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 REPLY TO DEFENDANT'S RESPONSE TO 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 files this reply to the *Defendant's Response to Motion for an In Camera Hearing and Motion for Order Pursuant to Sections 6 and 8 of The Classified Information Procedures Act*. Dkt. 68. The defendant's opposition should be rejected.

The case is uniquely suited for the silent witness rule. The case involves the defendant's willful retention of classified documents. That means that proof of the defendant's willfulness comes directly from the government's classified exhibits themselves In fact, the defendant himself concedes that "the exhibits that the government seeks to introduce through the silent witness rule ***are the primary pieces of evidence*** in this case" for the defense as well. *See Defendant's Response*, pg. 9, Dkt. 68 (emphasis added)(hereinafter "*Response*"). The information contained within those documents, the classifications markings on the them, the portion markings found within the documents – all of those visual cues are critical to establishing

the defendant's willfulness. The classified exhibits themselves, not substitutions, are the best evidence of the defendant's willfulness, precisely what is necessary in order to prove the essential elements of the charged crimes. As described below, the use of the silent witness rule as applied in this case will not put the public and the defendant in any worse position than if conventional CIPA substitutions were used.

CIPA, and in particular CIPA § 6(c), which sets forth an alternative procedure for disclosure of classified information, does not preclude the use of the silent witness rule simply because the silent witness rule is not specifically set forth in the statute as an alternative. CIPA does not preempt the field with regard to protection of classified information at trial. As discussed below, CIPA allows for the silent witness rule, the Fourth Circuit has ordered protection of classified information and national security information outside of CIPA, the national security privilege exists independent of CIPA, and to find that CIPA actually proscribed the options available to the Court to protect classified information from public disclosure would be contrary to the language and intent of CIPA.

I. Background

Under the silent witness rule, the government or the defendant would present a witness with a classified exhibit. The witness would not identify or describe the classified information contained within document, but instead would refer to the exhibit generally. Under questioning, the witness would direct the jury's attention to the classified information by some reference point, such as a number, a paragraph location, or a non-unique word or phrase. If necessary, the parties could use a code, such as "Person 1," or "Country A," to reference certain pieces of information. The jury, counsel, and the judge would have access to a key alerting them to the

meaning of these code designations. The public would not because to do so would reveal the classified information. The witness and the jury then would silently read the document to themselves.

The direct and cross examination would be conducted by asking questions in an unclassified fashion, just as the parties would ask questions with conventional CIPA substitutions. Similarly, the witness would respond with unclassified answers, and could be directed to various documents as part of those examinations, just as he or she would with conventional CIPA substitutions. The jury would follow along, examining the very same documents that either counsel or the witness referenced.

II. CIPA Is A Procedural Statute And Does Not Foreclose The Silent Witness Rule As An Available Substitution.

CIPA is a procedural tool that allows a court to address the use and relevance of classified information in a criminal case. *See United States v. Rosen*, 557 F.3d 192, 194-95 (4th Cir. 2009); *United States v. Moussaoui*, 591 F.3d 263, 282 (4th Cir. 2009); *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1990) (stating CIPA "is merely a procedural tool requiring a pretrial court ruling upon the admissibility of classified information."). *See also United States v. Stewart*, 590 F.3d 93, 130 (2nd Cir. 2009). Section 6(c) expressly grants a district court the authority to modify and restrict relevant evidence in order to accommodate both the legitimate interest of the defendants in defending the case and the important governmental interests in protecting national security. *United States v. Collins*, 603. F.Supp. 301, 304, 306 (S.D. Fla. 1985); *see* S. Rep. 96-823, 1980 USCCAN 4294, 4302 (substitutions are "clearly preferable to disclosing information that would do damage to the national security" so long as a defendant's right to a fair trial is not

prejudiced).

"When evaluating the governmental privilege in classified information which CIPA serves to protect, however, 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. 2007). Specifically, "[t]he trial court is required to balance the public interest in nondisclosure against the defendant's right to prepare a defense." *Id*. "A decision on disclosure of such information must depend on the `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 *United States v. Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985)).

Section 6(c)(1) allows the district court to order substitutions in lieu of the disclosure of classified information. Ths provision must be read broadly in light of the "particular facts of each case" and because the CIPA procedures vest "district courts with wide latitude to deal with thorny problems of national security in the context of criminal proceedings." *Abu-Ali*, 528 F.3d at 247. *See also United States v. North*, 713 F.Supp. 1452, 1453 (D.D.C. 1988) (stating that CIPA's legislative history "shows that Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems."

