the CNN Email in April 2006, but not in July 2006. That will not do.

Fourth, the district court violated Fed. R. Civ. P. 404(b) by admitting four ancient CIA documents that were recovered from Sterling's residence. The government concedes that those documents had nothing to do with the Program at issue, but maintains that they were relevant to prove Sterling's "intent" in allegedly retaining the Cover Letter. That argument might be persuasive in another case. Here, it is not. Sterling never claimed that he retained the Cover Letter unwittingly; he denied retaining it *at all*. Because Sterling's intent was never at issue, these documents served only to foster a criminal-propensity inference that Rule 404(b) forbids. In a purely circumstantial case such as this—which nearly hung the jury after three days of deliberation—that error was highly prejudicial.

ARGUMENT

I. THE GOVERNMENT FAILED TO PROVE VENUE FOR THE NON-OBSTRUCTION COUNTS

The government concedes that venue lies only where the defendant commits an "essential conduct element" of the offense. Opp. 21-22.[1] It also concedes that "preparatory acts" cannot sustain venue. *Id*. at 40. Nevertheless, the government claims to have proven that Sterling committed essential criminal conduct in the Eastern District of Virginia. It did not.[2]

1. *Risen Counts*. These counts charged Sterling with transmitting national-defense information (Count 4), including the Cover Letter (Count 5), to Risen. The government observes that such crimes of "transmission" can span multiple districts—and that so long as Sterling was in the Eastern District when he "commenced" an unlawful transmission to Risen (Opp. 27), venue was proper in the District. True. But the government offered no evidence of the sort.

As for Count 5 (the Cover Letter), the government claims that the unlawful transmission necessarily "commenced" in the Eastern District because that is where Sterling "kept the letter." Opp. 27. This argument is a byproduct of the

[1] The government's opposition brief is cited as "Opp. __", and Sterling's opening brief as "Br. __."

[2] We are puzzled by the government's assertion that this question is not reviewed *de novo*, but rather according to "ordinary sufficiency standards." Opp. 20. It is well established that this Court "review[s] a challenge to the sufficiency of the evidence de novo." *United States v. McDonnell*, 792 F.3d 478, 515 (4th Cir. 2015).

government's self-fulfilling theory of venue for the Retention Count: Sterling *must* have retained the letter at his Herndon home, because where else would he have kept it? That theory is debunked below. *See infra* pp. 8-9.

But even if there were evidence that Sterling *possessed* the Cover Letter in the Eastern District, it would not follow that Sterling *transmitted* the Letter from that District. There is not a whisper of evidence that Sterling sent the Letter to Risen by "mail," "wire," or "courier" (Opp. 27) from the Eastern District. The government looked. *See* JA2036-41, 2051-55. If, instead, Sterling "hand deliver[ed]" (Opp. 27) the Letter to Risen—as the government has always theorized—then the "transmission" began and ended when Sterling handed the Letter to Risen. There is not a jot of evidence of where that occurred.

The government supposes that, under its "hand delivery" hypothesis, the "process of transmission" actually began when Sterling jumped in his car in Herndon. Opp. 27-28. That is wrong. It is well settled—and the government concedes (*id*. at 40)—that preparatory acts cannot sustain venue. *See* Br. 21-22, 33-34 & n.18. Traveling to commit a crime is the paradigmatic "preparatory act" that "precede[s]" and is "not part of" the ensuing crime. *United States v. Perlitz*, 728 F. Supp. 2d 46, 57-58 (D. Conn. 2000); *see United States v. Tzolov*, 642 F.3d

314, 318 (2d Cir. 2011); *United States v. Strain*, 396 F.3d 689, 694 (5th Cir. 2005).[3]

The government fares no better with Count 4. It was required to prove that Sterling disclosed national-defense information to Risen within the Eastern District. But the totality of evidence that Sterling communicated with Risen from the Eastern District was the CNN Email, which disclosed no classified information, and seven telephone calls totaling four minutes and eleven seconds. *See* Br. 23-25. The government never argued to the jury that Sterling could have transmitted the relevant national-defense information on those brief calls.

The government's new theory on appeal is that perhaps Sterling let slip some classified information on those calls, after all. It acknowledges that "Sterling could not have told Risen the entire story of Classified Program No. 1" on a 50-second phone call, but speculates that Sterling might have disclosed *something*. Opp. 28-29. "[E]ven saying he had information about a plan to disrupt Iran's nuclear program would have been unlawful," the government muses. *Id*. at 29.

[3] None of the cases cited by the government (at Opp. 28) is to the contrary. In those cases, *essential criminal conduct* commenced in Venue A and continued into Venue B, so of course venue was proper in Venue A. In *United States v. Hankish*, for example, the essential criminal conduct was "*carrying or transporting* stolen goods," and venue was proper in West Virginia because that is where the "illegal transportation originated." 502 F.2d 71, 76 (4th Cir. 1974) (emphasis added).

