IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 1:05CR225
v.	)	
	)	Hon. T.S. Ellis III
STEVEN J. ROSEN,	)	
	)	
KEITH WEISSMAN,	)	Hearing: April 16, 2007
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE AND SUPPLEMENTAL MOTION TO STRIKE GOVERNMENT'S MOTION FOR HEARING PURSUANT TO CIPA SECTION 6

The United States, by undersigned counsel, respectfully submits this response to the defendants' Motion to Strike and Supplemental Motion to Strike the government's Motion for Hearing Pursuant to the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 Section 6. In their motion, the defendants contend that the government's proposed substitutions and use of the silent witness rule to protect the unnecessary disclosure of classified information is unconstitutional, not permitted by CIPA itself and prejudicial. Defendants are wrong on all counts. The government's proposal is constitutional, is exactly what was contemplated by CIPA and any prejudice to the defendants can be cured by an appropriate instruction from the Court.

BACKGROUND

In their Motion for a Hearing Pursuant to CIPA Section 6, the government requested that this Court approve specific substitutions, summaries and stipulations, in lieu of the disclosure of the underlying classified information. The government's motion provides that the court will remain open at all times, to all persons.

The vast majority of the government's case in chief will be in the public with no substitutions.[1] Further, the government has had much of the classified information provisionally declassified for use at trial, and is not proposing any substitutions for that classified information. In other instances, where the government was able to capture evidence of the defendants actually receiving and disclosing the national defense information the government has proposed a substitution in lieu of disclosure of the classified information to the public. The nature of the substitution, and the manner in which the evidence is presented in court is dependent upon and related to the nature of the classified information the defendants received and disclosed, and whether the disclosure was verbal or in an email. The substitutions generally track the nine separate instances set forth in the superseding indictment in which the defendants obtained and disclosed the classified information. With respect to any given instance of disclosure, the substitutions will follow through every disclosure the defendants made.

Under the government's proposal, the jury, in almost all instances, will receive the full and complete evidence without substitution or alteration. With regard to recorded conversations in which the defendants receive or disclose classified information, the government has proposed that the jury hear entire recordings, unedited. The public will hear a redacted version of the recording, narrowly redacting only that information necessary to protect national security interests. The public will also receive a redacted transcript with a summary or substitution in lieu

---

[1] This evidence includes evidence much at the heart of the defendants' conspiracy, including evidence relating to the defendants' false statements to the FBI, contact with foreign officials after being confronted by the FBI, conversations in which the defendants acknowledge the classified nature of the information they are disclosing, conversations reflecting knowledge of the rules applying to the restrictions on the disclosure of classified information, and statements reflecting efforts to cultivate Franklin as a source of information and surveillance information relating to the defendants meetings with their government sources.

of the classified information. In those instances, the amount of substituted information comprises only a small fraction of each recorded conversation.

The government also intends to offer in evidence classified documents which were the subject of the defendants' disclosures. The jury again, will receive the entire document with very few redactions or substitutions. The public will receive a redacted version of the document with a summary of the contents, or, in some cases, a summary of the contents of the documents.

Witness testimony will proceed along the same lines, with the jury receiving testimony pursuant to the "silent witness rule."[2] As described in *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987), pursuant to the silent witness rule classified documents go the jury and all testimony about the documents and the information contained in them is done by reference to the document without public disclosure of the contents of the document. In this case, testimony will also be guided by the substitutions and summaries the government has proposed for each of the redactions from the recorded conversations and the classified documents. Witnesses will testify by reference to the recorded conversations or classified documents or by reference to designated substitutions for country names, individuals and other information from a list which will be available to the court, the witness, the parties and the jury.

Through the use of this procedure, the jury will receive the fullest and most complete evidence, including documents, recordings and witness testimony. The jury will not receive summaries or substitutions, but the actual evidence. The public will receive all the evidence

---

[2] Contrary to defendants' contention, the "silent witness rule" label is not a creation of the government, rather, it was the court that called it such. *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987).

except for the remaining classified information, for which a summary or substitution will be provided.

SUMMARY OF ARGUMENT

In its Motion to Strike the defendants argue that the government's proposal should be rejected for essentially three reasons: it is unconstitutional, in its entirety; unsupported by CIPA; and prejudicial. They argue that the proposal to provide the jury with information the public will not receive constitutes an unconstitutional "closure" of the trial. They also argue that the silent witness procedure "raises the possibility of violating the defendants' Confrontation Clause rights" by affecting their ability to cross-examine witnesses. Next, defendants argue that CIPA does not allow the government to use the silent witness rule. Finally, defendants argue that use of the silent witness rule will be prejudicial because it will suggest to the jury that the information is national defense information. The defendants' motion fails on all points.

The government's proposal is not unconstitutional. Criminal trials may be closed when there is an overriding interest that requires closure. Consequently, the government's proposal is not, on its face unconstitutional. The Court must go through the CIPA process to determine what substitutions will be ordered, and then, the Court may determine whether such substitutions are constitutional. Additionally, the defendants' Confrontation Clause argument is hypothetical and may be obviated by revised substitutions designed to address specific objections. It any event, the substitutions are permissible if the Court finds that they allow the defendants substantially the same ability to conduct their examination, even if it is not their preferred way to do so. Finally, any prejudice that may arise from the use of the proposed substitutions can be addressed by appropriate instructions from the Court.