The legislative intent behind CIPA supports the use of the silent witness rule. The legislative intent was to allow the government to convey as directly as possible the information that the court found admissible, but to use the substitution to protect what can be protected.

> "[A]lthough the standard . . . for alternative disclosure, 'substantially the same ability to make his defense,' is intended to convey a standard of substantially equivalent disclosure, *precise,*

> *concrete equivalence is not intended*. The fact that insignificant tactical advantages could accrue to the defendant by use of the specific classified information should not preclude the court from ordering alternative disclosure."

H. Rep. 96-1436, 1980 USCCAN 4307, 4310-11 (emphasis added). The silent witness rule is one type of substitution.[1] It is an alternative to disclosure of the information at trial as contemplated by CIPA.

The legislative history of CIPA demonstrates that this procedure for reviewing substitutions "has been carefully crafted and is intended to insure that the defendant's case is not adversely affected because classified information is involved. The Committee expects the Court to pay particular attention to the language chosen for the statement or summary. Basically, the government's request should be granted in those circumstances where the use of the specific classified information, rather than the statement or summary, is of no effective importance to the defendant." H. Rep. 96-831, pt. 1, 96th Cong. 2d Sess. 19 (1980) pp 19-20. The Report states further, "[t]he Committee devoted a good deal of scrutiny to [the predecessor of Section 6(c)] . . . to insure that the provision is both constitutional and fair." *Id.*

The text and legislative history further establish the authority of the district court to approve substitutions that go beyond simple word or paragraph redactions. Section 6(c)(1)(B) uses the term "summary," which means an "abstract" or "abridgment," MERRIAM-WEBSTER DICTIONARY (2006), a meaning that does not suggest only limited redactions to the classified information. Because it is a procedural statute, CIPA does not, and could not, set forth the

[1] For example, in *United States v. Fernandez,* 913 F.2d 148, 162 (4th Cir. 1990), the Fourth Circuit analyzed a government proposal to use a "key card" system, where the jury would consult the key card to identify certain locations, as a "substitution" pursuant to CIPA § 6(c).

myriad types of manners and forms a substitution could take. Moreover, given the unique nature of each criminal case and the unique nature in which classified information may be at issue, it could not set forth every permissible substitution, but rather CIPA provides the tools for district courts to fashion them.

In *United States v. Rosen*, 520 F.Supp.2d 786, 796 (E.D.Va. 2007), the district court considered the exact same argument raised by this defendant and concluded that CIPA was "neither exhaustive nor explicitly exclusive with respect to the presentation of classified testimony or documents at trial." According to the district court, "[i]t follows that CIPA cannot be said to exclude the use of the [silent witness rule] at trial." *Id*. In fact, although noting that "no court has squarely addressed this precise question, a few courts have implicitly approved the use of the [silent witness rule] at trial." *Id* at 796 and n.16 (citing *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987) (noting the district court's approval of limited use of the silent witness rule and affirming on other grounds); *Fernandez,* 913 F.2d at 161-62 (rejecting the proposed use of the silent witness because it was so untimely, but noting that the government's proposal was "ingenious"); *United States v. North,* 1988 WL 148481 at *3 (D.D.C. 1986) (rejecting the use of the silent witness rule in "this particular case which will involve thousands of pages of redacted material and numerous substitutions" without addressing its applicability in other contexts)).[2] In addition, the *Rosen* court noted that other courts, without using the specific term, "have approved the presentation of evidence in one form to the jury and in another form to the public." *Rosen*,

[2]In addition to the cases cited by the *Rosen* court, there were at least two others. *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).

520 F.Supp.2d at 796 and n.17 (citing *United States v. Pelton*, 696 F.Supp. 156, 157-60 (D.Md.1986) (allowing recorded conversations containing classified information to be played only to the court, counsel, defendant, and the jury, while making only a redacted trial transcript available to the public); *United States v. George,* Nos. 91-0521 & 92-0215, 1992 WL 200027, at *3 (D.D.C. July 29, 1992) (withholding witnesses' names from the public, but disclosing them to defendant, the court, and government's counsel via a "key card" filed under seal). By so doing, these district courts "have given effect to Congress' express intent in enacting CIPA that federal district judges `must be relied on to fashion creative and fair solutions to these problems,' *i.e.,* the problems raised by use of classified information in trials. S. Rep. 96-823, *reprinted in* 1980 U.S.C.C.A.N. 4294." *Rosen*, 520 F.Supp.2d at 796. The district court concluded that the silent witness rule was *"precisely the sort of judicially-created fair solution envisioned by Congress*." *Id*. (emphasis added).[3]

