IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	Criminal No. 1:10CR485
	)	
	)	
	)	Hon. Leonie M. Brinkema
v.	)	
	)	
JEFFREY ALEXANDER STERLING	)	
	)	
Defendant.	)	

DEFENDANT JEFFREY STERLING'S RESPONSE TO GOVERNMENT'S MOTION FOR IN CAMERA HEARINGS AND MOTION FOR AN ORDER PURSUANT TO SECTIONS 6 AND 8 OF THE CLASSIFIED INFORMATION PROCEDURES ACT [DE 150]

On August 9, 2011, the Government moved this Court for an *in camera* hearing and an order pursuant to Sections 6 and 8 of the Classified Information Procedures Act ("CIPA") [DE 150] ("Motion" or "Gov't Mot."), asking that the Court allow it to introduce in its case-in-chief substitutions and redactions in lieu of classified information. That same motion sought this Court's approval for the use of the silent witness rule and for the use of extraordinary security measures at the trial of this case. As set forth below, CIPA does not allow the Government to introduce as evidence at trial substitutions or redacted documents. In addition, the silent witness rule and the other security measures that the Government seeks to use are highly prejudicial to Mr. Sterling and deprive him of his right to a fair trial and violate his confrontation rights as guaranteed by the United States Constitution. Accordingly, the Government's Motion must be denied in all respects.

I. CIPA establishes a procedural framework for the use of substitutions or redactions in two enumerated situations.

CIPA provides the exclusive means for dealing with classified information in criminal trials. As the Government explained in its Motion, CIPA is "simply a procedural tool[.]" (Gov't Mot. at 2.) Essentially, CIPA creates a procedure whereby the Court may authorize the use of "substitute" documents or redactions in lieu of the original classified documents. 18 U.S.C. App. 3. CIPA enumerates two distinct scenarios under which this procedure may be utilized: (1) the Court may authorize the Government to provide substitute or redacted documents in complying with its discovery obligations under the Federal Rules of Criminal Procedure (*id*. at § 4); and (2) the Court may authorize the use of substitute or redacted documents in lieu of classified information that the defense intends to use in any pretrial or trial proceeding (*id*. at §§ 5-6). In each of these instances, the Court may only grant a motion for using substitute material if "it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." *Id*. at § 6(c); *see also United States v. Moussaoui*, 382 F.3d 453, 477 (4th Cir. 2004) (substitutions must "place the defendant, as nearly as possible, in the position he would be in if the classified information . . . were available to him").

Thus, CIPA expressly sets forth when the procedure of substitutions and redactions may be used, *i.e.*, for information the Government provides the defense in discovery and information that the defense seeks to introduce into evidence. Notably absent is any statutory provision allowing for the Government to use substitutions or redactions for information it seeks to introduce into evidence at trial. The Government cites the Court no statutory or any other authority for allowing substitutions or redactions for the Government's evidence. This lack of any authority is hardly surprising. CIPA was enacted to ensure that the defendant receives exculpatory information to which he or she is entitled while addressing the issue of "graymail" by defendants. The Government, which alone

elects whether to bring charges in cases involving classified information, simply cannot "graymail" itself.

II. The Government cannot ask the Court to sanction its effort to expand the statutory provisions of CIPA.

Statutory provisions cannot be expanded or amended by the Government. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001) ("[O]ur methodology is. . . well established in earlier decisions, which explain that the interpretive inquiry begins with the text and structure of the statute[.]") (internal citation omitted). Certainly, the Government cannot write into the statute the availability of a procedural tool for Government exhibits when the statute itself does not include the Government's trial evidence among the enumerated category of documents to which the statutorily created procedural tool applies. It is a fundamental canon of statutory construction that a statute's expression of one thing is the exclusion of another. *See, e.g., Providence Square Associates, L.L.C. v. G.D.F., Inc.*, 211 F.3d 846, 852 (4th Cir. 2000). Accordingly, because CIPA established a specific and limited set of uses for its procedures, other applications of those procedures are necessarily precluded. The uses established by CIPA plainly apply to the potential use *by the defendant* of classified information at trial. *See United States v. Libby*, 467 F. Supp. 2d 20, 24 (D.D.C. 2006) ("The CIPA establishes the procedures for providing pretrial notification of a *defendant's* intent to use classified information at his trial and the process for determining exactly what information *the defendant* will be permitted to introduce as evidence.") (emphasis added). Indeed, even the Government's Motion, in discussing CIPA procedure, describes its application in the context of defense use. The Government explains that there are "three critical pretrial steps in the handling of classified information. . . under CIPA." Gov't Mot. at 4. First, the defendant must notify the government and the court of classified information he expects to use. *Id*. Second, upon defendant's notice, the court shall hold a hearing to determine the use, relevance or admissibility of