There is a reason the government never argued this theory to the jury. Sterling was not tried for making oblique reference to Iran's nuclear program. He was charged with divulging "key details" about the Program, which filled a 25-page chapter of *State of War*, "destroyed" the Program, "endangered" Merlin and his family, and "compromised" the United States' counter-proliferation efforts. Opp. 2. It is implausible that Sterling committed this essential criminal conduct on a 3-second, 14-second, or even 91-second phone call. *See* JA2802. But even were it plausible, speculation about what might have occurred on a telephone call cannot sustain venue. *E.g.*, *Strain*, 396 F.3d at 695-96 (telephone conversation between defendant and fugitive-husband insufficient to support venue finding for harboring charge, because no basis for jury to presume that defendant warned husband that marshals were looking for him).

2. *Attempt Counts*. As explained in our opening brief (at 22), venue was improper for the Attempt Counts for the same reasons as the Risen Counts. The essential criminal conduct for these counts is identical: Sterling was alleged to have divulged national-defense information to Risen (Risen Counts), thereby "attempting" to communicate that same information to the general public through Risen's never-published 2003 newspaper article (Attempt Counts).

The government urges that venue for the Attempt Counts should be more forgiving. Because a defendant may be convicted of criminal attempt merely by

taking a "substantial step toward completion of his goal," the government says, venue for the Attempt Counts should be proper so long as Sterling took a "substantial step" within the Eastern District. Opp. 30-32 & n.10.

Perhaps in another case. Here, however, the premise of the Attempt Counts was that Sterling "attempted" to disseminate national-defense information to the public *merely by giving it to Risen in the first place*. *E.g.*, JA47-50. And the government's theory was not that Sterling attempted, without success, to transmit national-defense information to Risen. It was that Sterling took *all* of the steps necessary to commit the crime—but Risen simply never ran the story. Whether or how Sterling took a "substantial step" was never at issue.

For that reason, the jury was not instructed that the Attempt Counts required only a "substantial step" to convict. The government never requested such an instruction. JA466-523. Rather, the jury was instructed (without government objection) that the essential conduct elements of the Risen Counts and the Attempt Counts were identical. JA2301-12. Accordingly, even if there were evidence that Sterling committed a "substantial step" in the Eastern District, reversal is still necessary because the jury never made—could not make—any such finding. *See United States v. Miller*, 111 F.3d 747, 753-54 (10th Cir. 1997); *United States v. Black Cloud*, 590 F.2d 270, 273 (8th Cir. 1979).

3. *Retention Count*. As for the Retention Count, the government claims that the jury could presume that Sterling retained the Cover Letter "in the only place he was known to be during the relevant time period." Opp. 25-26. This is a reboot of the government's venue-by-vicinity theory: Because Sterling resided in the Eastern District of Virginia, the theory goes, venue is presumptively suitable in that District for all possession-related crimes. That theory is unworkable. It was the *government*'s burden to prove venue; not Sterling's burden to prove that he is occasionally "known to be"—to possess items, even—outside the Eastern District.

Courts have rejected similar attempts to short-circuit the government's burden of proving venue. *See* Br. 27-28 & n.14. In *United States v. Evans*, the proof of venue was overwhelming by comparison: The government had established that (i) the defendant resided in Kansas, (ii) "Cherokee County [Kansas] law enforcement officers and an agent of the Kansas Bureau of Investigation arrested the defendant and searched his property," (iii) no law enforcement officers from any other state were involved, (iv) the defendant had a Kansas driver's license, (v) the drug samples sent away for testing were marked with stickers labeled "Cherokee County, Ks," and (vi) the "lab analysis for all the suspected drug materials … were referred back to an agent of the Kansas Bureau of Investigation." 318 F.3d 1011, 1021-22 (10th Cir. 2003). Surely the *Evans* jury could "reasonabl[y] intuit[]" (Opp. 25) that the drugs were seized in Kansas. But

the Tenth Circuit held otherwise. *Evans*, 318 F.3d at 1023; *see Jenkins v. United States*, 392 F.2d 303, 306 (10th Cir. 1968) (possession of goods in Oklahoma, which were recently stolen in Kansas, cannot support venue finding that stolen goods were received in Kansas); *see also* Br. 27-28 n.14 (collecting cases).