ARGUMENT

I. The Government's Proposal Is Constitutional

At no time will the trial in this case be closed to the public. The trial will be conducted in the open. This will not be a "secret trial." The government has a strong interest in ensuring that the defendants' conduct in this case, their conspiracy to obtain and disclose our nation's secrets is presented in open court. The court, the lawyers, witnesses and jurors will all be performing their respective functions in open court. *See Bell v. Jarvis*, 236 F. 3d 149, 165 (4th Cir. 2000) (en banc). The government proposes only that certain of the most sensitive national security secrets the defendants disclosed to foreign officials and others be provided in its complete form to the jury, and that the public receive a summary or substitution of that information to protect the information from further compromise. The Court will review these substitutions at the CIPA Section 6 hearing. This proposed substitution scheme is not unconstitutional.

The government, has proposed, pursuant to CIPA Section 6(c) that certain information be given to the jury and, in lieu of pubic disclosure of that information, the public receive a summary or substitution of that information. CIPA requires that the Court hold a hearing on these proposed substitutions and, if the substitutions provide the defendants with substantially the same ability to conduct their defense, the Court shall grant the government's motion. Only after the Court makes these determinations pursuant to CIPA Section 6(c) will the Court be in a position to conduct the appropriate analysis of whether there is any closure and whether such closure is constitutional.

1. The *Press-Enterprise* Standard

Nevertheless, the defendants argue that the proposal, in its entirety, is unconstitutional because the government proposes to give the jury evidence in its entirety and give the public a summary or substitution for that evidence. While it is well settled that the defendants have a rights to a public trial and the public and the press each has a right to attend a criminal trial, these rights, are not absolute. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). This presumption of openness can be overcome by an overriding interest which requires closure. *Id.* "Trial judges have discretion to impose reasonable limitations on access to a trial when overriding interests, 'such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information,' are likely to go unprotected if closure is not employed. *Bell v. Jarvis*, 236 F.3d 149, 165 (4th Cir. 2000) *citing Waller* 467 U.S. 39, 45 (1984).

In *Press-Enterprise*, the Supreme Court stated the rule as follows:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

464 U.S. at 510. The threshold requirement to close the courtroom is the existence of an overriding interest requiring closure to preserve that interest. The remaining three requirements relate to the specific details of the closure, alternatives and findings. At this stage of the proceedings, the Court has not reviewed the specific substitutions or been presented with any alternatives. Consequently, at this stage, the only way the defendants can prevail on their motion is to convince the Court that there could be no possible overriding government interest sufficient to allow even the substitutions the government has proposed. Absent that, the defendants'

argument is not ripe, as the Court has not yet ruled on the government's proposed substitutions or the government's need for those substitutions.

2. The Government Has a Compelling and Overriding Interest in the Protection of Classified Information

In the course of the CIPA Section 6 hearing the government will demonstrate to the Court, through *ex parte* pleadings provided for by Section 6(c), the specific potential damage that could result from the disclosure of the classified information at issue. Courts have, of course, recognized that criminal proceedings may be closed to protect national security information. In the very case in which the Supreme Court first recognized a constitutional right of public access to criminal proceedings, two justices nonetheless acknowledged that "national security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets." *Richmond Newspaper Inc. v. Virginia*, 448 U.S. 555, 598 n.24 (1980) (concurring opinion of Justice Brennan and Marshall). It is significant that Justices Brennan and Marshall chose national security concerns to illustrate their point that countervailing interests could be sufficiently compelling to overcome the "presumption of openness" recognized in *Richmond Newspapers*.

There can be little doubt that the government's interest in precluding the disclosure of classified information is a compelling one. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 527, 108 S.Ct. 818, 824, 98 L.Ed.2d 918, 928 (1988) (recognizing government's compelling interest in withholding national security information); *Central Intelligence Agency v. Sims*, 471 U.S. 159, 175, 105 S.Ct. 1881, 1891, 85 L.Ed.2d 173, 187 (1985) ("The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign

intelligence service") (quotation omitted) *United States v. Moussaoui*, 65 Fed. Appx. 881, 887 (4th cir. 2003) ("At the outset, we note that there can be no doubt that the Government's interest in protecting the security of classified information is a compelling one."); *United States v. Lonetree*, 35 M.J. 396, 412 (C.M.A. 1991) ("And no one can dispute that the societal interest in secrecy approaches its zenith when the subject is espionage conducted by a country's principal adversary; in this case, the now-departed Soviet Union. We are convinced that the extraordinary nature of this case and the risk that classified information might have been divulged justified the decision of the Court of Military Review to close oral argument."); *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 925 (N.D. Ill. 2006) (in affirming complete closure of courtroom during the testimony of two suppression-hearing witnesses, court notes "[t]he United States has rebutted the presumption of openness based on its showing that the anticipated testimony is classified and governed by CIPA as addressed above."); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1264 (W.D. Wash. 2002) ("[T]he Court finds that the Government has a compelling interest in maintaining the secrecy of its intelligence-gathering capabilities and that disclosure of the specified language would harm this interest. It further finds that the proposed redaction of ten words [from the Court's Order] referring to classified information with specificity is the most narrowly tailored means of protecting the Government's compelling interest."); *United States v. Poindexter*, 732 F. Supp. 165, 167 (D.D.C. 1990) ("The Court now holds that because top secret and other extremely sensitive information will pervade the deposition [of President Reagan] , it will be held *in camera*."); *United States v. Pelton*, 696 F. Supp. 156, 159 (D.D.C. 1986) ("While the court would not find a mere assertion of 'national security' sufficient to overcome the important First Amendment values at issue, in this case the court has conducted its own analysis

of the classified affidavit and the unredacted transcripts and finds that there are serious national security concerns that would be affected if Abell/NBC's motion were granted."); .