the classified information. *Id*. Finally, following the hearing and findings of admissibility, the government may move for the court to approve the use of substitute material. *Id*. at 5. Yet, despite the Government's own description of CIPA procedure, its Motion turns the statute on its head and "seeks an order permitting the Government to redact, and in many cases redact and substitute (or stipulate to), classified information contained within *the government's* potential trial exhibits . . . ." *Id*. at 11 (emphasis added).

A plain reading of its text illustrates that CIPA does not authorize the Government to proceed in this manner. As described above, CIPA clearly sets forth two scenarios in which the Court may admit substitute or redacted documents. The Government here proposes a third category of documents, evidence the Government seeks to introduce into evidence, and seeks to apply CIPA procedures to that category of documents, even though CIPA itself does not provide for it. The Court should not permit the Government to re-write the statute.

III. Limiting the application of CIPA to its terms is not inconsistent with the purpose of the statute as evidenced by the statutory language.

As set forth above, CIPA itself limits its application by its own words. "[I]n interpreting a statute a court should always turn first to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992); *see also United States v. Fisher*, 6 U.S. 358, 399 (1805) ("Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.").

While there are limited situations where a court can look past the statute's plain meaning, the Fourth Circuit has explained that such instances are "exceptionally rare."

> If a literal reading of a statute produces an outcome that is 'demonstrably at odds' with clearly expressed congressional intent to the contrary, *United States*

> *v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989), or results in an outcome that can truly be characterized as absurd, *i.e.*, that is "`so gross as to shock the general moral or common sense,'" *Maryland State Dep't of Educ. v. United States Dep't of Veterans Affairs*, 98 F.3d 165, 169 (4th Cir. 1996) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930)), then we can look beyond an unambiguous statute and consult legislative history to divine its meaning. But, such instances are, and should be, exceptionally rare. *See TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978).

Sigmon Coal Co., Inc. v. Apfel, 226 F.3d 291, 304 (4th Cir. 2000).

CIPA unambiguously fails to provide for the Government to use substitutions and redactions for its own evidence. And, precluding the Government from doing so is not an absurd result. Indeed, it fully accords with the purpose of the statute. CIPA is intended to implement procedures that allow for the defense to gain access to classified information so as not to impede a defendant's right to a fair trial. *United States v. Moussaoui*, 591 F.3d 263, 281 (4th Cir. 2010) ("CIPA provides procedures for protecting classified information without running afoul of a defendant's right to a fair trial.") (footnote omitted); *see also United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (CIPA's "fundamental purpose is to protect[] and restrict[] the discovery of classified information in a way that does not impair the defendant's right to a fair trial") (internal citations and quotations omitted) (alterations original); *United States v. Poindexter*, 698 F. Supp. 316, 320 (D. D.C. 1988) ("Fortunately, Congress was alert to the fact that special cases might create special problems. It made clear that in any case involving classified information the defendant should not stand in a worse position because of such information than he would have if there were no such statutory procedures.")

