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

Alexandria Division

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

GOVERNMENT'S REPLY TO 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

The United States of America, by and through the undersigned, respectfully replies to Defendant Jeffery Sterling's Response to the Government's Motion for *In Camera* Hearings and a Motion for an Order Pursuant to Sections 6 and 8 of the Classified Information Procedures Act. (Dkt. 158)(hereinafter "Response"). The defendant claims that the statutory language of the Classified Information Procedures Act (hereinafter "CIPA") only expressly authorizes the use of substitutions and redactions for evidence that the *defendant* wants to introduce into evidence at trial. *See* Response at 2. In other words, CIPA and its procedures are completely unavailable to the government for evidence that it intends to use in its case-in-chief. *Id*. at 1, 2. Thus, according to the defendant, the government must either declassify classified information intended for use in its case-in-chief or forego the information. *Id*. at 6 n.1. As support for this novel interpretation of CIPA, the defendant cites CIPA's statutory language and legislative history. *Id*. at 4, 5.

When viewed as whole, however, the statute and CIPA's legislative history actually

confirm that the government in fact can use CIPA to propose substitutions and redactions for evidence that it intends to use in its case-in-chief, thus completely refuting the defendant's argument. As a preliminary matter, the Court should deny the defendant's Response because, assuming arguendo the merits of the defendant's arguments, the defendant waived his objection by allowing the government to proceed first under CIPA, and did so after the Court had struck his deficient Section 5 notices on May 12, 2011.

However, even if the Court does not agree that the defendant has waived this objection, contrary to the defendant's claim, the statutory language of CIPA expressly permits the government to use substitutions and redactions for evidence that it intends to introduce in its case-in-chief, and CIPA's legislative history fully supports this interpretation of CIPA. Given this lack of ambiguity, the rule of lenity does not apply. Finally, the security measures proposed by the government should be adopted by the Court because an overriding interest in protecting national security and personal safety concerns exists; the recommended security measures are narrowly tailored; no reasonable alternative exists; and the defendant suffers no prejudice. Accordingly, the defendant's Response lacks any merit and must be denied.

I. The Defendant Waived Any Objection to the Government Proceeding First Under CIPA When He Consented to the Scheduling Order.

On August 4, 2011, the government filed a letter with the Court in which the government represented that "[t]he parties have conferred and agreed upon a proposed pre-trial schedule." *See* Dkt. 146 at 1. Based upon the defendant's representations, the government proposed a schedule for CIPA-related matters that specifically provided for the following:

(1) Filing deadlines and hearing related to the government's evidence in its case-in-chief.

Aug. 9 Government Expert Notice(s); unclassified versions of previously classified materials to be used or relied upon by government in its case-in-chief; any related CIPA submissions.

Id. at 3. The Court subsequently entered an Order endorsing that schedule, including the provision requiring the government to proceed first and disclose its case-in-chief evidence under CIPA. *See* Dkt. 147.

Amazingly, having agreed to this procedure, the defendant now objects to it. In fact, the defendant agreed to this procedure *after* the defendant had filed three CIPA Section 5 notices, and the Court struck them as deficient for lack of specificity on May 12, 2011. The whole idea behind the schedule to which the parties had agreed was to make the entire CIPA process more efficient, particularly in light of the defendant's inability to file a reasonably specific Section 5 notice. Under the proposed schedule, the Court and the parties could address any issues relating to the government's proposed trial exhibits first, and then turn to the defendant's proposed trial evidence, which presumably would have been more focused given the defendant's ample notice of the government's proposed trial exhibits. Instead, having given the defendant notice of its proposed trial exhibits two months in advance of trial, the government has been sandbagged, and the Court should not tolerate such a tactic. The Court should reject the defendant's objection as having been waived by virtue of their initial consent to this procedure.

II. CIPA Section 6 Authorizes the Use of Substitutions for Classified Information that the Government Intends to Use as Part of the Government's Case-in-Chief.