The Fourth Circuit has, in other contexts, consistently demonstrated its abiding concern for protecting national security information from disclosure, even when balanced against important competing values. *E.g., Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (holding that a private civil action must be dismissed because any attempt by plaintiff to establish a prima facie case would "so threaten disclosure of state secrets that the overriding interest of the United States [in] the preservation of its state secrets precludes any further attempt to pursue the litigation."); *Alfred A. Knopf v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975) (expressing concern about the disclosure of sensitive information to lawyers, judges, court reporters, expert witnesses and others;) *Colby v. Halperin*, 656 F.2d 70, 72 (4th Cir. 1981) ("no one should be given access to such information who does not have a strong, demonstrated need for it.").[3]

---

[3] Indeed, courts close proceedings for many overriding interests similar to those raised by national security concerns. Courts have upheld closures to protect confidential informants, undercover officers, and other "sensitive matters that arise during trial." *See Carson v. Fischer*, 421 F.3d 83, 88-91 (2nd Cir. 2005) (finding courtroom properly closed during testimony of confidential informant who feared for his safety); *Brown v. Artuz*, 283 F.2d 492, 501-02 (2nd Cir. 2002) (closing justified to protect safety of undercover officer); *Bowden v. Keane*, 237 F.3d 125, 128 (2nd Cir. 2001) (closing justified where undercover officer can articulate generalized fear for safety, described in "rough terms"); *Brown v. Kuhlmann*, 142 F.3d 529 (2nd Cir. 1998) (undercover officer's safety would be prejudiced by public testimony); *Ayala v. Speckard*, 131 F.3d 62 (2nd Cir. 1997)(en banc) (discussing and applying *Waller* and holding that closure of courtroom during testimony of undercover officers in three trials was justified); *United States v. John Doe*, 63 F.3d 121 (2nd Cir. 1995) (applying the standard set forth in *Waller* in reviewing a motion to close the courtroom); *United States v. Leos-Hermosillo*, No Cr-97-01221 (S.D. Cal.), *aff'd*, 213 F.3d 644, 2000 WL 300967, at *1 (9th Cir. Mar. 22, 2000) (District Court granted motion to exclude public from courtroom during testimony of a confidential informant, which was affirmed by the 9th Circuit in a summary order); *accord United States v. Blanche*, 149 F.3d 763, 769 (8th Cir. 1998) (applying *Waller* test to motion to exclude family members from

Two cases are compelling examples. Defendants rightly point out that *United States v. Pelton*, 696 F.Supp 156 (D. Md. 1986) is analogous to the instant case. In *Pelton*, the government sought to engage a procedure much like the government has proposed in this case. The government sought to introduce at trial two recorded phone calls the defendant made to a "targeted premises." *Id.* at 156. The government requested that the court play the tapes on headphones only for the court, jury and parties. The government identified for the court the damage to the national security that could result if the calls were played to the public. *Id.* at 156. The government offered to make a redacted transcript available, omitting those portions which the government sought to protect for national security. *Id.* Media organizations objected to the procedure.

After application of the *Press-Enterprise* standard the court granted the government's motion. The court found that the government had established an overriding interest and "compelling need" for closure. *Id.* at 158. The court conducted its own analysis of the classified affidavit supporting the government's redactions and found that there were "serious national security concerns" that could be implicated by disclosure of the information. *Id.* at 159. The court further found that the deletion of limited portions of the transcript would have little impact, if any, on the "public discussion." *Id.* The court observed that while it was important that a small amount of information was being withheld, the court stated that '"mere amount' of evidence restricted should never be the determinative factor." *Id.* at 160.

---

courtroom; family members may have been witnesses, but, to the extent they were not, case analyzed under *Waller*); *United States v. Sherlock*, 962 F.2d 1349, 1356- 58 (9th Cir. 1989) (applying *Waller* to analysis of partial courtroom closure in federal criminal case); *United States v. Galloway*, 937 F.2d 542, 545-47 (10th Cir. 1991).

In this case, the government likewise seeks similar treatment of recorded conversations. Additionally, beyond *Pelton*, the government proposes that there be a substitution or summary provided to the public for the redacted information. The defendants attempt to distinguish *Pelto*n by focusing on the court's references to the small amount of information being withheld. While the amount of evidence being withheld was important, it was, as the court said, not the determinative factor. Further, the court stated that if the government sought to close "a significant period of the trial" the balance struck between the national security interest and disclosure "*might*" be different. *Id*. at 159-60 (emphasis added).

In the instant case, the amount of information being shared with the jury *only* is similar to that in *Pelton*, in that in each instance the redactions are limited to the words necessary to protect the overriding interest. Unlike *Pelton*, however, in this case the defendants were caught on tape obtaining and disclosing classified information over the course of years. Moreover, the defendants were caught disclosing the same classified information to multiple persons. Consequently, to adequately protect the interest, each disclosure must be narrowly withheld from the public, which allows the defendants to cite, in a misleading fashion, the number of instances in which the government is seeking to withhold information. Finally, to further ameliorate the balance of the flow of public information, unlike *Pelton*, the government is offering substitutions and summaries of all redacted transcripts. Consequently, the flow of information is less impeded in this case than the procedure approved of in *Pelton*.