IV. CIPA's legislative history only confirms that CIPA's language is not inconsistent with its purpose.

To the extent that it was unclear from CIPA's statutory language whether or not the failure to allow the Government the benefit of substitutions and redactions for its own evidence was inconsistent with the statutory purpose, and the Court deemed CIPA's legislative history relevant,

that history only serves to confirm that CIPA's language providing substitutions and redactions only for information provided to the defense in discovery or which the defense intends to introduce is consistent with the statutory purpose. *See* H. Rep. No. 96-831, pt. 2, at 6 (1980) (stating that, by ratifying the substitution provision of CIPA, the House Judiciary Committee "does not mean to suggest that any hardship to the defense should be permitted. . . . It is the Committee's intent that there be no impairment of either the defendant's ability to present his case or his right to a fair trial as a result of the operation of this section."); *see also* S. Rep. No. 96-823, at 9 (1980) (CIPA's substitution provision "rests on the presumption that the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without this Act"), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4294, 4302.

CIPA recognizes that a defendant may wish to use classified information, and accordingly, structures a procedural framework with the purpose of ensuring both a fair trial to the defendant and the protection, where necessary, of classified information.[1] What CIPA does not provide is the ability of the Government to prosecute a defendant using substitute or redacted evidence against him in its case-in-chief.

V. The rule of lenity dictates reading CIPA to exclude the Government's use of substitute or redacted documents in its case-in-chief.

As a final matter, to the extent the Court were to find that CIPA, despite its express enumeration of only two categories of information under which its procedures of substitution and redaction apply, does not necessarily preclude the application of those procedures to a third category

[1] The statute in this regard precludes "graymail," a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the charge against him[.]'" *see United States v. Moussaoui*, 591 F.3d at 281. This concern is not at play when the Government, which decided to prosecute the case, decides it wants to use classified information in its case-in-chief. As noted above, the Government cannot "graymail" itself. It simply must make the election that is the natural consequence of its decision to prosecute: it must either declassify information it wishes to use in its case-in-chief or forego using that information.

as proposed by the Government, the statute is, at best, ambiguous as to whether or not its procedural provisions can be applied beyond the two enumerated categories. In that case, the Court should apply the rule of lenity to hold that CIPA does not permit such use. *See, e.g., United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them"); *United States v. Bell*, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.")

VI. The Eastern District of Virginia has previously declined requests by the Government to expand CIPA's plain language.

Consistent with all of the legal principles discussed above, a Court in the Eastern District of Virginia has declined previously to expand CIPA's plain and unambiguous terms. In *United States v. Rosen*, 487 F. Supp. 2d 703, 709 (E.D. Va. 2007), the Government argued that use of the silent witness rule, codes, and redacted recordings are "substitutions" authorized by CIPA. Judge Ellis squarely rejected this argument. *Id.* (E.D. Va. 2007) (precluding Government from utilizing proposed procedures as a "substitution" when CIPA's plain language does not authorize it and the procedure "simply cannot fit within CIPA's confines even assuming the statute's plain language would not otherwise preclude it.").[2] The *Rosen* Court noted,

> CIPA is at best silent on this issue. Yet, this silence should not be construed as implicitly authorizing the government's proposal... While it is true, as reflected in CIPA's legislative history, that 'Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems,' there is no evidence that Congress expected this creativity to extend to adopting procedures [such as those proposed by the Government].

[2] In this case, the Government also seeks use of the silent witness rule. However, rather than raise the argument rejected in *Rosen* that CIPA somehow authorizes this procedure, the Government ignores CIPA altogether in seeking this extraordinary procedure. Mr. Sterling addresses below separately why this procedure is not appropriate in this case, even assuming, *arguendo*, that CIPA's procedures are not exclusive and that the Court could in certain cases order that the silent witness rule be used.

Id. at 710. (internal citations omitted).

Likewise, CIPA's authorization of substitutions and redactions for discovery and defense evidence, even if read as being silent on the availability of this procedure for Government evidence, would not authorize a court to employ this procedure for Government evidence. Congress set forth the procedures it was authorizing. It did not authorize courts to create additional procedures not contemplated by the plain statutory language. The Government's renewed invitation to the Court to re-write CIPA must again be rejected, as it was previously by the *Rosen* Court.