Thus, the defendant's argument must fail. Neither CIPA nor Rule 26 foreclose the use of the silent witness rule. District courts are empowered to close proceedings to the public, to allow the jury to receive evidence that the public may not, and to undertake other procedures to safeguard witnesses and others. A finding that CIPA precludes this Court from using the silent witness rule also would lead to illogical results. District courts, for example, could close a courtroom to protect the myriad of compelling interests previously discussed, including juror

[3]Like the defendants in *Rosen*, the defendant here raises a Rule 26 objection to the silent witness rule. But the *Rosen* court summarily rejected that challenge, stating the Rule 26 "is general and aspirational and suffers the fate of all general rules: It has well-established exceptions. Courts in criminal cases have in a variety of circumstances partially closed proceedings to accommodate overriding interests, such as the safety of confidential informants and undercover officers." *Rosen*, 520 F.Supp.2d at 796-97 (citations omitted). The court reasoned that the silent witness rule was "simply another of these exceptions." *Id*. at 797.

embarrassment and protection of minor witnesses, undercover law enforcement agents and informants, but such a partial closure would be unavailable to protect classified information. Consequently, a statute designed to protect classified information from disclosure at trial would be turned on its head and be interpreted to preclude a type of protection available to unclassified information. Congress never intended CIPA to limit the options for a district court to address the use of classified information at trial. Instead, it supplements those options and provides a framework for the courts to address those available options prior to trial. And as discussed in more detail below, this case is uniquely suited for the use of this rule.

II. The Fourth Circuit And Other Courts Have Protected Classified Information Outside of CIPA

CIPA does not provide the exclusive means for protecting classified information or national security information. While all the reported cases which raise the silent witness rule do so in a CIPA context, CIPA is not the single authority through which courts have exercised the power to protect classified information from disclosure. Consequently, even if this Court were to find that the silent witness rule is not a substitution pursuant to CIPA, the Court would not be precluded from applying it because CIPA does not preempt the field with regard to protection of classified information. Other courts have protected classified information from disclosure outside the provisions of CIPA § 6(c) .

In *Pelton*, 696 F. Supp. 156 (D. Md. 1986), over objection by the media, the court allowed a select portion of a recording to be played only for the jury and to make a redacted transcript available to the public. The court held that while CIPA § 8 did not provide for closure of the courtroom, the tapes would be played only for the jury because the government had

established a "compelling reason" for the procedure. *Id*. at 159. Thus, even though the court in that case determined that while CIPA did not provide for the proposed protection of the information, CIPA was not found to preclude the court from protecting the information consistent with other applicable legal standards.

In *Smith*, 780 F.2d at 1108-10, the court held that the government may properly assert a national security privilege, that this privilege exists independent of CIPA, and that CIPA did not diminish the court's power to protect that privilege. In *Smith*, the court held that because the national security privilege existed at common law when CIPA was enacted, an assertion of that privilege would require a balancing of the privilege against the admissibility of the evidence. The court held that CIPA was not intended to, and did not change the substantive law as it existed when CIPA was enacted. *Id*. at 1110. Consequently, CIPA cannot be read to extinguish protections otherwise available to protect the government's national security privilege.

In *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), the defendant sought to depose an enemy combatant. The district court ordered the government to make the enemy combatant available for a Rule 15 deposition. The government invoked CIPA and appealed the district court's order. While that appeal was pending, the Fourth Circuit remanded the case to the district court "for the purpose of allowing the district court to determine whether any substitution existed which would place Moussaoui in substantially the same position as would a deposition." *Id*. at 458. The parties offered substitutions for the then three enemy combatants, which the district court rejected. Upon rejection of the substitutions, the government advised the district court that it would not make the enemy combatants available for deposition. The district court then entered an order imposing a sanction on the government for its refusal to make the

combatants available. The government appealed that order.