The government artificially distinguishes *Evans* by claiming that here, unlike in *Evans*, the government "seeks no [] presumption" that "law enforcement officers of a particular jurisdiction act within that jurisdiction." Opp. 26 n.8. But the government in *Evans* did not "seek" such a presumption, either. That was simply the practical "effect" of its argument. *Evans*, 318 F.3d at 1022. Here, too, the government may camouflage its position in terms of "circumstantial evidence" and "reasonable inferences," Opp. 25, but the practical *effect* of its argument is that a defendant is presumed to commit crimes of possession in the district of his residence—unless he can prove he didn't. This is not what the Founders had in mind.[4]

4. *Book Counts*. The government maintains that venue was proper for the Book Counts because Sterling "caused" Risen's book to be sold in the Eastern

[4] The government cites one case in support of its venue-by-vicinity theory. *See* Opp. 25 (citing *United States v. Leong*, 536 F.2d 993, 996 (2d Cir. 1976)). In *Leong*, however, there was sufficient evidence that the defendant possessed heroin in the Southern District of New York not merely because that is where the defendant resided, but because that is where he met his dealer and struck the drug deal. 536 F.2d at 996. The court observed, in *dictum*, that the defendant's residence alone would have been sufficient (*ibid.*), but we are aware of no court endorsing that *dictum* or applying it in another case.

District of Virginia. Opp. 33-35. For its causation theory, the government relies on cases in which there was a direct relationship between the *defendant*'s criminal conduct and the relevant district. In *United States v. Johnson*, for instance, the *defendant* initiated a fraudulent filing with the SEC, which was electronically transmitted to the district. 510 F.3d 521, 523 (4th Cir. 2007). In *United States v. Blecker*, the *defendant* filed false claims in the district for presentment to the government. 657 F.2d 629, 631 (4th Cir. 1981).

Here, by contrast, the chain of causation is practically metaphysical: Sterling provided national-defense information to Risen, thereby *causing* Risen to write his book, in turn *causing* Simon & Schuster to publish the book, in turn *causing* FedEx to deliver the book to Virginia, in turn *causing* Barnes & Noble to sell the book, ultimately *causing* the general public to receive national-defense information—thereby consummating the crime—in the Eastern District.

The government embraces this butterfly-effect theory of venue, Opp. 34-35, which would allow it to prosecute many crimes in the district of its choosing. But, "in a criminal case, venue must be narrowly construed." *United States v. Jefferson*, 674 F.3d 332, 365 (4th Cir. 2012). Because "proper venue is limited to the place where the *defendant*'s criminal acts are committed," *United States v. Bowens*, 224 F.3d 302, 312 (4th Cir. 2000) (emphasis added), venue under 18 U.S.C. § 793 should be assessed based on the essential criminal conduct of *the defendant* and

those, like co-conspirators, "with whom he shares liability as a principal," *id*. at 311 n.4.[5] "Inasmuch as the statute permits and does not forbid this construction," the Constitution adjures it. *United States v. Johnson*, 323 U.S. 273, 278 (1944).

II. THE DISTRICT COURT'S VENUE INSTRUCTION WAS ERRONEOUS AND PREJUDICIAL

As our opening brief explains (Br. 31-39), the district court gave the jury an erroneous venue instruction: Rather than instruct the jury that Sterling must have committed an *essential conduct element* in the Eastern District of Virginia, the jury was instead told that any "act in furtherance" of the crime would do. JA2108-12, 2319.

The government does not quarrel with the governing legal principles. It concedes that venue must be assessed under the "essential conduct elements" standard. Opp. 37. It does not dispute that an "act in furtherance" and "essential conduct element" of a crime are not the same thing. It concedes that preparatory acts cannot sustain venue. Opp. 40. And it does not dispute that preparatory acts, like planning or traveling to commit a crime, satisfy the expansive definition of "acts in furtherance" of the crime.

[5] The government has renounced any theory that Risen was an unindicted coconspirator. *E.g.*, JA725, 2125-28, 2451-52.

Despite all of this, the government insists that the district court's venue instruction was correct—or, if it was erroneous, that error was harmless. Neither argument is credible.

A. The Instruction Allowed The Jury To Find Venue Based On Preparatory Acts Alone

1. The government concedes that preparatory acts cannot sustain venue. Indeed, it acknowledges "acts preparing to transmit classified information would have been insufficient here." Opp. 40. Yet the government claims, without explanation or support, that the venue instruction did *not* permit the jury to convict "based solely on the commission of 'preparatory acts.'" Opp. 37.

Of course it did. Sterling's fleeting telephone calls with Risen—most of which consumed fewer seconds than it will take to read this sentence—could not plausibly be construed as essential criminal conduct, but might well be considered to be "in furtherance of" Sterling's ultimate crime. Indeed, Sterling's mere *presence* in the Eastern District satisfied the district court's erroneous instruction; to have met anywhere with Risen, Sterling would have needed to travel through the District "in furtherance of" that meeting.

The venue instruction misstated the law and permitted the jury to find venue based on Sterling's preparatory acts. It was erroneous.