Therefore, the Court should wholly reject the Government's attempt to use CIPA to obtain advance approval of substituted evidence that it intends to use at trial in an effort to implicate Mr. Sterling in the crimes alleged in the Indictment. CIPA was designed solely to allow the Government to provide classified exculpatory evidence to the defense and to provide the defendant with a means by which to put that information to the jury. The Government should simply provide the unredacted and complete exhibits that it wishes to admit at trial and not seek or obtain prior approval from this Court for a process not provided for in applicable law.[3]

VII. This Court should not allow the Government to employ the silent witness rule.

In its Motion, the Government asserts that "[t]o facilitate the introduction into evidence of the classified information contained in the government's proposed exhibits, the United States will move the court to allow their admission pursuant to the 'silent witness rule.'" Gov't Mot. at 14. The defendant does not know at this time exactly what information or witnesses the Government seeks to introduce or call under the silent witness rule. What is known, however, is that it will be impossible effectively to contest and challenge the Government's evidence before a jury if the Court permits use of the silent witness rule, which would impermissibly provide the stamp of secrecy and national

[3] This same analysis would preclude consideration of the proposed stipulation that the Government proffers on pages 13-14 of its Motion. The Government has no right to "move" for a stipulation of its own evidence.

security importance to information that the Government has elected to disclose in a criminal trial where those very issues are contested. The Court must decline this invitation to conduct and unfair and constitutionally impermissible trial.

The silent witness rule is an extraordinary evidentiary procedure that has rarely been utilized in cases involving classified information. Under that rule

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

United States v. Zettl, 835 F.2d 1059, 1063 (4th Cir. 1987). Thus, pursuant to the silent witness rule, certain evidence identified by the prosecution is revealed to the judge, the jury, counsel, and witnesses, but is completely withheld from the public. A witness who refers to this evidence in answering a question posed by counsel does not specifically identify or describe it, but instead refers to it by citing the page and/or line numbers of a document, or, more commonly, by the use of some form of a code system. While the jury, counsel, and the judge have access to some key document that sets forth the meaning of the various code designations, the public does not.

In the 30 years since the Classified Information Procedures Act was enacted, the silent witness rule has been used in only a tiny fraction of cases. Use of the rule has never been approved by the Fourth Circuit; indeed, "[t]here is a paucity of reported cases on the propriety of using the silent witness rule under CIPA, as the rule has been infrequently proposed and even less frequently employed." *Rosen*, 487 F. Supp. 2d at 713. At least two courts, in the Eastern District of Virginia, have rejected use of the rule in a CIPA case, *see United States v. North*, 1988 WL 148481 (D.D.C. Dec. 12, 1988); *Rosen*, 487 F. Supp. 2d at 715-21, and the Fourth Circuit has rejected a government

proposal that was quite similar to the rule. *See United States v. Fernandez*, 913 F.2d 148, 162 (4th Cir. 1990) (rejecting a "key card proposal" similar to the silent witness rule; emphasizing that such a proposal was an "artificial means of presenting evidence" which "might confuse or distract the jury"). This Court should also refuse to allow the Government to use the silent witness rule in this case. *See North*, 1988 WL 148481 at *3 ("[T]his technique for denying public access to the full proof in the interests of protecting national security cannot serve the requirements of this particular case which will involve thousands of pages of redacted material and numerous substitutions. Cross-examination would still be stultified and confusion would undoubtedly increase.").

In this case, the Government cannot use, and certainly has not justified the need to use, the silent witness rule, for several reasons. First, use of the rule is precluded by CIPA itself as well as by Rule 26 of the Federal Rules of Procedure. In CIPA, Congress established an intricate and comprehensive set of procedures to be utilized by courts, prosecutors, and defense counsel in cases involving classified information. As set forth above, the Government cannot add to these procedures by invoking a rule that is based in neither statutory nor constitutional law.

In addition, even assuming that the silent witness rule could be used in some cases involving classified information, an assumption with which the defense does not agree, the Government has not even attempted to justify its use in this case. Use of the silent witness rule here carries with it the very real danger of violating Jeffrey Sterling's right to a fair proceeding under CIPA itself, as well as his right to a fair trial under the Fifth and Sixth Amendments. The rule does so by causing awkwardness in the manner in which the defense will present its case; by almost certainly resulting in jury confusion; by preventing witnesses and counsel from exploring fully facts protected by the silent witness rule; and by prejudicing the defense by employing a procedure that impermissibly suggests to the jury that the information being discussed is in fact classified, that it is so sensitive that it must relate to the national defense, and that Jeffrey Sterling acted with the specific intent

required under 18 U.S.C. § 793 (d) & (e), which are all factual determinations that the jury itself must decide.