On appeal, the Fourth Circuit held that the question of access to enemy combatants and the use of the summaries of their information as substitutes for testimony was not subject to CIPA. *Id*. at 477, 482. Nonetheless, the Fourth Circuit held that CIPA provided an analogous framework within which to fashion a remedy that would allow the defendant to use the information he needed and still allow the government to protect its national security interests. *Id*. at 476. The court stated, "CIPA thus enjoins district courts to seek a solution that neither disadvantages the defendant nor penalizes the government (and the public) for protecting classified information that may be vital to national security." *Id*. at 477. The Fourth Circuit ordered the district court to fashion suitable summaries of the enemy combatant information that would then be used as substitutes for the enemy combatant testimony along with appropriate instructions advising the jury of the nature of the summaries and the substitution. *Id*. at 480, 482. This demonstrates that the Fourth Circuit endorsed a broad and flexible use of substitutes, including summaries of material live witness testimony, to allow a "measured approach" so that the case could proceed to trial. In so doing, while the Fourth Circuit used the CIPA as an analogous framework, it found that courts have power outside of CIPA to protect the information from disclosure at trial.

III. The Use Of The Silent Witness Rule Satisfies A Compelling Interest, Is No Broader Than Necessary, And No Other Reasonable Alternatives Exist.

Partial closure of a trial may occur where (i) a compelling interest exists to justify the closure, (ii) the closure is no broader than necessary to protect that interest, and (iii) no reasonable alternatives exist to closure. *Press-Enterprise Co. v. Superior Court of California,*

464 U.S. 501 (1984); *Waller v. Georgia,* 467 U.S. 39, 48 (1984). *See also Rosen*, 520 F.Supp.2d at 797; *United States v. Aleynikov*, 2010 WL 5158125 at *1 (S.D.N.Y. 2010) (finding that complete closure of the courtroom satisfies *Press-Enterprise* test in trade secrets case). The court must make its findings concerning the *Press-Enterprises* test on the record. *See Press-Enterprise,* 464 U.S. at 510; *Bell v. Jarvis,* 236 F.3d 149, 166 (4th Cir. 2000); *Rosen*, 520 F.Supp.2d at 797.

A. National Security Is A Compelling Interest

The Supreme Court has noted that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). "'The Government has a substantial interest in protecting sensitive sources and methods of gathering information,'" *Abu Ali*, 528 F.3d at 247 (quoting *Smith*, 780 F.2d at 1985), and "'in protecting both the secrecy of information to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.'" *Abu Ali*, 528 F.3d at 247 (quoting *C.I.A. v. Sims*, 471 U.S. 159, 175 (1985)).

Because national security is such a compelling interest, it is one such exception that justifies closure. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 598 n.24 (1980) (concurring opinion of Justices Brennan and Marshall citing "national security concerns" as an example of a possible basis for closure); *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165, 1179 (6th Cir. 1983) (stating that "courts have carved out several distinct but limited common law exceptions to the strong presumption in favor of openness", including privacy rights, trade secrets and national security); *Rosen*, 520 F.Supp.2d at 797 (finding national security a justification for partial closure).

The government does not suggest that the mere invocation of national security trumps the

First Amendment. However, the fact that this case involves classified documents and exhibits satisfies the first hurdle of *Press-Enterprises*.

B. The Silent Witness Rule is Narrowly Tailored

The silent witness rule as applied in this case is narrowly tailored and no broader than to protect national security concerns. As described above, under the silent witness rule, the government or the defendant would present a witness with a classified exhibit. The witness would not identify or describe the classified information contained within document, but instead would refer to the exhibit generally. The government's expert would refer the jury to her two short, classified statements contained within two exhibits, which explain in classified terms why two of the charged classified documents relate to national defense. Under questioning, the witness would direct the jury's attention to the classified information by some reference point, such as a number, a paragraph location, or a non-unique word or phrase. The witness and the jury then would silently read the document to themselves.[4]

The direct and cross examination would be conducted by asking questions in an unclassified fashion, just as the parties would ask questions with conventional CIPA substitutions. The witness would respond with unclassified answers, just as he or she would with conventional CIPA substitutions. Conventional CIPA substitutions would be created for the public. Therefore, the public would be in the same position as if the silent witness rule had not been used.

[4]If necessary, the parties could use a code, such as "Person 1," or "Country A," to reference certain pieces of information. The jury, counsel, and the judge would have access to a key alerting them to the meaning of these code designations. The public would not because to do so would reveal the classified information.

If necessary, the conventional CIPA substitutions also could be used for cross-examination. The substitutions would be no different than demonstrative exhibits routinely used every day in courts throughout the country. Therefore, the defendant would be in the same position as if the silent witness rule had not been employed.