In *United States v. Abu Marzook*, 435 F. Supp. 2d 708, 714 (N.D. Ill. 2006), the defendant sought to suppress statements he made while in the custody of the Israel Security Agency (ISA). At the suppression hearing, the government planned to present two witnesses

from ISA to testify to classified "work-related activities, procedures, interrogation techniques investigative methods and other counterintelligence and securities activities of the ISA. *Id.* Pursuant to CIPA Sections 4 and 6 the government sought to close the courtroom during the agents' testimony. Additionally, the government sought to keep the agents' true names and identities from the public and the defendant. *Marzook*, 412 F.Supp.2d 913, 918. The defendant, as well as several media entities objected to the closure. The defendant objected to allowing the agents to testify under pseudonyms.

The district court allowed the government to conduct portions of a suppression hearing in a closed courtroom "because the anticipated testimony was classified under [CIPA]." *Marzook*, 435 F.Supp.2d 714. The court ordered the testimony closed to the public. Transcripts from the hearing containing either non-classified information, or information which the government approved for release were then provided to the public. *Id.* at 714.

In closing the courtroom the court applied the *Press-Enterprise* standards. *Marzook*, 412 F.Supp.2d 913, 925. The court held, "The closure of the courtroom to protect the CIPA governed ISA testimony is justified under the mandates of Press Enterprise." *Id.* "The United States has rebutted the presumption of openness based on its showing that the anticipated testimony is classified and governed by CIPA . . .." *Id.* citing *Waller*, 467 U.S. at 45. "The United States has an overriding interest in maintaining the agents' sensitive testimony–including testimony regarding intelligence gathering methods and counterintelligence measures–as classified in order to protect the national security of Israel and the relationship between Israel and the United States of sharing national security information." *Id.* (citation omitted). The court further found that, in addition to the classified nature of the information justifying the complete

closure, the court would alternatively seal the courtroom during the agents' testimony based upon the overriding interest in their safety. *Id.* at 926.

The court continued by reviewing whether a complete closure was narrowly tailored and whether any alternative procedures were available. The court concluded that complete closure during the agents' testimony was narrowly tailored to address the CIPA interest and security concerns. *Id.* The court rejected a proposed alternative that would have allowed the public to be present until questions were asked that would implicate classified information. *Id.* at 927. The court held that such a procedure would be impracticable and that the better course was to conduct the testimony in a closed courtroom, with a release of a redacted transcript a week later. *Id.*[4]

The court's closure of the suppression hearing, after application of the *Press Enterprise* and *Waller* tests, demonstrates that the government's overriding interest in the protection of classified information can allow even complete closures to the public. In the instant case, of course, the closure is only partial, as the courtroom will not be closed and the court, jury and parties will be conducting the trial in full view of the public. Additionally, for each redacted transcript or document subject to the silent witness rule, the public will receive a summary or substitution.

---

[4] At the trial in *Marzook*, over objection of media organizations, the court closed the courtroom to spectators during the ISA agents' testimony. *See* Order of August 29, 2006, Case No. 03:cr978 - 2,3, attached hereto as Exhibit 1. The court allowed a live video feed showing the courtroom, but not the witnesses. Order at 4-5. The ISA agents were also permitted to testify in light disguise and prohibited the disclosure of the agents true identities.

3. The Government's Proposed Use of the Silent Witness Rule is Narrowly Tailored to Protect the Classified Information

The government has not requested that this court redact or restrict disclosure of all of the classified information the defendants unlawfully received or disclosed. Indeed, the jury will see everything. The government has narrowly tailored the proposed redactions and substitutions, including use of the silent witness rule, to the most sensitive and potentially damaging information. In the case of recorded conversations, the public will see and hear the defendants' conversations, including their own statements that the information they are communicating is classified and will receive substitutions or summaries for some of that classified information. The government's proposal is designed to allow the jury to see, hear, read and receive the actual classified information the defendants received, disclosed and put at risk through their unlawful conduct.

Defendants argue that the quantity of the proposed substitutions for the public in this case shows that the proposal is not narrowly tailored. Def. Supp. Mot. at 4-5. Defendants appear to be arguing that because the defendants were so prolific in their disclosures of our nation's secrets and the government was successful in gathering evidence of those disclosures, the government cannot narrowly tailor a substitution to protect its overriding interest in limiting the disclosure of that classified information. The defendants want the court to look only at numbers of redactions and numbers of substitutions. The appropriate analysis for this court is to look at the government's overriding interest and then, to protect that interest, what is a narrowly tailored closure that will protect that interest. *See Press Enterprise*, 464 U.S. 501, 510. For example, if the overriding interest would be compromised by the disclosure of a single item of information a substitution of that single word would be narrowly tailored, even if it would have to be

substituted many times. Defendants would turn the analysis on its head, arguing that simple numbers, without reference to the specifics, can establish that a proposal is not narrowly tailored. The government's proposal, as the Court will observe in the CIPA Section 6 hearings, is narrowly tailored to protect the multiple overriding interests the government possesses in protecting the disclosure of the classified information.