Finally, the rule violates Mr. Sterling's right to a public trial under the Sixth Amendment. Use of the silent witness rule results in a partial, but highly significant, closure of the proceedings, because it hides essential information from the public. *See Rosen*, 487 F. Supp. 2d at 710-21 (use of the silent witness in case involving classified information did not satisfy fairness requirements of CIPA and violated defendant's right to a public trial); *United States v. Rosen*, 520 F. Supp. 2d 786, 798 (E.D. Va. 2007) ("[I]t is appropriate to reject any use of the [silent witness rule] that is unfair to defendants.").

VIII. Use of the silent witness rule is barred by CIPA and Rule 26 of the Federal Rules of Criminal Procedure.

The silent witness rule cannot apply to cases that involve classified material under CIPA. Through its exhaustive procedures, CIPA provides the exclusive means for dealing with classified information in criminal trials. This is reflected not only by the plain meaning of CIPA's text (and its title: the "Classified Information Procedures Act"), but also by the statute's structure.

In enacting CIPA, Congress put in place a procedural structure that, as set forth above, cannot be amended by the prosecution. Under CIPA, § 5(a), defense counsel in a criminal case must provide notice to the government of any classified information they reasonably expect to disclose or to cause the disclosure of "in any manner" at trial or any pretrial proceeding. This notice requirement applies even to classified information that may be revealed by a defendant's own testimony, as well as classified information that defense counsel expect to elicit from prosecution witnesses on cross-examination, or defense witnesses during direct examination, and classified information that may be revealed by counsel's very questions to those witnesses.

Under CIPA § 6(a), the Government may request that the Court conduct a hearing to make all determinations concerning the use, relevance, or admissibility of such information. If the Court subsequently authorizes the disclosure of specific classified information under the procedures established by CIPA, the Government may, under § 6(c)(1), move that, in lieu of the disclosure of such classified information, the Court may order "(A) the substitution for such classified information of a statement admitting relevant facts that the specified classified information would tend to prove; or (B) the substitution for such classified information of a summary of the specific classified information." CIPA § 6(c)(1). The Court shall grant the Government's motion only if it finds "that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." *Id*.; *see also Fernandez*, 913 F. 2d at 151 (describing CIPA procedures).

Thus, the plain meaning of CIPA's text makes clear that the statute was designed to be the sole procedure governing the use of classified information in a criminal case, and fully addresses the exact problem that use of the silent witness rule is supposedly designed to alleviate, the disclosure of classified information during the questioning and cross-examination of witnesses in a criminal trial.[4] *See United States v. Libby*, 467 F. Supp. 2d 20, 24 (D.D.C. 2006) ("The CIPA establishes the procedures for providing pretrial notification of a defendant's intent to use classified information at his trial and the process for determining exactly what information the defendant will be permitted to introduce as evidence. It was enacted to permit the government to ascertain the potential damage to national security of proceeding with a given prosecution before trial.") (citation and quotation

[4] This reading of the plain meaning of CIPA is further affirmed by a well-understood and fundamental canon of statutory construction: *expressio unius est exclusio alterius*, reflecting the notion that a statute's "expression of one thing is the exclusion of another." *Providence Square Associates, L.L.C. v. G.D.F., Inc.*, 211 F.3d 846, 852 (4th Cir. 2000). Under this interpretive canon, the fact that CIPA establishes a specific and limited set of procedures for the handling of classified information in criminal cases necessarily precludes the use of any other type of procedure, including the silent witness rule.

omitted). If the Government is concerned that the examination of witnesses by the defense will expose classified information to the public, CIPA requires that it provide a suitable substitution for such classified information, either by a statement admitting relevant facts that the specified classified information would tend to prove, or by a summary of such information. It does not authorize use of the silent witness rule.

