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

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

UNITED STATES' RESPONSE TO
DEFENDANT'S MOTION FOR A DECLARATION
THAT SECTIONS 5 AND 6 OF CIPA ARE UNCONSTITUTIONAL AS APPLIED

Comes now 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, and respectfully files this response to the defendant's *Motion for a Declaration That Sections 5 and 6 of CIPA Are Unconstitutional As Applied*. Dkt. 51. The motion should be denied.

To date, no court has ever held that Sections 5 and 6 of CIPA are unconstitutional. Instead, every single court that has addressed the same constitutional challenges raised by the defendant in this case has rejected those attacks, finding that CIPA neither violates a defendant's Fifth Amendment or Sixth Amendment rights. This defendant's case is no different, and this court similarly should adopt the persuasive reasoning of its sister courts and deny the defendant's motion.

I. SECTIONS 5 AND 6 OF CIPA DO NOT VIOLATE THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE.

The government accepts the defendant's representation that they do not know whether or not the defendant will testify. If that is the case, then the government elects not to enforce the Section 5 notice provisions as they relate to the defendant's possible trial testimony prior to trial. A separate CIPA hearing can be scheduled at some point during the trial if necessary.

Delay of the notice also makes practical sense. By that point in the trial, most if not all of the issues regarding the admissibility of certain evidence should have been resolved, and the parties should have a good framework by which they can minimize any disputed issues prior to any CIPA hearing. If necessary, the parties can notify the Court of any issues that need resolution, and the Court can schedule a separate CIPA hearing.

Therefore, this issue is not ripe for consideration. Since the defendant does not know if he will testify, and the government does not seek notice of his hypothetical trial testimony, there is no Fifth Amendment violation. The current situation is no different than that of any other defendant.

In the event that the Court declines to adopt the government's position, the Section 5 notice provision does not violate the defendant's Fifth Amendment privilege against self-incrimination. To the government's knowledge, every court that has considered the constitutionality of the discovery provisions of CIPA generally or the advance notice requirement of Section 5 has rejected the claims raised by the defendant.[1] *See United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir.1991)(affirming denial of motion to dismiss on claim that CIPA

[1]The defendant argues that Sections 5 and 6 violate his Fifth Amendment right to: (1) not be penalized for his pretrial silence and(2) to testify in his own defense. *See Motion*, pg. 3.

discovery provisions infringed on defendant's Fifth and Sixth amendment rights); *United States v. Wilson,* 750 F.2d 7, 9 (2nd Cir. 1984); *United States v. Wilson,* 721 F.2d 967, 976 (4th Cir.1983)(CIPA provisions did not infringe on defendant's confrontation rights or privilege against self incrimination); *United States v. Hashmi*, 621 F.Supp.2d 76, 81 (S.D.N.Y. 2008) (upholding constitutionality of Section 5); *United States v. Lee*, 90 F.Supp.2d 1324, 1326-27 (D.N.M. 2000) (upholding constitutionality of Section 5); *United States v. Ivy*, 1993 WL 316215 at *3 (E.D. Pa. 1993)(upholding constitutionality of the CIPA discovery provisions and Section 5).

The reasoning of the district courts in *Hashmi* and *Ivy* are persuasive. In *Hashmi*, 621 F.Supp.2d at 81, the defendant raised issues identical to those raised by this defendant. The district court concluded that "CIPA's Section 5 pretrial notification requirement likewise does not infringe on a defendant's privilege against self-incrimination." *Id*. The court reasoned that

> Section 5(a) requires the defendant to notify the Government and the Court only if he `reasonably expects to disclose or cause the disclosure of classified information' so that the Court can rule on the admissibility of the potential evidence before the trial starts. In the event that the defendant does not comply, the Court *may,* under CIPA 5(b), preclude the disclosure of the classified information. The potential of precluding the disclosure does not amount to a "penalty" for the defendant's exercising of his right to remain silent, as Defendant argues.

Id. (emphasis in original). The fact that CIPA did not compel the defendant to do anything distinguished CIPA from the statute found unconstitutional in *Brooks v. Tennessee,* 406 U.S. 605 (1972). *Id*.