2. The government tries to salvage the venue instruction by pretzeling this Court's holding in *United States v. Ebersole*. Opp. 38-40 (citing 411 F.3d 517

(4th Cir. 2005)). According to the government, *Ebersole* endorsed the use of an "acts in furtherance" instruction for any crime that spans multiple districts. Opp. 38. It did nothing of the sort. *Ebersole* affirmed the district court's "acts in furtherance" instruction because, on the facts of that case, the instruction required the jury to find (as it must) that *essential criminal conduct* occurred in the district. In *Ebersole*, the relevant "acts in furtherance"—the venue-sustaining acts—were *also* essential conduct elements of the underlying crimes. 411 F.3d at 527, 533. Accordingly, the jury could find venue only if it found that essential criminal conduct occurred in the district. *Ibid*.

Ebersole did not abrogate the "essential conduct elements" standard or upset the well-settled rule that preparatory acts cannot sustain venue. It is therefore consistent with the First Circuit's decision in *United States v. Georgacarakos*, which rejected an "acts in furtherance of" instruction because, on the facts of *that* case, the instruction allowed the jury to find venue based on preparatory acts alone. 988 F.2d 1289 (1st Cir. 1993). The government urges the Court to disregard *Georgacarakos* as "inconsistent" with *Ebersole*, Opp. 41 n.13, but there is no tension between the two cases: In *Ebersole*, the venue instruction did not permit the jury to find venue based on preparatory acts; in *Georgacarakos*, it did.

Here, as in *Georgacarakos*, the jury was invited to find venue based on preparatory acts alone. The only "acts in furtherance" that occurred in the Eastern

District—Sterling's residence and travel in the District, moments-long telephone calls, and a lawfully sent email—did not comprise essential criminal conduct. At least, not necessarily: The jury *might* have found that Sterling transmitted national-defense information on a 14-second phone call,[6] but nothing in the court's charge required the jury to make such a finding. The jury needed only to find that this phone call, even if not essential—even if not *criminal*—was somehow "in furtherance of" Sterling's crime. The government agrees that this is not the law. Opp. 37, 40.

3. Last, the government resorts to circular reasoning: It claims that the jury instruction was not inconsistent with cases like *Stewart* and *Strain*—which confirm that mere "acts in furtherance" of a crime cannot sustain venue—because here "the actual transmission of classified information either began or ended in the district." Opp. 41. There's the rub. Had the jury been *instructed* to find that the criminal transmissions "either began or ended" in the Eastern District of Virginia, then the instruction would not have been erroneous. But it was not so instructed. That is the whole point.

B. The Error Was Not Harmless

The government advances three arguments as to why any instructional error was harmless. None is persuasive.

[6] If so, that finding was speculative. *Supra* Part I.

First, the government claims that, even if the jury was erroneously instructed, there still was "ample evidence" to support venue in the Eastern District. Opp. 41. No, there was not. *Supra* Part I. But even if there were, that would not forestall a remand because there is "no indication in the record that this essential finding was actually made." *Black Cloud*, 590 F.2d at 273; *see Miller*, 111 F.3d at 753-54 (if the jury is not appropriately instructed on venue, reversal is necessary because "our speculation as to the verdict a jury might reach may not substitute for an actual jury verdict").

Second, the government suggests that the erroneous venue instruction was cured because the district court elsewhere made comments to the jury that more closely resembled the law of venue. For example, the government identifies one instance in which the district court—introducing the *concept* of venue—stated that "a defendant has a right to be tried in the district where the offense was committed." JA2319 (quoted at Opp. 39). According to the government, that remark "blunt[ed] any likelihood" that the jury would base its venue finding on preparatory acts alone. Opp. 39.

The government's "cured-by-contradiction" theory finds no support in the law. Rather, courts have held that such contradictory statements to the jury aggravate—rather than mitigate—the risk of jury confusion. *E.g.*, *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972) (far from "remov[ing] the sting" from

erroneous jury instruction, correct but conflicting instruction "[a]t best" rendered the charge "confusing and contradictory"). Because it is "impossible after the verdict to ascertain which instruction the jury followed," the "effect of a conflicting instruction is to nullify a correct one." *Nowell By & Through Nowell v. Universal Elec. Co.*, 792 F.2d 1310, 1316 (5th Cir. 1986); *accord United States v. Varner*, 748 F.2d 925, 927 (4th Cir. 1984); *United States v. Walker*, 677 F.2d 1014, 1016 (4th Cir. 1982).

Third, the government points out that the district court issued a supplemental venue instruction on the Retention Count, clarifying that the "willful retention" must have occurred in the Eastern District of Virginia. Opp. 39 (citing JA2365-66, 2368-72). The government implies that this supplemental instruction constructively repaired the venue instructions for *all* of the counts, because the court uttered the following words after giving its supplemental instruction: "[T]hat's the venue issue that I explained to you [in the original instructions]." JA2372; *see* Opp. 39, 41-42. That is baseless. The district court did not acknowledge that its original instruction was mistaken, much less purport to correct it, with this offhand remark.

