IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA	*	
	*	
v.	*	**Criminal No. 10 CR 00181 RDB**
	*	
THOMAS ANDREWS DRAKE,	*	
	*	
Defendant.	*	
	******	

GOVERNMENT'S MOTION FOR AN *IN CAMERA*
HEARING AND MOTION FOR ORDER PURSUANT TO
SECTIONS 6 AND 8 OF THE CLASSIFIED INFORMATION PROCEDURES ACT

The United States of America, by and through William M. Welch II, Senior Litigation Counsel, and John P. Pearson, Trial Attorney, Public Integrity Section, Criminal Division, United States Department of Justice, respectfully moves this Court, pursuant to Sections 6(a), 6(b) and 8 of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, to hold *in camera* the hearing scheduled to take place on March 31, 2011, during which the court will determine the use, relevance, and admissibility of classified information that would otherwise be made at trial.[1]

In support of its motion that the hearing be conducted *in camera*, the United States will file a certification of the Assistant Attorney General for the National Security Division that will exercise the authority of the Attorney General for this purpose pursuant to Section 14 of CIPA prior to the hearing.

I. Legal Background

Sections 5 and 6 of CIPA "'establish[ ] a pretrial procedure for ruling upon the

[1]Although typically the Section 6 motion follows the defendant's Section 5 notice, the government thought it prudent to file this motion now in order to maintain the schedule set by the Court.

admissibility of classified information.'" *United States v. Moussaoui*, 591 F.3d 263, 281 (4th Cir. 2009)(quoting *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985)). There are three critical pretrial steps in the handling of classified information under Sections 5 and 6 of CIPA. First, the defendant "must notify the government and the court of classified information he expects to use, and the defendant is prohibited from `disclos[ing] any information known or believed to be classified . . . until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of [CIPA].'" *Moussaoui*, 591 F.3d at 282 (quoting 18 U.S.C. app. 3, § 5).

Second, upon the defendant's notice of intent to introduce classified information and a motion of the government, the court shall hold a hearing pursuant to Section 6(a) "at which the court shall determine the 'use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding.'" *Id*. (quoting *Smith*, 780 F.2d at 1105). Third, following the Section 6(a) hearing and formal findings of admissibility by the Court, the government may move that, rather than disclosure of specific classified information, "the court approve the use of a substitution in the form of 'a statement admitting relevant facts that the specific classified information would tend to prove' or 'a summary of the specific classified information.'" *Moussaoui*, 591 F.3d at 282 (quoting *Smith*, 780 F.2d at 1105). Pursuant to Section 6(c)(1), "[t]he court *shall* grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." *Moussaoui*, 591 F.3d at 282.

A. <u>The Section 5(a) Notice Requirement</u>

Section 5(a) of CIPA requires a defendant who reasonably expects to disclose or to cause

the disclosure of classified information at any trial or pretrial proceeding to provide timely pretrial written notice to the attorney for the government and the Court. *United States v. Hammoud*, 381 F.3d 316, 338 (4th Cir. 2004). Section 5 specifically provides that notification shall take place "within the time specified by the court or, where no time is specified, within thirty days prior to trial."

The Section 5(a) notice must be specific because it is the central document in the procedures envisioned under CIPA. Section 5(a)'s requirement that "such notice shall include a brief description of the classified information" does not mean "a vague description." *United States v. Collins*, 720 F.2d 1195, 1199-1200 (11th Cir. 1983). Nor does it matter that "the government can locate specific data about defendant's knowledge of sensitive information in its own records." *Id*. Instead, the "Section 5(a) notice requires that the defendant state, with particularity, which items of classified information entrusted to him he reasonably expects will be revealed by his defense in this particular case." *Id*. "The court, the government and the defendant should be able to repair to the Section 5(a) notice and determine, reliably, whether the evidence consisting of classified information was contained in it." *Id*. For a court to "countenance a Section 5(a) notice which allows a defendant to cloak his intentions and leave the government subject to surprise" would simply "require the defendant to reduce 'greymail' to writing." *Id*.[2]

The particularization requirement applies both to documentary exhibits and to oral testimony, whether it is anticipated to be brought out on direct or cross-examination. *See id.;*

[2]Since the Court ordered the defendant to produce hard copies of his classified documents on March 7th, particularized notice should not be an issue in this case.