For these reasons, it is CIPA this Court should look to resolve issues relating to classified information, not an extraneous mechanism such as the silent witness rule. The court should not judicially amend CIPA by allowing the Government to invoke the silent witness rule, when CIPA already provides adequate and just procedures enacted by Congress.

In addition, use of the silent witness rule is barred by Rule 26 of the Federal Rules of Criminal Procedure. Rule 26 states that "[i]n every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-2077." The silent witness rule is not based on any statute or any properly codified rule, and its use is therefore precluded by Rule 26.

IX. Even assuming for argument's sake that the silent witness rule were not barred by CIPA, its use would violate Mr. Sterling's right to a fair trial under CIPA and the Fifth and Sixth Amendments.

It is a fundamental guarantee of the Sixth Amendment to the United States Constitution that a criminal defendant has the right to present a defense to the charges he is facing. *See Taylor v. Illinois*, 484 U.S. 400, 409 (1988). This fundamental right includes "the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). In addition, a defendant has a right to a fair trial under the Due Process Clause of the Fifth Amendment. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.") Finally, fairness is guaranteed by CIPA itself. *See United States v. Moussaoui*, 591 F.3d 263, 281 (4th Cir. 2010) ("CIPA provides

procedures for protecting classified information without running afoul of a defendant's right to a fair trial.") (footnote omitted).

Even assuming for argument's sake that CIPA allowed for the use of the silent witness rule under certain circumstances, the rule does not meet CIPA's requirement of fairness in this case. Nor is it consistent with Mr. Sterling's constitutional rights to a fair trial.[5] To prove that use of the silent witness rule does not result in an unfair trial, the Government must show that the rule does not impede the defendant from fairly presenting evidence, or intrude on the defense's cross-examination of witnesses and argument to the jury about the facts protected by the rule; that an ordinary juror will be able to follow the evidence and argument despite the use of the silent witness rule; and that prejudice from the rule's use is curable by an instruction or otherwise. *See Rosen*, 520 F. Supp. 2d at 799.

The Government in this case has not yet attempted to satisfy these criteria, nor can it. Use of the silent witness rule in this case would seriously prejudice Mr. Sterling and totally eviscerate his right to a fair trial. Application of the rule would result in: (a) an awkwardness in presenting the defense's case and the jury confusion that would almost certainly result; (b) the witnesses' and counsel's inability to explore fully (and counsel's inability to adequately argue to the jury) facts protected by the silent witness rule; and (c) prejudice the defense by employing a procedure that suggests to the jury that the information being discussed, and Mr. Sterling's specific intent in allegedly disclosing or retaining any information relating to this program, are sufficient to justify his

[5] *See also United States v. Poindexter*, 698 F. Supp. 316, 320 (D. D.C. 1988) ("Fortunately, Congress was alert to the fact that special cases might create special problems. It made clear that in any case involving classified information the defendant should not stand in a worse position because of such information than he would have if there were no such statutory procedures."); *United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (CIPA's fundamental purpose "is to protect and restrict discovery of classified information in a way that does not impair defendant's right to a fair trial;" in this regard, "[i]t is essentially a procedural tool").

conviction under § 793(e), which, of course, are the central questions that the jury itself must decide in this case. *See Rosen*, 487 F. Supp. 2d at 711-15.

Without knowing what information is at issue, the prejudice to the defense can only be addressed hypothetically. Needless to say, requiring counsel to talking in code, nod, wink or blithely point to paragraphs and line numbers simply cannot replace effective cross-examination. And this process would unfairly suggest to the jury that the documents are so secret that counsel cannot talk about them, when their alleged status as national security information is one of the very issues of fact the jury needs to decide. The myriad reasons why using the silent witness rule would be unworkable in this case are too numerous to count and too difficult to predict. But, what is certain is that employing the silent witness rule in this case would be prejudicial and unfair to Mr. Sterling.