Nor did the supplemental instruction "resolve[] any ambiguity" (Opp. 42) concerning venue for the Retention Count. The supplemental instruction was squarely contradicted by the original instruction. The court never advised the jury

that the original instruction was erroneous, nor did it tell the jury to disregard the original instruction in favor of the supplemental one. To the contrary, as the government points out (Opp. 41-42), the court implied that the two instructions were *consistent* with one another. JA2372. If anything, this "blunt[ed] any likelihood" (Opp. 39) that the jury comprehended the supplemental instruction—and, at a minimum, renders it "impossible" to know which instruction the jury followed. *Nowell*, 792 F.2d at 1316; *see Varner*, 748 F.2d at 927. The Retention Count must be reversed.[7]

III. THE GOVERNMENT FAILED TO PROVE THAT STERLING INTENDED TO OBSTRUCT THE GRAND JURY

1. The government does not dispute that it was required to establish beyond a reasonable doubt that Sterling specifically intended to obstruct the grand jury's investigation. *See* Br. 40-41. It concedes that Sterling was not aware of that investigation until he received a subpoena on June 16, 2006. Opp. 44, 45. It also acknowledges that its only evidence of obstruction was that the CNN Email "vanished" between April and July 2006. Opp. 46. The government says that this

[7] The government cites *United States v. Smith*, 62 F.3d 641, 645-46 (4th Cir. 1995), for the proposition that supplemental instructions are reviewed for abuse of discretion. Opp. 42 n.14. True enough but beside the point. Here, the *original* instruction was erroneous. The supplemental instruction better reflected the law of venue, but the court never told the jury which instruction to follow. The government also reproves that Sterling is in a "poor position" to complain, since he is the one who requested the supplemental instruction. *Ibid*. That is an audacious claim. Sterling implored the district court to correct its venue instructions for *all* of the counts, but the court refused. JA2330-33; *see* JA2374.

was good enough, because a "jury may draw logical inferences from circumstantial evidence." Opp. 44.

Of course it may. But the jury may *not* "bridg[e] an evidentiary gap with rank speculation." *Goldsmith v. Witkowski*, 981 F.2d 697, 703 (4th Cir. 1992). And the "evidentiary gap" here was yawning: The government offered no evidence of how or where the CNN Email was maintained, either on Hotmail's server or in Sterling's mailbox; no evidence of Hotmail's retention policies; no evidence of whose IP addressed accessed Sterling's account, or when; no evidence of how the Email was deleted, or by whom; no evidence of whether other emails were deleted at the same time;[8] and, critically, no evidence of *when* the Email was deleted. Just—it was there in April, but not in July.

This will not do. The government fails to cite a case in which an obstruction conviction was sustained based on the mere fact that a document disappeared, with no evidence of who caused its disappearance, when, or under what circumstances.[9] The government considers it suspicious for the CNN Email to have gone missing

[8] The government asserts that the April and July snapshots were "essentially the same," aside from the missing CNN Email. Opp. 44. That mischaracterizes the record. The lead FBI agent testified only that she could not "recall there being a considerable difference" between the two snapshots. JA1965-66.

[9] As explained in our opening brief (at 41-42), there are any number of innocuous explanations for the Email's disappearance that do not involve Sterling's having intentionally obstructed justice—including that Hotmail deleted it. The government criticizes Sterling for failing to offer evidence at trial in support of this "Hotmail-deletion theory," Opp. 45-46 & n.15, as if it were his burden to do so.

years after it was sent (Opp. 46), but evidence creating "a mere suspicion or conjecture of guilt is not sufficient," *Moore v. United States*, 271 F.2d 564, 568 (4th Cir. 1959).

Here, timing is everything. Because the government offered no evidence that the CNN Email was deleted after Sterling received the subpoena, the jury could only speculate as to whether Sterling deleted the Email—if at all—with the requisite criminal intent. *See United States v. Sun Myung Moon*, 718 F.2d 1210, 1236 (2d Cir. 1983); *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1971). *Cf. United States v. Van Fossen*, 460 F.2d 38, 41 (4th Cir. 1972) (without evidence of *when* fingerprints were impressed, jury can only "guess[]" and "speculate[]" whether prints were coincident to crime); *United States v. Corso*, 439 F.2d 956, 957-58 (4th Cir. 1971) (same).

2. Even assuming the jury could find that Sterling deleted the CNN Email after June 16, 2006, there still was insufficient evidence that Sterling did so "corruptly." *See* 18 U.S.C. § 1512(c)(1). The Email was facially non-responsive to the subpoena. JA2851-52. The government claims that Sterling should have known from the "context" of the Email that it fell within the subpoena's penumbrae (Opp. 47-48), but, conspicuously, cites no authority for that novel theory of obstruction.