As the *Hashmi* Court explained, "the Fifth Amendment guarantees that no person `shall be *compelled* in any criminal case to be a witness against himself,'" and "compulsion is a

prerequisite to the application of the self-incrimination privilege." *Id.* (citing LaFave, Israel, & King, 1 Criminal Procedure § 2.10(b) (2d ed. 1999)). The Supreme Court in *Brooks* found that the Tennessee statute at issue was a "heavy burden" on the defendant's right not to testify, and that the State's regulatory interest being advanced - preventing the witness from being influenced by the testimony of others - was "`insufficient to override the defendant's right to remain silent at trial.'" *Id.* (quoting *Brooks*, 406 U.S. at 611).

The question considered by the *Hashmi* court was whether CIPA advanced "a legitimate regulatory interest in attaching an adverse consequence to the defendant's failure to disclose certain information." *Id.* (citing LaFave, Israel, & King, 1 Criminal Procedure § 2.10(b) (2d ed. 1999)). The district court concluded that it had "no trouble concluding that CIPA strikes the proper balance." *Id*. Unlike the statute in *Brooks,* the court stated that

> the 'penalty' the Defendant faces is the *possible* preclusion of undisclosed classified information-possible because preclusion is not mandatory under CIPA § 5(b). This potentiality, when compared to the Government's interest in protecting classified information, is a legitimate regulatory interest like others the law recognizes. *See also* Fed.R.Crim.P. 12.1 (alibi defense); Fed.R.Crim.P. 12.2 (insanity defense); Fed.R.Crim.P. 12.3 (public authority defense); and Fed.R.Crim.P. 16 (medical and scientific tests, tangible objects, and certain documents).

Id. (emphasis in original). Thus, the district court joined "its sister courts in upholding CIPA §§ 5 and 6." *Id*. at 82 (citing *United States v. Wen Ho Lee,* 90 F.Supp.2d. 1324, 1326-27 (D.N.M. 2000); *United States v. Poindexter,* 725 F.Supp. 13, 34 (D.D.C. 1989) ("The leap from the [CIPA] requirement of disclosure - similar to the disclosure of an alibi or insanity defense - to a violation of a defendant's right to testify or not to testify is too wide to be justified.").

Similarly, the district court in *Ivy* rejected the same arguments advanced by this defendant, i.e. that "CIPA requires him to divulge to the Government what classified information he intends to disclose at trial, including his own testimony, the statute impermissibly requires Ivy to disclose his anticipated trial testimony and violates his right to remain silent and testify in his own defense." 1993 WL 316215 at 3. Like the *Hashmi* court, the district court in *Ivy* noted that

> [a]s a preliminary matter, section 5 of CIPA does not require Ivy to specify whether he will testify or what he will testify about. As Judge Greene explained in *Poindexter,* 725 F.Supp. at 33, where a similar argument was advanced, "[t]he statute requires merely a general disclosure as to what classified information the defense expects to use at the trial, regardless of the witness or the document through which that information is to be revealed. In other words, [Poindexter] need *not* reveal what he will testify about or whether he will testify at all."

Id. The general disclosure requirement of Section 5 of CIPA, therefore, disposed of the defendant's first argument. *Id*.

The *Ivy* court then addressed the defendant's argument that CIPA required the defendant to "disclose pretrial elements of his defense." *Id*. The court rejected this argument, holding that "there is no violation of Ivy's fundamental right to remain silent or testify in his own defense." *Id*. The district court reasoned that "defendants in criminal cases may be constitutionally required to disclose elements of their defense in advance of trial," stating that examples of such requirements included "`Fed.R.Crim.P. 12.1 (alibi defense); Fed.R.Crim.P. 12.2 (insanity defense); Fed.R.Crim.P. 12.3 (public authority defense); and Fed.R.Crim.P. 16 (medical and scientific tests, tangible objects, and certain documents).'" *Id*. (quoting *Poindexter,* 725 F.Supp. at 33). The district court further noted that those particular Criminal Procedure provisions "requiring the disclosure of such defenses in advance of trial have

consistently been upheld as constitutional." *Id*. (citing *Williams v. Florida*, 399 U.S. 78 (1970) (upholding Florida notice-of-alibi rule); *Taylor v. Illinois*, 484 U.S. 400 (1988) (refusing to allow undisclosed defense witness to testify as sanction for failing to identify defense witness in response to pretrial discovery request upheld)).