United States v. Wilson, 750 F.2d 7 (2d Cir. 1984). The Section 5(a) notice, however, does not require a defendant to provide argument in support of the relevance of particular noticed documents in the notice itself.

Section 5(b) permits the court to preclude the disclosure of classified information by the defendant if he fails to provide a sufficiently detailed notice far enough in advance of trial to permit implementation of CIPA procedures. *See United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987). Similarly, if a defendant attempts to disclose classified information at trial that had been described in his Section 5(a) notice, a court may preclude disclosure of the classified information under Section 5(b). *See United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985).

B. The Section 6(a) Hearing

Once the defendant files a notice of intent to disclose classified information under Section 5, the government may then petition the court for a hearing under Section 6(a). The purpose of the hearing under Section 6(a) of CIPA is "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceedings." 18 U.S.C. App. 3, § 6(a). "CIPA does not [] alter the substantive rules of evidence, including the test for relevance: thus, it also permits the district court to exclude irrelevant, cumulative, or corroborative classified evidence." *United States v. Passaro*, 577 F.3d 207, 220 (4th Cir. 2009).

"When evaluating the governmental privilege in classified information which CIPA serves to protect, [] district courts must ultimately balance 'this public interest in protecting the information against the individual's right to prepare his defense.'"*United States v. Abu Ali*, 528 F.3d 210, 247 (4th Cir. 2008)*(*quoting *Smith*, 780 F.2d at 1105). "`decision on disclosure of such

information must depend upon "particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [evidence], and other relevant factors."'" *Id*. (quoting *Smith*, 780 F.2d at 1107)(quoting *Roviaro v. United States*, 353 U.S. 53, 61 (1957))). However, the classified information privilege "must . . . give way when the information . . . 'is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'" *United States v. Rosen*, 557 F.3d 192, 195 n.4 (4th Cir. 2009) (quoting *Smith*, 780 F.2d at 1107)). *See Fernandez,* 913 F.2d at 154 (4th Cir. 1990)(stating that "*Smith* requires the admission of classified information" once the defendant has satisfied this standard).

C. Rule 403 Balancing

At the Section 6(a) hearing, the defendant has the burden of establishing that the evidence is relevant and material. *See United States v. Miller*, 874 F.2d 1255, 1276-77 (9th Cir. 1989). "To overcome the governmental privilege, the defendant `must come forward with something more than speculation as to the usefulness of such disclosure.'" *Abu Ali,* 528 F.3d at 248 (quoting *Smith*, 780 F.2d at 1107). Upon hearing the defense's proffer and the arguments of counsel, the court must determine whether or not the classified information identified by the defense is relevant under the standards of Fed. R. Evid. 401.

Relevance "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. *See also United States v. Williams*, 445 F.3d 724, 736 (4th Cir. 2006) "`[R]elevance typically presents a low barrier to admissibility.'" *United States v. Basham*, 561 F.3d 302, 332 (4th Cir. 2009)(quoting *United States v. Leftenant,* 341 F.3d 338, 346 (4th Cir. 2003)). "`Thus, evidence is relevant if it is "worth consideration by the jury" or has a

"plus value."'" *Basham*, 561 F.3d at 332 (internal citations omitted)).

The Court's inquiry, however, does not end there as the Court still must determine whether or not the classified information is excludable under Rule 403. *Smith*, 780 F.2d at 1106) (stating that "the ordinary rules of evidence determine admissibility under CIPA."). *See also United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984). A district court should exclude relevant evidence when "its probative value is 'substantially outweighed' by the potential for undue prejudice, confusion, delay or redundancy." *United States v. Queen,* 132 F.3d 991, 994 (4th Cir.1997)(quoting Fed.R.Evid. 403). *See also Old Chief v. United States*, 519 U.S. 172, 182-186 (1997)(evidence may be excluded under Rule 403 if its probative value is substantially outweighed by certain dangers, including unfair prejudice, confusion of the issues, or misleading the jury); *United States v. Aramony,* 88 F.3d 1369, 1378 (4th Cir.1996)(internal quotation marks omitted)(stating that evidence is unfairly prejudicial and excludable under Rule 403 "when there is a genuine risk that the emotions of a jury will be excited to irrational behavior, and ... this risk is disproportionate to the probative value of the offered evidence."). *See also United States v. Mohamed*, 410 F. Supp.2d 913, 917-18 (S.D. Ca. 2005)(excluding evidence whose probative value may be substantially outweighed by the "distraction and confusion" of a fair determination of the issues for the jury or the creation of "side issues or mini trials resulting in undue prejudice, undue delay, and waste of time.").