The government also observes that a defendant may obstruct justice by destroying documents that he foresees to be relevant to a grand jury's investigation, even if those documents have not yet been subpoenaed. Opp. 48 & n.17 (collecting cases). That is true. But here, unlike in the cases cited by the government, Sterling *had* received a subpoena. And that subpoena effectively communicated that the grand jury was not seeking unclassified documents unrelated to Sterling's work at the CIA. Accordingly, Sterling might well have inferred that, unlike the four classified documents sitting in his house—which he did retain—he was not required to keep the Email.

3. At a minimum, the Obstruction Count should be remanded for resentencing if the Court reverses the other counts of conviction. *See* Br. 45-47. The government claims that a remand is "unnecessary" because the district court commented that an obstruction-only sentence "would have been the same," Opp. 50 n.19, but it elides the district court's numerous comments to the contrary. *See* JA2520-22, 2526-27. Because it is far from clear that the district court in fact would impose the same sentence, remand is warranted. *E.g.*, *United States v. Bull*, 145 F.3d 1326, at *4 (4th Cir. May 20, 1998) (unpublished).

IV. THE DISTRICT COURT ERRONEOUSLY ADMITTED PREJUDICIAL CHARACTER EVIDENCE

The district court crippled Sterling's alternative-source defense by admitting four CIA documents that were recovered from Sterling's Missouri home. *See* Br.

47-57. The government concedes that those documents had nothing to do with the Program. Opp. 51. In fact, the government abandons all theories of admissibility except one: Those documents, it claims, were admissible to show Sterling's "intent" and "state of mind" in allegedly retaining the Cover Letter. Opp. 56-60. That argument is untenable. And the error was not harmless (Opp. 62-63)—it was devastating.

A. The Documents Were Not Admissible To Establish Sterling's Intent

1. The government's only remaining argument is that the documents were admissible to show that Sterling retained the Cover Letter "willfully," rather than "innocently or accidentally." Opp. 56. This is a Trojan Horse. Sterling's defense was that he *never retained* the Letter—not that he did so unwittingly. His state of mind in possessing the Letter was never at issue.

The government claims that Sterling's not-guilty plea placed his "intent at issue," thereby opening the door to evidence of "similar prior crimes." Opp. 56 (quoting *United States v. Penniegraft*, 641 F.3d 566, 575 (4th Cir. 2011)). This Court has rejected that blinkered view of Rule 404(b). A plea of not guilty "does not throw open the door to any sort of other crimes evidence." *United States v. Bailey*, 990 F.2d 119, 123 (4th Cir. 1993). "Most crimes involve some level of intent," but where (as here) the defendant "unequivocally denies committing the acts charged in the indictment," the question of intent is effectively academic.

United States v. Hernandez, 975 F.2d 1035, 1039-40 (4th Cir. 1992). Under these circumstances, evidence of the defendant's prior bad acts serves only to foster the "propensity inference that Rule 404(b)'s built-in limitation was designed to prevent." *United States v. Sanders*, 964 F.2d 295, 298-99 (4th Cir. 1992); *see Hernandez*, 975 F.2d at 1040-41.[10]

Take Ms. Hernandez. Charged with conspiracy to distribute crack cocaine, her defense was that she wasn't there, and didn't do it. *Hernandez*, 975 F.2d at 1038-39. At trial, the district court admitted the testimony of an acquaintance who reported that Hernandez had previously claimed to know "a special recipe for cooking crack," and that she knew the recipe because "she used to do that, sell [crack] in New York." *Id*. at 1037. Hernandez was convicted.

On appeal, the government urged that this testimony was admissible under Rule 404(b) because "intent and knowledge [were] essential elements of the charge against Hernandez, which were placed in issue by her plea of not guilty." *Id*. at 1040. This Court rejected that argument and reversed the conviction. *Id*. at 1042. Because Hernandez never claimed that "she had in some way sold or handled the

[10] *Accord United States v. Sampson*, 385 F.3d 183, 193 (2d Cir. 2004) (where defendant claims that he "did not do the charged act at all," then "evidence of other acts is not admissible for the purpose of proving intent"); *United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978) ("When a defendant denies participation in the act or acts which constitute the crime, intent is not a material issue for the purpose of applying Rule 404(b)."); *United States v. Silva*, 580 F.2d 144, 148 (5th Cir. 1978) (same).

crack but without the requisite knowledge or intent," or that "she had never touched crack or did not know what it was," Hernandez's intent was rather beside the point. *Id*. at 1039-40. The crack-recipe testimony simply made it more "plausible" that Hernandez committed the charged offense because of her "involvement with crack on other occasions"—that is, "precisely the criminal propensity inference Rule 404(b) is designed to forbid." *Ibid*.; *see United States v. McBride*, 676 F.3d 385, 397 (4th Cir. 2012); *Sanders*, 964 F.2d at 299.