The benefit of the silent witness rule is that the jury sees exactly what the defendant saw when he removed the classified document from NSA and illegally took the classified document home. The theories of the defense in this case are clear: intent and classification are critical to the defense case. Given the centrality of those issues in this case, the content of the documents, the portion markings, the classification markings, and other information and visual cues contained within and relevant to the charged classified documents are important in establishing those essential elements. Given that the defendant has conceded the importance of those issues, *see Response*, pg. 9 ("the exhibits that the government seeks to introduce through the silent witness rule ***are the primary pieces of evidence*** in this case"; "***whether the information in the documents is classified will be a hotly contested issue*** in this case") (emphasis added), the jury should see what the defendant saw, and know what the defendant knew, exactly as those documents appeared so that the jury can make the most informed decision. If the classified exhibits are the primary evidence in this case, then the jury should see the classified exhibits in their native form. The jury should not be deprived of the best, most relevant evidence in this case.

C. No Reasonable Alternatives Exist

For the jury to see the classified documents exactly as the defendant read them, and know what the defendant knew when he saw them, there are no reasonable alternatives. Either the jury

sees the classified documents in their native form, or they do not. There are no other alternatives. Declassification of the classified exhibits is not an option, and substitutions and redactions add a level of generalization that does not match exactly what the defendant saw.

There is no prejudice to the defendant. If the content of the classified exhibits are truly "insignificant" or not the defendant's "greatest hits," *see Defendant's Memorandum in Support of Disclosure of Department of Defense Inspector General Audit Documents*, pg. 3, Dkt. 76, then the jury should see this allegedly exculpatory, content-based information. If true, by seeing the content of the actual classified exhibits, the jury will have more appreciation for their "insignificance," and the theories of defense will have more weight with the jury. In effect, the defendant argues against the admission of exculpatory evidence.

The use of the silent witness rule does not impair the cross-examination of the defendant in any way. As noted above, the defense can use conventional CIPA substitutions to cross-examine witnesses. The conventional CIPA substitutions can be admitted as demonstrative exhibits. Therefore, the defendant is in the exact same position as he would have been if the silent witness rule was not used. In any event, as argued in a previous pleading, *see United States' Response to Motion for a Declaration That Sections 5 and 6 of CIPA Are Unconstitutional As Applied*, pg. 7-8, Dkt. 65, 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.'" *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985).

There is no inherent prejudice from the procedure itself. "Talking in code, nodding, or pointing to paragraphs" will not prejudice the defendant. *See Response*, pg. 9. The parties or the

Court could fashion limiting instructions to cure any alleged prejudice. There is no reason to believe that a jury could not or would not follow those limiting instructions. *See United States v. Johnson*, 587 F.3d 625, 631 (4th Cir. 2009)(stating that "[w]e presume that juries follow such instructions)(citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)); *United States v. Basham*, 561 F.3d 302, 335 n.15 (4th Cir. 2009)(stating that "we presume the jury follows instructions, *Jones v. United States,* 527 U.S. 373, 394 (1999) ("The jurors are presumed to have followed ... [the] instructions.")).

Finally, there is no prejudice to the public or deprivation of the defendant's Sixth Amendment right to a public trial. The conventional CIPA substitutions put the public and the defendant in the exact same position as they would have been if the silent witness rule was not used. Of course, the public does not get to see the classified documents in their original form, but they would not under CIPA anyway.

In the end, the jury, the fact-finder of these "hotly contested" issues, benefits from the use of the silent witness rule, and no party is prejudiced. If the "contents of the documents are of paramount importance to the defense," *Response*, pg. 9, then the jury should see the classified documents in their original form.[56]

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[5]In Sections II, III, and IV, the defendant offered additional legal guidance to the court regarding various legal issues that arise in CIPA litigation. The government believes that Fourth Circuit law is well-settled in these areas, and the government does not anticipate much disagreement over the law during the Section 6 hearing.

[6]The government's point here is simple. The more expansive the defendant is in his Section 5 notice, the easier the Section 6 hearing will be for all parties, including the Court. If the defendant has not identified lines of inquiry with some specificity in his Section 5 notice, and sufficiently amplified those lines of inquiry during the Section 6 hearing, the government will move for exclusion at trial. *See Rosen*, 520 F.Supp.2d at 790 (stating that CIPA "requires both prosecutors and defense counsel to disclose, well in advance of trial, certain aspects of their trial

III. Conclusion

Based upon the foregoing, the United States respectfully requests that the Court grant its motion and permit the use of the silent witness rule at trial.

Respectfully submitted this 18th day of March 2011.

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strategy, including the identity of potential witnesses and the nature and thrust of expected trial testimony and potential jury arguments."). The government looks forward to the defendant's amended Section 5 notice.

CERTIFICATE OF SERVICE

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

/s/ William M. Welch II
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