Specifically, the silent witness rule would be particularly prejudicial to Mr. Sterling, because, along with the other elements of an offense under 18 U.S.C. §§ 793 (d) & (e), the Government must show that the information and documents he allegedly retained did in fact "relat[e] to the national defense," *i.e.*, the information would potentially damage the national defense if disclosed. The Government also must establish that the information was closely held by the United States to prove it related to the national defense. The Government must prove both of these facts beyond a reasonable doubt to obtain a valid conviction under 18 U.S.C. §§ 793 (d) & (e). *See United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir. 1988).

In cases such as this one, where there is a real question as to whether the information at issue was closely held or related to the national defense under 18 U.S.C. 793 §§ (d) & (e), the silent witness rule neither meets CIPA's requirement of fairness, nor is consistent with Mr. Sterling's constitutional right to a fair trial. *See Rosen*, 487 F. Supp. 2d at 710-11 ("Where, as here, a central issue in the case is whether the government's alleged [national defense information] is indeed

genuinely [such information] . . . it cannot be said that the procedure affords defendants 'substantially the same ability to make [their] defense as would disclosure of the specific classified information.' CIPA § 6(c)."); *see also id*. at 720 (silent witness rule "is not a 'substitution' authorized by CIPA, and even if it were, it would not afford defendants substantially the same opportunity to present their defense as the specified classified information").

"Plainly, [he] would be significantly hobbled in doing so by use of [the silent witness rule], inasmuch as the specific information could not be used in open court." *Id*. "The silent comparison of paragraphs or sentences, even where supplemented by codes, would effectively preclude defense counsel from driving home important points to the jury." *Id*. For these reasons, the silent witness rule "essentially robs [Mr. Sterling] of the chance to make vivid and drive home to the jury [his] view that the alleged [national defense information] is no such thing. . . ." *Id*. Such impaired cross-examination could very well also rise to the level of a violation of the Confrontation Clause. *See id*. at n.13. Add the Government's claim that certain information that was allegedly disclosed was false and misleading to the similarities between the analysis in this case and the *Rosen* case. Does the Government propose to discuss false information to the jury under the silent witness rule or will it signal to the jury what it believes to be true by invoking the silent witness rule to drive home key points? Surely such a procedure would violate Mr. Sterling's right and give the CIA, through its decisions whether or not to declassify documents, the right to decide how and when evidence is presented in this case.

Accordingly, application of the silent witness rule to allegedly classified information in this case would make it virtually impossible for Mr. Sterling to conduct effective cross-examination as to the question of whether the alleged national defense information was be damaging to national security. *See id*. at 712 (it is "simply not plausible" to argue that defense counsel could effectively cross-examine witnesses about whether information is potentially damaging to national security via

use of a virtually incomprehensible system of code; defense counsel's closing jury arguments would also be similarly limited and adversely affected) (footnotes omitted). *See also Rosen*, 520 F. Supp. 2d at 798 ("[I]t is appropriate to reject any use of the [silent witness rule] that is unfair to defendants. This is so for several reasons. . . ."); *North*, 1988 WL 148481, at *3 (rejecting use of silent witness rule because under the rule cross-examination would "be stultified and confusion would undoubtedly increase").

For all these reasons, use of the silent witness rule would violate Mr. Sterling's constitutional and statutory right to a fair trial.

X. Use of the silent witness rule in this case would violate Mr. Sterling's constitutional right to a public trial.

Once again assuming for argument's sake that the silent witness rule may be utilized in at least some criminal cases involving classified information, the Government must meet a very high standard before it can invoke the rule, because the rule seriously endangers Mr. Sterling's right to a "public trial" under the Sixth Amendment. The silent witness rule prevents the public from seeing and hearing the complete body of evidence in the case, and thus effectively results in at least a partial, but constitutionally significant, closure of the trial. *See Rosen*, 487 F. Supp. 2d at 715 n.20 (noting that "the government sensibly appears to have abandoned its original position that the proposed use of the silent witness rule . . . does not close the trial" because such an argument would lead to an "absurd result"). Accordingly, to justify use of the rule, the Government must meet the standards set forth in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984), which establishes the criteria that must be met before a trial may be closed to the public. *See also Waller v. Georgia*, 467 U.S. 39, 48 (1984) (applying *Press-Enterprise* in cases where the right to a public trial is asserted by a defendant).