So too here. The question was never *why* Sterling retained the Cover Letter, but whether he did at all. Evidence that Sterling had a few other classified documents, which had nothing to do with the Program or the crimes charged, served only to undermine his defense and make it more "plausible" that he is of the stripe to take classified documents home in violation of CIA policy—"precisely the criminal propensity inference Rule 404(b) is designed to forbid." *See Hernandez*, 975 F.2d at 1039-40; *United States v. Kirk*, 528 F.2d 1057, 1060-61 (5th Cir. 1976) (when intent not truly contested, Rule 404(b) evidence "goes more to the inadmissible purpose of proving that the defendant is a bad man than to the admissible purpose of proving intent").

2. The government cites a smattering of cases in which other-acts evidence was offered to establish the defendant's intent. Opp. 56-59. In every one of those cases, the defendant's intent was squarely at issue. In *Penniegraft*, the

defendant was one of several individuals apprehended in a house containing narcotics, and the ultimate question was whether he knew the drugs were there. 641 F.3d at 570, 575. In *United States v. Byers*, a key question was whether the defendant had a motive to commit a murder, and the government's Rule 404(b) evidence demonstrated that the victim was going to implicate the defendant in a different murder. 649 F.3d 197, 205-09 (4th Cir. 2011). In *United States v. Queen*, the defendant was charged with witness tampering, and he claimed that he had contacted the witness for a non-tampering purpose—placing his intent at center stage. 132 F.3d 991, 993 (4th Cir. 1997).[11]

3. As explained above, Sterling's intent was never at issue. But even if it were, the government's character evidence was hardly "necessary" to prove it. *See United States v. Lighty*, 616 F.3d 321, 354 (4th Cir. 2010). In this case, there were only two possibilities: Either Sterling never retained the Cover Letter (as he maintained), or he *did* retain the Cover Letter and therefore must have been the one

[11] The government's "contraband" cases (at Opp. 59) are likewise distinguishable—the defendant's intent was a key issue in every one of them. *See Huddleston v. United States*, 485 U.S. 681, 683 (1988) ("the only material issue at trial was whether petitioner knew [the cassettes] were stolen"); *United States v. Whorley*, 550 F.3d 326, 338 (4th Cir. 2008) (defendant's state of mind "genuinely in dispute" where he contested that he knowingly received child pornography or knew that individuals depicted were minors); *United States v. Jernigan*, 341 F.3d 1273, 1276, 1281-82 (11th Cir. 2003) (defendant denied that firearm seized from automobile belonged to him, creating dispute over whether he "knowingly" possessed it); *United States v. Crachy*, 800 F.2d 83, 86-87 (6th Cir. 1986) (where defendant invoked entrapment defense, "[t]he element of intent was of critical importance").

who gave it to Risen. But if Sterling gave the Letter to Risen, then he necessarily possessed it willfully. The government's entire case was predicated on circumstantial evidence that Sterling was Risen's source. That evidence, if credited, was more than sufficient to dispel the notion—again, *which no one raised*—that Sterling somehow retained the Cover Letter accidentally. *See id.* at 354-55; *United States v. Wilson*, 624 F.3d 640, 653-54 (4th Cir. 2010).

4. Last, even if Sterling's intent *were* relevant, the government's character evidence shed no light on that topic. None of the documents had anything to do with the Program or any other CIA operation. They were personnel-type documents from Sterling's earliest days with the agency, including his first performance evaluation (from 1993) and telephone numbers for use outside the office (from 1987). *See* JA2724-25; *GX142-44* (classified). Sterling never disclosed the documents to Risen, or anyone else. The government offered no evidence as to where or how those documents were maintained in Sterling's residence, much less evidence that Sterling retained them willfully. Rather, the fact that these documents were the only classified materials found in Sterling's possession—among the tens of thousands that he handled during the course of his career—suggests that Sterling may have taken them home in the early 1990s, and simply forgotten about them. At any rate, it can scarcely be said that Sterling's possession of innocuous personnel files from the Cold War Era was "exceedingly

similar" to the crimes charged. *See McBride*, 676 F.3d at 397; *United States v. Johnson*, 617 F.3d 286, 297-98 (4th Cir. 2010).

B. The Documents Were Prejudicial

Even if the seized documents were admissible to prove Sterling's intent, their probative value was eclipsed by their prejudicial effect. *See* Fed. R. Civ. P. 403. The documents devastated Sterling's alternative-leaker defense and gave the jury a tangible reason to presume that Sterling was a chronic flouter of CIA policies. *See* Br. 54-57. In a case borne entirely of circumstantial evidence, this arrow was lethal.

According to the government, other-acts evidence is not unduly prejudicial unless it is more "sensational" and "disturbing" than the crimes charged. Opp. 60-61. Rule 403 is not so blunt an instrument. The balancing inquiry under Rule 403 is informed by the "probative value of the Rule 404(b) evidence." *Lighty*, 616 F.3d at 354 n.39. As such, "[t]he court's Rule 403 balancing should take account of the extent to which the non-propensity fact for which the evidence is offered actually is at issue in the case." *United States v. Stacy*, 769 F.3d 969, 974 (7th Cir. 2014).