Thus, the *Ivy* court concluded that in contrast to the statute held unconstitutional in *Brooks*,

> under CIPA no penalty is exerted upon Ivy for relying on his Fifth Amendment rights. As discussed above, Ivy need not reveal when or even whether he will testify. All that CIPA requires is pretrial disclosure of the classified information on which the defense intends to rely in the course of the trial. Significantly, CIPA does not authorize the preclusion of Ivy's testimony if he fails to comply with the section 5(a) notice requirement; rather, it merely authorizes the Court to forbid testimony about classified information not disclosed in a section 5(a) notice. Thus, unlike the defendant in *Brooks,* Ivy is not compelled to choose whether he will testify at trial.

Id. at *4. "`The leap from the requirement of disclosure - similar to the disclosure of an alibi or insanity defense - to a violation of defendant's right to testify or not to testify, is too wide to be justified.'" *Id*. (quoting *Poindexter,* 725 F.Supp. at 34).

Here, the defendant's arguments are no different that the defendants in *Hashmi* and *Ivy*, and, like those defendants, the defendant relies almost exclusively on *Brooks*. *See Motion*, pg. 5-6. CIPA, however, does not compel disclosure, and the penalty for non-compliance with the Section 5 notice is discretionary, not mandatory exclusion. Moreover, the regulatory interests advanced by CIPA are far different than those in *Brooks*, and consequently strike a constitutionally permissible balancing. Therefore, the court should deny the defendant's Fifth Amendment challenge to CIPA.

II. SECTIONS 5 AND 6 OF CIPA DO NOT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHTS.

Once again, every court that has considered the arguments raised by the defendant "in the CIPA context has rejected them." *United States v. Bin Laden*, 2001 WL 66393 at *5 (S.D.N.Y. 2001)(citing *Lee*, 90 F.Supp.2d at 1328; *Poindexter,* 725 F.Supp. at 34-35; *Ivy*, 1993 WL 316215 at *7). The defendant here argues that his Sixth Amendment rights are violated by CIPA because the notice provisions: (1) allow the government to plan for cross examination, *Motion*, pg. 11; (2) deprive the defendant of the element of surprise, *id*., and (3) place an undue burden on the defendant not shared by the government. *Id*. As described in more detail below, none of those arguments are persuasive.

Like the defendant here, the defendant in *Lee* argued that Sections 5 and 6 of CIPA violated his Sixth Amendment rights to confront and cross-examine government witnesses because CIPA forced him to preview his classified evidence and explain its significance prior to trial. *Lee,* 90 F.Supp.2d. at 1328. Through CIPA, according to the defendant, the "`prosecution can shape its case-in-chief to blunt the force of the defense cross examination,' and [] the advance notice under CIPA `will impede effective defense cross-examination.'" *Id*.

The district court rejected that argument, reasoning that the "Confrontation Clause does not guarantee the right to undiminished surprise with respect to cross-examination of prosecutorial witnesses." *Id*. (citing *Ivy,* 1993 WL 316215 at *7; *Poindexter* at 34-35.). The *Lee* court stated that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination." *Id*. (citing *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986)). Thus, while the Confrontation Clause "`guarantees the

opportunity for effective cross-examination,' it does not guarantee cross-examination `that is effective in whatever way, and to whatever extent, the defense may wish.'" *Id.* (*quoting Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)). The district court reasoned that

> CIPA does not require that the defense reveal its plan of cross-examination to the government. CIPA also does not require that the defendant reveal what questions his counsel will ask, in which order, and to which witnesses. Likewise, the defendant need not attribute the information to any particular witness. *See Poindexter,* 725 F.Supp. at 34. CIPA merely requires that the defendant identify the classified information he reasonably intends to use. Because the only cited tactical disadvantage that may accrue, minimization of surprise, is slight, *see North,* 708 F.Supp. at 401, Defendant has failed to demonstrate that the requirements under CIPA render his opportunity for cross-examination ineffective.

Id. at 1328-29.

