U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

May 30, 2011

Honorable Richard D. Bennett
United States District Court
for the District of Maryland
101 West Lombard Street
Baltimore, Maryland 21201

Re: United States v. Thomas Andrews Drake
Case No. 10 CR 00181 RDB

Dear Judge Bennett:

This letter shall respond to the defendant's letter, dated May 30, 2011, and filed publicly on the docket.

The defendant's accusations are outrageous and false. At no point has the government defied any order of the Court. Instead, the defendant has cherry-picked from the hearing transcript and provided this Court only a brief, limited exchange between the Court and the government regarding how the substitutions should appear. In fact, the day before, the government specifically had the following exchange with the Court:

Mr. Welch: It struck me that we will be doing the substitutions as the Court has indicated, but we're not going to be re-writing an email to make it seamless, because it's an email that he received at NSA as opposed to something at his house.

Court: Yes.

Mr. Welch: We don't know how we're going to re-write an email.

Court: I think that's correct.

(TR, May 4, 2011, pg. 310). The defendant never objected to nor opposed this statement by the government. As the defendant admits, the charged documents have been re-typed and appear seamless.

Ultimately, the government's proposed substitutions reflected its understanding of the court's rulings regarding how the proposed substitutions should appear: that the charged documents as found at the defendant's home should appear seamless; that the Murray documents should retain any handwritten notes to insure an adequate opportunity for cross-examination; and that the source documents may contain the boxed-in substitutions. Because the Murray documents contain handwritten notes, they cannot be re-written or re-typed. At the conclusion of the Section 6(c) hearing, the government confirmed this understanding with the Court's clerk regarding the government's understanding of how the substitutions should appear.

Nowhere does the defendant acknowledge that he specifically ***asked for*** and **agreed to** similar, boxed-in substitutions that he now criticizes the government for having generated. For example, as the Court will recall, defense counsel specifically requested that the substitutions for the classified information appearing in the "Buy v. Make" and "HPSCI Mark" source documents be created in order to highlight to the jury that the defendant did not take home this classified information. The Court and the parties spent a considerable amount of time crafting substitution language for descriptions of CODELs and other subject areas that the defendant specifically wanted to appear, and the government then provided those proposed substitutions to the defendant for review. The defendant agreed to those boxed-in substitutions. For the defendant now to criticize the government for utilizing the same method for substitutions that the defendant himself requested is stunning and hypocritical.

The defendant's proposal - that everything appear seamless and no evidence of substitutions should appear anywhere on any document - is impractical and nonsensical. Under the defendant's proposal, the jury will be unable to tell where the classified information had been. The defendant's proposal promises to sow more confusion in the jury's mind and prejudice the government's case because the jury will think that everything the defendant saw, read, and generated was unclassified on its face. In fact, the idea that no reference to substitutions should or can be made has been flatly rejected by the Fourth Circuit. Indeed, the Fourth Circuit quite sensibly expects a district court to instruct the jury regarding the practice of substitutions. *See United States v. Moussaoui*, 382 F.3d 453, 480 (4th Cir. 2004)(stating that "[a]s previously indicated, the jury must be provided with certain information regarding the substitutions."). *See also United States v. Salah*, 462 F.Supp.2d 915, 924 (N.D. Ill. 2006)(setting forth a limiting instruction that district court intended to give each time a substitution or stipulation of fact would be read to the jury). The fact that this case involves classified information does not mean that the facts should be sanitized to nothingness.

There is no prejudice that results from the use of these substitutions. The Court quite properly ordered that the charged documents should appear seamless. That is exactly what the government did, and visually the jury will see no cues from the face of these documents that will prejudice the defendant in any way. These are the only documents from which the jury must conclude whether the defendant willfully retained national defense information.

Second, regarding the Murray documents, the defendant specifically asked that those

documents retain the handwritten notes. The handwritten notes clearly mark the portions of those documents that are "Top Secret," "Secret" or "Confidential," and those classified portions are the very same portions in which the substitutions appear. The defendant cannot claim prejudice when he himself requested the handwritten notes and the "TS" and "S" identifiers to remain on the Murray documents. In addition, the government's expert will point to those very same passages during her testimony and testify that those substitutions contain "Top Secret," "Secret" or "Confidential" information. If anything, the substitutions are more innocuous and less prejudicial to the defendant than the original language, and the fact that the substitutions appear in boxes highlights the language no more than the original, handwritten notes labeling those portions "Top Secret" or "Secret" that the defendant asked to remain within the documents. The defendant cannot have it both ways.

Furthermore, no prejudice results from the use of substitutions in the Murray documents in cross-examination. The defendant can cross-examine the government's expert about portions of documents marked "Unclassified," and have the government's expert compare and contrast those unclassified portions with sections of documents deemed classified. The substitutions certainly will not inhibit that cross-examination in any way. Since the substitutions used the same terms for the same original language appearing in the unclassified and classified sections of the various documents, the defendant will be able to compare "apples to apples" and point out any alleged inherent inconsistencies.

Third, the source documents, largely NSA emails copied, pasted and removed from a Top Secret system by the defendant, bear headers and footers that read "Top Secret" or "Secret." The use of substitutions in these documents cannot possibly prejudice the defendant given those headers and footers. Of course, the defendant also is not charged with illegally retaining or possessing these documents. Therefore, the substitutions appearing in these documents cannot possibly prejudice the defendant in any way.

Finally, the use of the substitutions signals nothing about the Court's views on the matter. The fact that this case involves classified information and substitutions does not mean the issue should be avoided and hidden from the jury. Instead, just as the district court dealt with this issue squarely in *Marzook*, this Court can address the issue by instructing the jury that the Court expresses no opinion regarding the use of the substitutions or any of the substituted matter. That is precisely what jury instructions are for. Limiting instructions also can inform the jury, among other things, that the government has asserted that classified information exists within certain documents; that the government has the burden of proving that assertion beyond a reasonable doubt; that the defendant vigorously contests the presence of classified information within the documents; that the substitutions are simply a way of the government presenting its case without revealing what it alleges to be classified information; and the jury should draw absolutely no adverse inference about the use of substitutions in this case, and that it would be inappropriate to do so.

In the end, the substitutions provided to the defendant are not final. The government provided the substitutions to the defendant so that the defendant can identify where the substitutions have been made and make any necessary revisions. The government does not intend the final versions to be in red, but the substitutions in the non-charged documents must be explained to guarantee fairness for the government.

/s/
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