Federal courts "'do not . . . construe statutory phrases in isolation; we read statutes as a whole.'" *Samantar v. Yousuf*, 130 S.Ct. 2278, 2289 (2010) (quoting *United States v. Morton,*

467 U.S. 822, 828 (1984)). The cardinal rule of statutory construction is "'that a statute is to be read as a whole.'" *Corley v. United States*, 556 U.S. 303, ___, 129 S.Ct. 1558, 1567 n.5 (2009)(quoting *King v. St. Vincent's Hospital,* 502 U.S. 215, 221)). Therefore, the starting point for any analysis of CIPA and its provisions is to read the statute as a whole.

A. The Plain Language of CIPA

CIPA Section 6(a) expressly provides that

> (a) Motion for Hearing - Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to *make all determinations concerning the use, relevance or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding*. Upon such a request, the court shall conduct such a hearing.

(emphasis added). Section 6(a) does not distinguish between classified information noticed by a defendant pursuant to Section 5 and classified information that will be used as evidence of guilt in the government's case-in-chief. *See United States v. Abu Ali*, 528 F.3d 210, 255 (4th Cir. 2008)("If classified information is to be relied upon as evidence of guilt, the district court may consider steps to protect some or all of the information from unnecessary public disclosure in the interest of national security and in accordance with CIPA . . ."). Instead, by its plain terms, Section 6(a) applies to any classified evidence for which there is, or may be, an issue regarding its use, relevance, or admissibility at trial. *See United States v. Passaro*, 577 F.3d 207, 219 (4th Cir. 2009) ("CIPA permits a court to review classified evidence in camera to determine its relevance and admissibility, and then order disclosure (with or without redaction) of the evidence or issue protective orders against disclosure."); *United States v. Fernandez*, 913 F.2d 148, 157 (4th Cir. 1990) ("CIPA contemplates that the government may propose substitutions for relevant

classified information . . ."). *See also United States v. Apperson*, 441 F.3d 1162, 1193 n.8 (10th Cir. 2006) (CIPA "evidence[s] Congress's intent to protect classified information from unnecessary disclosure at any stage of a criminal trial."). Put simply, Section 6(a)'s plain language, *i.e.* "all determinations concerning the use . . . of classified information," means "all determinations," regardless of who is using the information.

Nor does the plain language of Section 6(a) require the filing of a defendant's Section 5 notice first. Instead, the *only* restriction upon a Section 6(a) filing explicitly referenced in the statute is that the filing occur "[w]ithin the time specified by the court . . ." Thus, not only does Section 6(a) make no mention of a defendant's Section 5 notice, but it expressly contains only one limitation, a timing restriction, on a Section 6(a) filing. *See* Response at 3 ("It is a fundamental canon of statutory construction that a statute's expression of one thing is the exclusion of another.").[1] Had Congress wanted a Section 6(a) motion to follow a defendant's Section 5 notice, Congress would have said so. Instead, Congress imposed a timing restriction completely unrelated to a Section 5 notice.

The plain language of Section 6(b) requires the government to provide "notice of the classified information that is at issue" prior to a Section 6 hearing. 18 U.S.C. App. 3 § 6(b). Nowhere, however, does Section 6(b) define how or what that notice should look like other than to say that "[s]uch notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States." *Id*.

[1] The defendant makes much of the fact that the government's Motion, Dkt. 150, stated that a Section 6(a) motion typically occurred upon the filing of a defendant's Section 5 notice. *See* Response at 3-4. However, that a Section 6(a) motion usually follows a defendant's Section 5 notice in the ordinary course does not equate to such a practice being the *only* course under the statute. In any event, the defendant consented to the government going first in this case.

Where a proposed government trial exhibit contains both classified and unclassified information, a substitution or redaction for specific classified information provides the notice required by Section 6(b) and does so with greater specificity than simply identifying the document as a whole. Providing this type of notice and offering substitutions or redactions for specific classified information is no different than the use of substitutions or redactions in various unclassified settings. *See, e.g. United States v. Akinkoye*, 174 F.3d 451, 456-57 (4th Cir. 2007) (retyping confession and substituting neutral phrases for references to co-defendants cured any potential *Bruton* concerns). There is nothing in CIPA that precludes the government from satisfying its notice requirement in the same way.