4. Consideration of Alternatives

To allow the substitutions proposed in this case, *Press Enterprise* requires that the Court consider alternatives. 464 U.S. at 510. Contrary to the defendants' assertion, the government does not have any burden to present alternatives to the Court. Def. Supp. Mot. at 4; *see Ayala v. Speckard*, 131 F.3d 62, 72 (2nd Cir. 1997) ("No additional alternatives were suggested by any party, and the trial judges had no obligation to consider additional alternatives *sua sponte*."). Although defendants cite *Press Enterprise* and *Waller* to support their contention, nothing in those cases assigns the burden to the government to suggest alternatives. Those cases simply require that the court consider alternatives to closure. *Press Enterprise*, 464 U.S. at 511 ("the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard."); *Waller*, 467 U.S. at 48 ("the trial court must consider reasonable alternatives to closure").

II. CIPA Provides for the Use of Substitutions, Including the Silent Witness Rule

CIPA is a procedural statute which provides a process for this Court to determine the use, relevance and admissibility of classified information at trial in this matter, including the use of substitutions in lieu of the disclosure of classified information. Use of the silent witness rule is a

substitution in lieu of the disclosure of classified information that has been used in this courthouse and others. The text, case law and legislative history all support use of the silent witness rule as a substitution. Defendants' argument that CIPA does not allow the use of the silent witness rule is wrong.

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. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1990). One of CIPA's purposes is to provide procedures to permit a trial judge to rule on questions of use, relevance, admissibility and substitutions before trial. S. Rep. 96-823, 96th Cong., 2d. Sess. 1980, 1980 U.S.C.C.A.N. 4294. Contrary to defendants' misleading paraphrase of the Senate Report, the purpose was not that these rulings are made "so that information could be used in open court," Def. Supp. Mot. at 13, rather, that these rulings, including rulings on substitutions, are made *before* any evidence is introduced in open court. S. Rep. 96-823 at 1, 1980 U.S.C.C.A.N. at 4294. Indeed, CIPA contemplates that a court will "determine whether and the *manner in which* the information at issue may be used in a trial or pretrial proceeding." *Id.* (emphasis added). Allowing the rulings to be made before evidence is introduced in open court allows the government to propose substitutions in lieu of disclosure in open court and requires the court to hold a hearing on the government's proposed substitutions.

CIPA Section 6(c) expressly grants district courts 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 not prejudiced). Specifically, Section 6(c)(1) authorizes the government to move for the substitution of a "statement admitting relevant facts" or a "summary" in lieu of the classified information, and requires the use of the substitution if the statement or summary gives the defendants "substantially" the same ability to present their defense. The legislative history of CIPA makes clear that the substitution standard is concerned solely with satisfying the right to a fair trial, not with satisfying the defendant's desire to gain tactical advantages:

> [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 text and legislative history 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 set forth the 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 the district courts to fashion them. "CIPA is a procedural statute, and the legislative history of it shows that Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems." *United States v. North*, 713 F.Supp. 1452 (D.D.C. 1988); *see also*

United States v. Moussaoui, 382 F.3d 453, 479 (4th Cir. 2004) (in non-CIPA context noting that "compiling substitutions is a task best suited for the district court, given its greater familiarity with the facts of the case and its authority to manage the presentation of the evidence").

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.*

In *Zettl*, in the context of CIPA Section 6, the district court allowed the use of the silent witness rule with respect to some 192 classified documents the defendant sought to use at trial, but did not permit the use of the silent witness rule with respect to certain documents. 835 F. 2d at 1063. In *United States v. George*, 1992 WL 200027 (D.D.C. 1992), the court addressed the testimony of CIA officers at a criminal trial and held that, due to risk of harm, the witnesses' names would not be disclosed to the public and that their identities would only be revealed to the defendant, the court, and the jury on a "key card" that would be filed under seal. *See also Pelton,* 696 F.Supp. at 158 (allowing disclosure of recorded information to the jury but not to the public); *United States v. North*, 1988 WL 148481, *3 (D.D.C. 1988) (rejecting use of the silent witness rule, but observing that it is "a procedure adopted by some District Courts").

Use of the silent witness rule is also contemplated by the legislative intent behind CIPA. Certainly a primary purpose behind CIPA was to combat the problem of "greymail," referring to efforts by defendants to derail prosecutions by seeking the disclosure of classified information. *See Moussaoui*, 333 F.3d at 513-14. The purpose however, was broader than just the defendant's use of classified information at trial. *See United States v. Pappas*, 94 F.3d 795 (2d Cir. 1996) (noting that the risk of "greymail can arise in various circumstances, including those in which "the government expects to disclose some classified items in presenting its case"). Rather, the purpose involved the creation of a procedure to allow the trial court to resolve all questions concerning the use, relevance and admissibility and substitutions of classified information before trial. The concern was not only the defendant's use, but that: "[t]he more sensitive the information compromised, the more difficult it becomes to enforce the laws that guard our national security. At time then, regardless of whether the compromise is to a newspaper reported [sic] or directly to a foreign agent, the government often must choose between disclosing classified information in the prosecution or letting the conduct go unpunished." S. Rep. 96-823 *2. The Senate Report continues:

> The situation is further complicated in cases where the government expects to disclose some classified items in presenting its case. . . . In the past, the government has foregone prosecution of conduct it believed violate criminal laws in order to avoid compromising national security information. The costs of such decisions go beyond the failure to redress particular instances of illegal conduct. Such determinations foster the perception that government officials and private persons with access to military or technological secrets have a broad de facto immunity from prosecution for a variety of crimes. This perception not only undermines the public's confidence in the fair administration of criminal justice but it also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.