Because the probative value of this evidence was meager at best, *supra* pp. 21-26, most any prejudice was too much. And there was plenty. The government made sure of that in its summation: By repeatedly impressing upon the jury that Sterling is someone "who keeps CIA documents at his home," JA2229-30, the

government implored the jury to draw "precisely the criminal propensity inference Rule 404(b) is designed to forbid," *see Hernandez*, 975 F.2d at 1039-40. The government claims that those comments invited the jury only to draw "legitimate non-propensity inferences." Opp. 61. Which ones, exactly? The only "legitimate, non-propensity inference" advanced by the government is Sterling's intent in retaining the Cover Letter, and his supposed habit of keeping classified documents "*at his home*" is hardly relevant to that question. *See United States v. Madden*, 38 F.3d 747, 754 (4th Cir. 1994) ("repeated, clear references" to improper Rule 404(b) evidence creates "reversible harm").[12]

The government next claims that the documents could not have prejudiced Sterling because "the jury saw them only briefly" and the parties were forbidden from discussing or asking questions about their content. Opp. 61. But it was precisely this illusion of gravity that aggravated the prejudice: Sterling mishandled documents *so sensitive* that the lawyers could not discuss their contents, and the jurors could never breathe a word of them to anyone. *See* JA2094-98, 2292. And as far as their "brief[]" cameo, the government cannot know how much time the

[12] The government notes that "Sterling did not object" (Opp. 61) to the prosecutor's closing remarks. Neither did the defendant in *Madden*. *See* 38 F.3d at 750-51. This Court still held that the government's closing remarks precluded a finding of harmlessness where, as here, they placed "repeated, heavy emphasis" on impermissible Rule 404(b) evidence. *Id*. at 754.

jury spent reviewing and discussing these documents in its deliberations.[13] *See* JA2291-92.

Last, the government maintains that the district court's limiting instruction ameliorated any prejudice. Opp. 61-62. Hardly. Limiting instructions offer only "meager protection" and cannot stanch the prejudicial effect of evidence improperly admitted under Rule 404(b). *Johnson*, 617 F.3d at 297. In *Hernandez*, the district court offered a limiting instruction identical to the one given here, but it could not repair the damage inflicted by the infamous crack-recipe testimony. 975 F.2d at 1038-39. The government cites cases (at Opp. 62) in which limiting instructions were deemed to be effective prophylaxes after evidence was *properly* admitted under Rule 404(b). *See Byers*, 649 F.3d at 208, 211 (other-acts evidence "clearly relevant" and offered for "permissible purposes under Rule 404(b)"); *Queen*, 132 F.3d at 997-98 (same). That is not what happened here.

C. The Error Was Not Harmless

The government has not carried its burden of proving harmlessness. *See United States v. Curbelo*, 343 F.3d 273, 278 (4th Cir. 2003). It merely argues that the "circumstantial evidence" of Sterling's guilt was "compelling." Opp. 62. The government ignores that the jury remained deadlocked into its third day of

[13] It is true that the government "offered to introduce unclassified versions of these documents," Opp. 53 n.20 & 61, but it proposed incomplete and misleading renditions that were even *more* prejudicial to Sterling. *See* JA342-64, 392-406. The district court so held. *9/28/2011 CIPA Tr. at 25, 35* (classified).

deliberations. JA2386-87. This was a close case. Given the prejudicial nature of the government's character evidence, it cannot be said to be "highly probable that the error did not affect the judgment." *Madden*, 38 F.3d at 753.

Nor was the error harmless as to the Obstruction Count and the counts relating to Sterling's lawful possession of national-defense information. *See* Opp. 62-63. The government insists that the seized documents did not "have any bearing" on those counts. Opp. 63. Right—the documents were even *less* relevant to those counts, but equally prejudicial insomuch as they depicted Sterling as a scofflaw with a pastime of mishandling CIA documents. The prejudicial spillover from those erroneously admitted documents warrants reversal of all counts. *See United States v. Wright*, 665 F.3d 560, 575-77 (3d Cir. 2012); *United States v. Rooney*, 37 F.3d 847, 855 (2d Cir. 1994).

CONCLUSION

The judgment of conviction should be reversed. Alternatively, the Court should vacate all counts of conviction and remand for a new trial.

Dated: April 22, 2016

Respectfully submitted,

/s/ William J. Trunk

Lawrence S. Robbins
William J. Trunk
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER, LLP
1801 K Street, N.W, Suite 411L
Washington, D.C. 20006
Phone: (202) 775-4517
wtrunk@robbinsrussell.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,993 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

/s/ William J. Trunk
William J. Trunk

CERTIFICATE OF SERVICE

I hereby certify that, on April 22, 2016, I filed three copies of the foregoing Reply Brief with the CISO.

/s/ William J. Trunk
William J. Trunk