The test is always one of *unfair* prejudice, and "`[t]he mere fact that the evidence will damage the defendant's case is not enough.'" *United States v. Benkahla*, 530 F.3d 300, 310 (4th Cir. 2008)(quoting *United States v. Hammoud,* 381 F.3d 316, 341 (4th Cir.2004))(en banc), *vacated on other grounds*, 543 U.S. 1097 (2005)). *See also Williams*, 445 F.3d at 730. "`[T]he

evidence must be *unfairly* prejudicial, and the unfair prejudice must *substantially* outweigh the probative value of the evidence.'" *Benkahla*, 530 F.3d at 310 (quoting *Hammoud,* 381 F.3d at 341)(internal quotations omitted, emphasis in original)). *See also Williams*, 445 F.3d at 730.

"The court's determinations regarding relevance and admissibility of evidence are accorded great deference, even in the context of CIPA § 6(a), and such decisions may only be overturned `under the most extraordinary circumstances.'" *Rosen*, 557 F.3d at 199 (quoting *United States v. Fernandez*, 913 F.2d 148, 155 (4th Cir. 1990)). "`The abuse of discretion standard also applies to the trial court's decision to reject a proposed substitution under [CIPA] § 6(c).'" *Rosen*, 557 F.3d at 199 (quoting *Fernandez*, 913 F.2d at 155). In order to preserve the record on appeal, at the conclusion of the hearing, the court must state in writing its determination as to each item of classified information. CIPA, 18 U.S.C. App. 3, § 6(a).

In sum, the Court "`may order disclosure only when the information is at least essential to the defense, necessary to [the] defense, and neither merely cumulative nor corroborative, nor speculative'." *Abu Ali,* 528 F.3d at 248 (quoting *Smith*, 780 F.2d at 1110). Moreover, a Section 6(a) "hearing must be conducted *in camera* if the government certifies `that a public proceeding may result in the disclosure of classified information.'" *Moussaoui*, 591 F.3d at 282 n.16 (quoting 18 U.S.C.A. App. 3 § 6(a)). At the conclusion of the Section 6(a) hearing, CIPA requires the court to state in writing the reasons for its determinations as to each item of classified information.

D. Substitutions Pursuant to Section 6(c)

In the event that the Court rules that one or more items of classified information may be admitted, the government has the option of offering substitutions pursuant to Section 6(c) of

CIPA. These include either (1) a statement admitting relevant facts that the classified information would tend to prove or (2) a summary of the classified information instead of the classified information itself. *See Rezaq*, 134 F.3d at 1142-43.

"The government must also 'provide the defendant with notice of the classified information that is at issue.'" *Moussaoui*, 591 F.3d at 282 n.16 (quoting 18 U.S.C. App. 3, § 6(b)(1)). "If the classified information has been produced to the defendant, it must be specifically identified. If it has not been made available to the defendant, it 'may be described by generic category, in such form as the court may approve.'" *Moussaoui*, 591 F.3d at 282 n.16 (quoting 18 U.S.C.A. App. 3, § 6(b)(1)). A motion for substitution shall be granted if the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." 18 U.S.C. App. 3, § 6(c)(1).

A Section 6(c) hearing must be conducted *in camera* at the government's request, and the government may require that the court examine *in camera* and *ex parte* 'an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information.'" *Moussaoui*, 591 F.3d at 282 n.17. (quoting 18 U.S.C.A. App. 3, § 6(c)(2)). The Court may approve the substitutions provided by the government if, after conducting a detailed *in camera* comparison of the originals with the proposed substitutions, the court determines that the substitutions protect the defendant's right to a fair trial. *Abu Ali,* 528 F.3d at 253-54. *See also Rezaq,* 134 F.3d at 1142-1143.