Id. One purpose then behind CIPA was to provide a procedure whereby the government could pursue justice against those who disclose our nation's secrets without requiring the government to be further victimized with public disclosure of those very secrets. In *Pelton*, for example, one argument the media raised in objecting to the redaction of the tapes was that because the information had already been disclosed to the Soviets, there could be no further harm to the national security by disclosing the information to the public. 696 F.Supp. at 158. The court rejected this argument noting that "the integrity of classified information can be somewhat compromised without necessarily meaning that no harm could result if the information were then made public." *Id.*[5]

Defendants argue that the silent witness substitution should not be available because that information is the very national defense information for which the defendants have been charged with conspiring to disclose. Def. Mot. at 23. By defendants' logic, only those who disclose national defense information which poses the least risk to the national security could be punished, whereas, those who disclose the most dangerous information cannot. CIPA was designed to eliminate exactly that absurdity and it does so by balancing the government's interest in the national security while maintaining the defendant's ability to present a defense. In some cases, such as this one, the potential danger posed by the disclosure of the information balanced

[5] It is in this regard that CIPA Section 8 supports use of the silent witness rule as well. Section 8(a) provides that classified information may be offered into evidence (without specifying whether it is offered into evidence without limitation in open court or through some other procedure) without change in the classification status. Evidence offered pursuant to the silent witness rule then would remain classified and the disclosure limited and there would be no need, as the defendants argue to put any cat back in the bag.

against the defendants ability to present a defense will allow for the use of the silent witness rule. That is what CIPA intended.

Defendants also argue that the only substitution option available to the government is to enter a summary of the information disclosed. Def. Mot. at 12-13. Again, defendants' logic would lead to exactly the absurd result CIPA was designed to eliminate. By defendants' logic, the government must present either summaries which will necessarily minimize the nature and potential harm of the very information that the defendants disclosed to foreign officials and others or suffer further victimization by public dissemination of the information to present the true nature of the defendants' conduct. The defendants argue that this is what CIPA calls for, when an alternative procedure, used before in this courthouse and others, allows for presentation of the actual evidence of the defendants' conduct to the jury and simultaneously protects the national security through public summaries and still allows the defendants to present a defense. This absurd result should be rejected.

Finally, the silent witness rule substitution is consistent with the structure of CIPA. The defendants argue that if the silent witness rule is an option, then there would be no need to require courts to make determinations on the use, relevance and admissibility of classified information. Def. Mot. at 10-11. This argument completely misses the point. As we have seen in this litigation, CIPA is a process. At the Section 6(a) stage the court determines the universe of classified information that may be used, in some form, at trial. Once the government sees that universe of that information, it can then agree to the use, or request substitutions, including the silent witness rule, under Section 6(c). The court must then find that the proposed substitutions allow the defendant substantially the same ability to present a defense. If the substitution does

not, the government can propose alternative substitutions, or the court can order disclosure of the information. Simply because the silent witness rule is an available substitution does not mean it can or would be used in all cases, and CIPA provides the procedure through which the court determines when it is available.[6]

III. The Defendants' Sixth Amendment Confrontation Clause Claim is Premature

Defendants argue that the employment of the silent witness rule substitution in the government's case in chief "raises the possibility of violating defendants' Confrontation Clause rights . . . ." Def. Mot. at 14. The defendants' generalized arguments about the constitutionality of the government's CIPA Section 6(c) motion are premature. The Court has not yet determined which specific substitutions and summaries are appropriate. It is simply not possible for the Court to decide whether the government's proposed substitutions and summaries combine to constitute an unconstitutional burden on the defendants. *See United States v. Pryba*, 674 F.Supp. 1504, 1515 n.32 (E.D.Va. 1987) (Ellis, J.), *aff'd*, 900 F.2d 748 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990) (stating that "[t]his court is well aware of the cardinal rules governing the federal courts," one of which is "never to anticipate a question of constitutional law in advance of the necessity of deciding it"). Nevertheless, we are confident that when the Court does review the government's proposed substitutions it will find that they pose no threat to the defendants' Confrontation Clause rights.

The courts have repeatedly emphasized that, in the context of CIPA cases, defendants are not always going to get all that they want. For example, in *United States v. Collins*, 603 F. Supp.

[6] The use, relevance and admissibility rulings would also not be rendered moot because information subject to the silent witness rule is being disclosed to the jury.

301 (S.D. Fla. 1985), the defendant argued that his due process rights were violated by the substitution procedures of Section 6(c). Specifically, he contended that "the substitutions permitted under Section 6(c) [of CIPA] would preclude him from presenting his side of the story to the jury." *Id.* at 304. The defendant also argued that "prohibiting him from eliciting the minutiae of each item of classified information w[ould] adversely impact upon the jury's determination of his credibility as a witness." Id. In rejecting these claims, the *Collins* court noted that "[i]t does not follow, however, that because the evidence is relevant that it is necessarily admissible in the form offered." Id. "Section 6(c)," the court further noted, "does not preclude presentation of the defendant's story to the jury, it merely allows some restriction on the manner in which the story will be told." Id.; *see also United States v. Libby*, 467 F. Supp. 2d 20, 27 (D.D.C.) (in analyzing defendant's attacks on government's proposed section 6(c) CIPA substitutions, court notes that "it is clear that the Court may in some circumstances limit a defendant's ability to present his defense in the precise manner that he wishes, even if the evidence he seeks is relevant to the defense . . . the section 6(c) analysis does not require the Court to engage in a numbers game; a one-for-one substitution for every item of classified information the defendant desires to disclose is therefore not required"), *appeal dismissed*, 2006 WL 3827534 (D.C. Cir. 2006).