The *Lee* court also denied a due process challenge, also raised by this defendant, that "CIPA's disclosure requirements violate the Due Process Clause by imposing a one-sided burden on the defense, without imposing a mandatory reciprocal duty on the prosecution." *Id.* The court stated that "due process is only denied where the balance of discovery is tipped against the defendant and in favor of the government." *Id.* (citing *Wardius v. Oregon*, 412 U.S. 470 (1973)). The district court distinguished *Wardius,* in which the Supreme Court struck down the Oregon notice of alibi statute because Oregon granted no discovery rights to criminal defendants and made no provision for reciprocal discovery. 412 U.S. at 475. The *Lee* court reasoned that CIPA was different because

> the CIPA burdens are not one-sided. First, the government has already agreed to allow Defendant and his counsel access to all classified files at issue in the indictment. Second, the government

> must produce all discoverable materials before the defense is required to file a § 5(a) notice. Third, before a § 6 hearing is conducted, the government must reveal details of its case so as to give the defense fair notice to prepare for the hearing. *See* 18 U.S.C. app. III §6(b)(2). Specifically, the government must provide the defense with any portions of any material it may use to establish the "national defense" element of any charges against Lee. Fourth, under § 6(f), the government is required to provide notice of any evidence it will use to rebut classified information that the court permits the defense to use at trial. Finally, in addition to the discovery obligations under § 6 of CIPA, the government must also comply with the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963).

Id. Accordingly, the court concluded that the "overall balance of discovery is not tipped against Lee," and "the burdens of discovery under CIPA and the Federal Rules of Criminal Procedure are carefully balanced." *Id*.

The district court in *Ivy* also had to address due process arguments identical to those raised by this defendant. Like this defendant, the defendant in *Ivy* contended that CIPA imposed "a one-sided burden on him, `without requiring the prosecution to make comparable disclosures about its case or, for that matter, even to specify particular classified information to which Mr. Ivy's notice can be limited.'" *Ivy,* 1993 WL 316215 at *4. But the district court disagreed, stating that

> CIPA burdens are not one-sided, but rather are carefully balanced. Admittedly, Ivy is required to disclose some of his defense pretrial - that his defense in this case will in large measure turn upon whether he had the requisite criminal intent and whether his conduct was authorized by the Government. Memorandum in Support of Motion at 1. Significantly, however, the Government has a reciprocal burden under CIPA to provide Ivy such details relating to the portion of the indictment at issue in the section 6(a) hearing as are needed to give him fair notice to prepare for the hearing and to provide Ivy with evidence the Government will use to rebut the defense's revealed classified information. The court,

> moreover, may place the Government under a continuing duty to disclose such rebuttal information. *See United States v. Collins*, 720 F.2d 1195, 1200 (11th Cir.1983) (discussing CIPA's reciprocity requirements).

Id. at *5. Moreover, given Rule 16 requirements, the district court stated that the defendant "will have an opportunity to examine and assess all discoverable documents before deciding whether he will disclose, or cause to be disclosed, any classified documents or information." *Id*. Thus, according to the district court, "[c]learly, with such a statutory scheme, CIPA does not impose a one-sided burden on the defense." *Id*.

The *Ivy* court found the defendant's heavy reliance on *Wardius* unpersuasive. *Id*. Indeed, the district court stated that the defendant's "comparison of the CIPA notice requirement with the notice-of-alibi rules at issue in *Wardius* and *Williams* . . . in fact . . . demonstrates the constitutionality of CIPA." *Id*. The district court noted that "[b]efore Ivy is required to file a Section 5(a) notice, the Government must produce all discoverable materials and before a section 6 CIPA hearing is conducted, the Government is required to reveal details of its case so as to give Ivy fair notice to prepare for the hearing." *Id*. Thus, "like the Florida statute upheld in *Williams,* and unlike the Oregon statute struck down in *Wardius,* CIPA provides for a narrowing of factual issues." *Id*. In addition, "like the Florida statute, CIPA authorizes the Court to impose on the Government a continuing duty to disclose rebuttal evidence and failure to comply with that obligation may result in the exclusion of evidence not made the subject of a required disclosure." *Id*. Finally, the district court noted that Government also has continuing discovery obligations under Rule 16 and *Brady*. Thus, the district court concluded that "because the CIPA burdens are

carefully balanced and the overall balance of discovery is not tipped against Ivy and in favor of the Government, Ivy's due process claim is rejected." *Id*.