Under *Press-Enterprise* and *Waller*, a party seeking to close a trial must advance an overriding interest that is likely to be otherwise prejudiced, and demonstrate that closure is no broader than necessary to protect that interest. In addition, the trial court must consider reasonable alternatives to closing the proceeding, and must make findings adequate to support closure. *See Waller*, 467 U.S. at 48; *see also Bell v. Jarvis*, 236 F.3d 149, 166 (4th Cir. 2000) (same). In cases involving classified information, the prosecution must show, at the very least, why substitutions under CIPA are not sufficient to meet the Government's needs. *See Rosen*, 487 F. Supp. 2d at 716 (applying *Press-Enterprise* test to determine whether use of silent witness rule in CIPA case violated defendant's right to public trial). In this regard, the Government's justification in denying the public access to evidence at trial "must be a weighty one." *Press-Enterprise*, 464 U.S. at 509-10. There is a strong presumption in favor of allowing the public to view and consider all the evidence presented by both parties in a criminal case, because "[o]penness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise*, 464 U.S. at 508.

The silent witness rule "is a highly artificial means of presenting evidence that could, in many circumstances, inhibit the ability of witnesses and counsel to communicate with the jury, to the detriment of defendants' ability to present their defense fairly." *Rosen*, 520 F. Supp. 2d at 798 (quotation omitted). The Fourth Circuit has recognized as much. *See Fernandez*, 913 F.2d at 162 ("key card proposal" that was very similar to silent witness rule "is an artificial means of presenting evidence" that "might confuse or distract the jury"). For all the reasons discussed above, this Court should rule that the silent witness may not be utilized by the Government in this case.

XI. The Government's request for special security measures must be denied.

In its Motion, the Government requests that "in light of national security, counter-intelligence, and personal safety concerns, the government asks that some of those witnesses be referred to

throughout public proceedings by the initial of their true last name (e.g. Mr. D. John Doe), and that a screen be used to prevent the identities of several of those current or former officers from being revealed to the public...The government also anticipates making this request for any CIA human assets, including but not limited to Human Asset No. 1, who may appear at trial.") Gov't Mot. at 15.

For many of the same reasons that the Court should refuse to allow the Government to stipulate to or substitute for its own evidence, the Court should deny these requests for special security measures in their entirety. The Department of Justice, surely after consultations with the CIA, approved this prosecution. In doing so, it should have expected an open and public trial that featured all of the Constitutional protections afforded a defendant in the United States. In the ten years since Mr. Sterling left the CIA, none of these constitutional provisions have been eroded and no Court has recognized a "national security" exception to the rights of a criminal defendant. This Court should decline the invitation as well.

The defense has detailed above many of the specific instances of prejudice that will arise from the use of the silent witness rule. These same arguments apply to this request as well but are heightened. The jury will surely take the clue that any evidence that must be discussed in code or from behind a screen or a by a witness who cannot be identified or named, is national security information that was closely held by the United States when that is one of the ultimate issues to be resolved by the jury. While this may not be the primary purpose for this request, this is the inevitable result of the procedure requested and is entirely unfair to Mr. Sterling and his counsel. In addition to his public trial and confrontation rights being violated, Mr. Sterling has been unable to investigate who Mr. D. and the various other anonymous witnesses may be, whether they are fact or expert witnesses or both. It would only serve to compound this problem to then allow these witnesses to testify in this fashion. As such, the request for special security measures should be denied.

CONCLUSION

For these reasons and any others that may develop at a hearing on this motion, Jeffrey Sterling requests that the Court issue an order denying the Government's Motion for An *In Camera* Hearing and Motion for Order Pursuant to Sections 6 and 8 of the Classified Information Procedures Act to the extent the motion seeks to use the silent witness rule and is otherwise inconsistent with CIPA. In addition, the request for special security measures should also be denied.

Dated: August 19, 2011

Respectfully submitted,
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By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

By:_____/s/_____

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