Further, as other courts have recognized, the Confrontation Clause does not guarantee a defendant an unequivocal right to one hundred percent effective cross examination. *See United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324, 1328 (D.N.M. 2000) (in rejecting defendant's confrontation-clause claim premised on notice requirements of CIPA, court noted that, "although 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'" (citing *Delaware v. Van Arsdall*, 475 US 673, 679 (1986)); *United States v. Poindexter*, 725 F. Supp. at 34-35 (same);

IV. A Cautionary Instruction is Sufficient to Remedy any Potential Prejudice to the Defendants

The defendants argue that it is impossible to give a curative instruction to the jury that would meet constitutional standards because the government's CIPA Section 6(c) substitutions and summaries "are so prejudicial," that they "will create a 'continuing influence' of guilt on the jury that cannot be purged." Def. Mem. at 8. The defendants' allegations of prejudice follow a grossly exaggerated description of the government's CIPA Section 6(c) motion. The defendants describe security procedures that "must necessarily follow," the government's CIPA Section 6(c) proposals, including the use of magnetometers at the courtroom door, security sweeps of the courtroom itself, and a court security officer monitoring for electronic surveillance. *Id.*

The fact is, the government's CIPA Section 6(c) motion does not propose magnetometers on any door; the motion does not propose any security sweeps of the courtroom; and the motion does not propose any monitoring for electronic surveillance. These are simply inventions of the defendants in order to shore-up their weak constitutional arguments – which are predicated on cases that either have no applicability or are easily distinguishable.

The primary case relied on by the defendants is *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, the defendant and Evans were tried together for armed postal robbery. At trial, a postal inspector testified that Evans confessed to him that both defendants committed the robbery. *Id.* at 124. The trial court instructed the jury that it was to disregard Evans' confession when considering Bruton's guilt or innocence because the confession was inadmissible hearsay

as to Bruton. *Id.* at 125. Bruton was convicted. On appeal, the Supreme Court held that admitting Evans' statement violated Bruton's Sixth Amendment right to confront witnesses against him, despite the district court's curative instruction. *Id.* at 126. In reaching this conclusion, the Court focused on the fact that out-of-court statements by one defendant which implicate a co-defendant are inherently unreliable and that "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.* at 136. In other words, the defendant's inability to cross-examine evidence against him was the Court's driving concern in *Bruton*, not simply the risk of prejudice. As the Court itself recognized, "[a] defendant is entitled to a fair trial but not a perfect one." *Id.* at 135.

Fourth Circuit case law interpreting *Bruton* has emphasized that *Bruton* is "a narrow exception" to the principle that jurors are assumed to follow their instructions. *United States v. Brooks*, 957 F.2d 1138, 1146 (4th Cir. 1992). *Bruton* has accordingly been limited in a number of ways. *Bruton* does not apply when the non-testifying co-conspirator is not a co-defendant. *See United States v. Morsley*, 64 F.3d 907, 918 (4th Cir. 1995). Nor does *Bruton* apply to hearsay statements of a co-defendant made in furtherance of the conspiracy. *See United States v. Shores*, 33 F.3d 438, 442 (4th Cir. 1994), *cert. denied*, 514 U.S. 1019 (1995). Most significantly for this case, "[a] *Bruton* problem exists only to the extent that the co defendant's statement in question, *on its face,* implicates the defendant." *United States v. Locklear*, 24 F.3d 641, 646 (4th Cir.), *cert. denied*, 513 U.S. 909 (1994) (emphasis added). This means that "[a]s long as the nontestifying defendant's statement does not on its face inculpate the codefendant, it is admissible – even it if it becomes incriminating when linked with other evidence." *United States*

v. Holmes, 30 Fed.Appx. 302, 308 (4th Cir. 2002) (unpublished) (citing *Richardson v. Marsh,* 481 U.S. 200, 208-09 (1987)).

As a consequence, "*Bruton* does not apply where the codefendant's statement is redacted to eliminate any reference to the defendant, or where the defendant's name is replaced by a symbol or neutral pronoun." *Brooks*, 957 F.2d at 1146. When a defendant's name is redacted or substituted, the co-defendant's confession cannot "be fairly understood to incriminate the accused." *United States v. Campbell*, 935 F.2d 39, 43 (4th Cir. 1991). The fact that other evidence admitted during the trial may connect the defendant to the confession does not present a *Bruton* problem because the defendant is free to confront and cross-examine that other evidence. *Id.* This Court has repeatedly found that no *Bruton* violation exists when the defendant's name is redacted or substituted and a proper limiting instruction is provided to the jury. *See United States v. Reyes*, 384 F.Supp.2d 926, 932-33 (E.D.Va. 2005) (Ellis, J.); *United States v. Cuong Gia Le*, 316 F.Supp.2d 330, 338 (E.D.Va. 2004) (Ellis, J.).