In order to facilitate an orderly hearing, the United States wishes to inform the court and counsel of the following:

II. Matters to be Discussed at the Hearing

1. Admissibility of Proposed Government and Defense Exhibits

The United States will seek to admit in its case-in-chief a number of exhibits that contain classified information. These exhibits are relevant to all charges in the Indictment. Much of the classified information has not been excised or redacted from the original documents. Some of the classified documents have been specifically portion marked by NSA's Original Classification Authority (hereinafter "OCA"). Other classified documents have retained the classification status of the originator of the document, but the classification status is not being offered for its truth, but rather for the notice that they provided the defendant.

Copies of these documents have already been provided to the defendant through discovery. To the extent there are additional classified documents identified, copies will be provided to the defendant. As envisioned by Section 6(a) of CIPA, the court will hear the proffer of the government and arguments of counsel, and then rule whether the classified documents are admissible and whether or not the Court will admit them in whole or in a redacted state, provided the proper foundation is laid at trial. The United States will provide copies of the classified documents to the Court for purposes of the March 31st hearing later next week.

Section 8 of CIPA allows classified exhibits to be admitted without changing its classification status. The Government will thus propose that the exhibits be admitted into evidence ***under seal.***

2. Use of "Silent Witness Rule" at Trial

As previously mentioned, Section 8(a) of CIPA allows classified information to be admitted into evidence without change in their classification status. To facilitate the introduction

into evidence of the classified information contained in the government's proposed exhibits, the United States will move the court to allow their admission pursuant to the "silent witness rule." Under the "silent witness rule,"

> the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury.

United States v. Zettl, 835 F. 2d 1059, 1063 (4th Cir. 1987). *See Abu Ali*, 528 F.3d at 250, 255 n.22 (noting district court permitted use of silent witness rule at trial, but expressing no opinion regarding its use on appeal). *See also United States v. Ford*, Criminal No. 05-0235-PJM (using silent witness rule at trial).

If the "silent witness rule" is employed at trial, the United States and the defendant will be able to present classified exhibits to the jury alone without disclosing the contents of the exhibits to the public.

3. Use of Substitutions for Certain Classified Information

The United States will seek to have its classified exhibits admitted into evidence in their classified form. Absent the defendant's Section 5 notice, it is unclear what, if any, substitutions will be needed to be offered in lieu of the introduction of certain classified information. If necessary, the United States will seek to offer unclassified substitutions for specific classified information. The substitutions should provide the defendant with substantially the same ability

to make his defense as would disclosure of the specific classified information. Section 6(c) of CIPA directs that the court grant such motion of the United States if, after a hearing, it finds that the defendant's ability to make his case is not prejudiced.

4. Limitations on Cross Examination of Government Witnesses

In order to ensure that classified information is not inadvertently elicited during direct or cross-examination of any witness, and to ensure that classified information is not inadvertently suggested by questions asked by defense counsel on cross-examination, the United States will move the court to order counsel for both the government and the defendant not to ask questions which reveal classified information, unless it has been previously addressed by the "silent witness rule" or substitutions. Additionally, the United States will request that the court order counsel for both the government and the defendant to instruct each witness who could disclose classified information, not to do so. The United States will inform the court of certain categories of questions which could inadvertently disclose classified information at the hearing and request that the court limit inquiry and offer substitution of terminology that would allow counsel to effectively examine and cross examine witnesses at trial.

WHEREFORE, the United States respectfully requests that, following a hearing, the Court order that: (1) the government's proposed classified exhibits be admitted at trial pursuant to the Federal Rules of Evidence; (2) the proposed classified exhibits be admitted at trial pursuant to the "silent witness rule; (3) the proposed classified exhibits be admitted under seal; (4) if necessary, substitution for specific classified information be permitted pursuant to CIPA Section 6(c); and (5) direct and cross examination of witnesses be limited so as not to inadvertently disclose classified information.

III. Conclusion

Based upon the foregoing, the United States requests that the Court order that the hearing scheduled for March 31, 2011 be held *in camera* subject to the proper certification being filed by the United States.

Respectfully submitted this 25th day of February, 2011.

For the United States:

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CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of the *Motion for an In Cameria Hearing* to be served via ECF upon James Wyda and Deborah Boardman, counsel for defendant Drake.

/s/ William M. Welch II
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