Like this defendant, the defendant in *Ivy* also claimed that CIPA deprived him of an effective cross-examination, forcing him to disclose all of his classified information pre-trial and depriving him of the element of surprise. *Id*. at *6. The district court rejected thoe challenges as well, stating that

> CIPA does not, however, require the defense to disclose to the Government its plan of cross-examination. As discussed above, the statute requires a defendant to identify the classified information he intends to use, but not to `attribute any particular piece of information to the cross examination of any particular witness.' *Poindexter*, 725 F.Supp. at 34. CIPA does not, therefore, deprive Ivy of the opportunity to confront and question the Government's witnesses at trial.

Id. To the extent that CIPA reduces the element of surprise, the district court found no Sixth Amendment violation, stating that "`[t]his argument assumes that defendant has an unqualified right to undiminished surprise with respect to his cross-examination, and that if there is any impairment of the element of surprise, however slight, cross-examination must be regarded as *per se* ineffective.'" *Id*. (quoting *Poindexter*, 725 F.Supp. at 34). Since the Confrontation Clause only "guarantees an *opportunity* for effective cross-examination," not a cross-examination of the defendant's pleasing, the *Ivy* court rejected this Sixth Amendment challenge as well. *Id*. (quoting *Van Arsdall*, 475 U.S. at 679). *See also United States v. Wilson*, 571 F.Supp.2d 1422, 1427 (S.D.N.Y. 1983), *aff'd*, *United States v. Wilson*, 750 F.2d 7, 9 (2nd Cir. 1984)).

Here, the defendant's arguments are no different that the defendants in *Lee* and *Ivy*, who like this defendant, relied almost exclusively on *Wardius*. *See Motion*, pg. 5-6. There is no Sixth

Amendment confrontation clause violation because the defendant's Sixth Amendment rights are not unlimited. The deprivation of surprise is speculative at best, and a sufficient regulatory interest justifies the notice provisions of CIPA.

Morever, contrary to *Wardius*, there is no one-sided burden on the defendant not shared by the government. The defendant has received full discovery in this case. The defendant received unclassified discovery in May 2010, including redacted FBI 302s and agents' handwritten notes of the defendant's statements. In September 2010, the Government provided the grand jury testimony of the two testifying special agents and associated grand jury exhibits as well as a Powerpoint presentation used during a reverse proffer with the defendant. At that point, the defendant "effectively had many, but not all, of the documents that the Government intended to introduce at trial as well as the prosecutive theory of the case." *Second Status Report*, Dkt. 23, pg. 1.

Similarly, by late August 2010, the government had installed a viewing station within the defense SCIF that contained, among other things, the unredacted, classified statements of the defendant; phone records; FOIA requests; personnel records of the defendant; the defendant's NSA emails; and approximately forty (40) FBI 302s and/or memoranda of interview memorializing witness interviews. The government has made all of the documents seized from his residence available for review. By October 15, 2010, the defendant had installed in their SCIF a mirror image of the defendant's NSA email account.[2]

[2]There have been no limitations placed on the defense's consulting experts' access or review of any discovery.

On November 28, 2010, the government provided the defendant its Rule 16(g) unclassified summary of its expert. On December 15, 2010, the defendant received almost all of the classified exhibits that will be the subject of the Section 6 hearing. Where the government has received defense discovery requests, the government has attempted to process those requests as expeditiously as possible. The government recognizes its continuing duty of disclosure under Rule 16 and *Brady* and remains in compliance with those obligations. Therefore, to suggest that the burden is somehow one-sided is just wrong.

III. CONCLUSION

Based upon the foregoing, the government respectfully requests that this Court deny the defendant's *Motion for a Declaration That Sections 5 and 6 of CIPA Are Unconstitutional As Applied*.

Dated this 11th day of March, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of the *Government's Response to Defendant's Motion for a Declaration That Sections 5 and 6 of CIPA Are Unconstitutional As Applied* to be served via ECF upon James Wyda and Deborah Boardman, counsel for defendant Drake.

/s/ William M. Welch II
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