When applied to this case, these legal principles make clear that the defendants' alleged *Bruton* violation is non-existent. First and foremost, the government's CIPA Section 6(c) motion does not involve the admission into evidence of inherently unreliable hearsay statements of a non-testifying co-defendant that inculpate the defendants. For that reason, and that reason alone, *Bruton* does not apply. The constitutional harms the Supreme Court sought to prevent by not admitting such inherently unreliable, and untested, hearsay statements simply are not present here.

In addition, nothing in the government's CIPA Section 6(c) motion is facially incriminating. As the defendants very well know, the fact that information is deemed by the

government to be classified does not necessarily mean that the information is national defense information.[7] To be sure, a jury may consider the fact that information is classified when deliberating on the elements of conspiracy.[8] But *Bruton* does not forbid such a scenario. As the Fourth Circuit has stated, *Bruton* does "not bar admission" of a statement that does "not on its face incriminate" the defendant, "though its incriminating import was certainly inferable from other evidence that earlier had been admitted properly against him." *United States v. Vogt*, 910 F.2d 1184, 1192 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). This is true even "though it may not be easy for a jury to obey the cautionary instruction," because "there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s rule." *Id*; *See also United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (a defendant's right to a fair trial can be ensured even though a substitution was used in lieu of witness testimony due in part to adequate jury instruction).

---

[7] In a footnote, the defendants allege that "whether the information is NDI and whether it is classified are both elements that the government has to prove." Def. Mem. at 11 n.4. Proving that the information is classified is not an element of conspiracy under 18 U.S.C. § 793(g). Nor is it part of the intent element, as defined by this Court in its August 9, 2006 Memorandum Opinion. The Court's opinion was clear that the intent element focuses exclusively on what "the defendants knew." *United States v. Rosen*, 445 F.Supp.2d 602, 625 (E.D.Va. 2006). At issue in the intent element is whether the defendants believed the information was classified, not whether the information was, in fact, classified. The fact that the government can actually prove the information was classified may be probative of the defendants' intent, but it is not an element of the offense that the government has to prove and therefore is not facial incriminating.

[8] The Security Procedures established pursuant to Pub. L96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information provides:

"6. Jury. . . . After a verdict has been rendered by a jury, the trial judge should consider a government request for a cautionary instruction to jurors, regarding the release or disclosure of classified information contained in documents they have reviewed during trial."

Moreover, the defendants will be fully capable of attacking the credibility of the government's evidence and cross examining witnesses. The defendants, their counsel, and the jury will have access to all of the information alleged to be national defense information. The defendants and their counsel will be able to confront the government's witnesses against them, including the expert witnesses that will testify about the national defense information at issue. In short, the defendants' "argument misses the point of *Bruton,* which is to protect the accused's right of confrontation." *Campbell*, 935 F.2d at 43. If a defendant's confrontation rights can be adequately protected through a cautionary instruction and by redacting or substituting an inherently unreliable form of hearsay testimony, then surely *Bruton* does not mandate that this Court find a constitutional violation here.

Recognizing that *Bruton*'s holding regarding the Sixth Amendment right to confront witnesses is inapplicable, the defendants turn to a second line of cases that deal with whether shackling a defendant or forcing him to wear a prison uniform violates the Due Process clause of the Constitution. The defendants contend that "especially like the prison garb and shackles . . . the [government's] proposal here is so inherently prejudicial that a cautionary instruction would be ineffective as a matter of law." Def. Mem. at 10. Yet, the defendants' own cases show that while Due Process may prohibit shackling or prison uniforms in some instances, this "constitutional requirement, however, is not absolute." *Deck v. Missouri*, 544 U.S. 622, 633 (2005). Trial courts are permitted to shackle defendants if "[i]n so doing, it accommodates the important need to protect the courtroom and its occupants." *Id.*; *see also Estelle v. Williams*, 425

U.S. 501, 505 (1976) (forcing defendant to wear prison uniform unconstitutional because it "furthers no essential state policy").[9]

As the Fourth Circuit has recognized, "[t]he Government has a compelling interest 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." *United States v. Smith*, 780 F.2d 1102, 1109 (4th Cir. 1985) (quoting *Sims*, 471 U.S. at 175). The CIPA Section 6(c) declarations filed by the government in this case demonstrate that the national security interests at issue in this case are significant. On the other hand, the proposals in the government's Section 6(c) motion are not unfairly prejudicial, nor do they impair the defendants' Due Process rights. Under such circumstances, the government's compelling national security interests can be accommodated in accordance with the defendants' right to a fair trial.

[9] In *Estelle*, no curative instruction was provided to the jury because the defendant did not object to wearing the prison uniform at trial. In fact, the Supreme Court, citing the defendant's failure to raise the issue at trial, reversed the Court of Appeals decision which overturned the defendants conviction. 425 U.S. at 514.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that defendants' Motion to Strike be denied.

Respectfully Submitted,

Chuck Rosenberg
United States Attorney

By: _____
Kevin V. Di Gregory
Assistant United States Attorney

_____
W. Neil Hammerstrom, Jr.
Assistant United States Attorney

_____
Thomas Reilly
Trial Attorney
Department of Justice

_____
Michael C. Martin
Trial Attorney
Department of Justice

Date: March 29, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing "Government's Response to Defendants' Motion To Strike" was sent by facsimile transmission on March 29, 2007 to:

Abbe David Lowell, Esq.
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
fax: (202) 974-5602

John N. Nassikas III, Esq.
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
fax: (202) 857-6395

_____

W. Neil Hammerstrom, Jr.
Assistant United States Attorney