Finally, the plain language of Section 6(c) clearly empowers the government to make substitutions. 18 U.S.C. App. § 6(c)(1)(A) and (B). Section 6(c)(1)'s plain terms do not limit its scope solely to evidence that the *defendant* wants to introduce into evidence at trial, but instead encompasses "*any* determination by the court authorizing the disclosure of specific classified information." *Id*. at § 6(c)(1) (emphasis added) Nor does the plain language of Section 6(c)(1) require the filing of a defendant's Section 5 notice first. Instead, Section 6(c)(1) explicitly refers to the "procedures established by this section," thereby excluding the Section 5 notice from its ambit. *Id*. at § 6(c)(1). Thus, like Section 6(a), Section 6(c)(1) does not distinguish between classified information noticed by a defendant pursuant to Section 5 and classified information intended to be used by the government in its case-in-chief, and does not require the filing of a Section 5 notice first. As with Section 6(a), "any determination by the court authorizing the disclosure of specific classified information" means precisely that, "any determination," regardless of who is the proponent of the classified information.

Moreover, when read as a whole, other sections of CIPA support the government's ability to use substitutions and redactions for evidence that the government intends to use in its case-in-chief. Section 4 of CIPA empowers the government to use substitutions and redactions for evidence that it intends to offer in its case-in-chief. Federal Rule of Criminal Procedure 16(a)(1)(E) requires the government to turn over to the defense any documents that the government intends to use in its case-in-chief. The defendant concedes that the plain language of Section 4 authorizes substitutions for "specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure . . ." 18 U.S.C. App. 3 § 4. *See* Response at 2. Under Section 4, the government's proposed trial exhibits containing substitutions and redactions are nothing more than documents that the government intends to use in its case-in-chief and must make "available to the defendant through discovery." Nothing in the plain language of CIPA places a time limit on the Section 4 process or restricts when the government can avail itself of Section 4. *See United States v. O'Hara*, 301 F.3d 563 568 (7th Cir. 2002) ("Nothing in Section 4 nor elsewhere in CIPA limits its invocation and use to pretrial proceedings."); *see also United States v. LaRouche Campaign*, 695 F. Supp. 1282, 1285 (D. Mass. 1988) ("When it is read as a whole, CIPA plainly manifests a congressional intent to protect classified information from *any* disclosure incident to court proceedings, at whatever stage of trial. . . ."). Thus, Section 4 allows the government to satisfy its notice obligation under Section 6 through substitutions and redactions.

Section 4's application to oral testimony of trial witnesses further confirms that the government may use Section 4 to propose substitutions and redactions for its case-in-chief evidence. Various "[c]ourts have held that [Section 4] applies to testimony, as well as

documents." *United States v. Marzook*, 412 F.Supp.2d 915, 917 (N.D.Ill. 2006)(citing *United States v. Lee,* 90 F.Supp.2d 1324, 1326 n.1 (D.N.M. 2000); *United States v. North,* 708 F.Supp. 399, 399–400 (D.D.C. 1988). To say that Section 4 applies to proposed trial testimony, but not proposed trial exhibits, would lead to an incongruous result completely inconsistent with the plain language of Section 4 and the underlying purposes of CIPA.

Similarly, when read as a whole, CIPA authorizes the government to use substitutions and redactions for evidence that it intends to offer in its case-in-chief through Section 8(b). Section 8(b) authorizes a court,

> in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, [to] order admission into evidence of only part of a writing . . . or may order admission into evidence of the whole writing . . . with excision of some or all of the classified information contained therein . . .

18 U.S.C. App. 3 § 8(b). The government's proposed trial exhibits that contain substitutions and redactions fall squarely within a court's authority under Section 8(b). Nothing in the plain language of Section 8(b) limits or restricts the timing of the Section 8(b) process or the scope of the court's authority under Section 8(b) other than to ensure the "unnecessary disclosure of classified information." Thus, a court's authority under Section 8(b) is no different than its authority to make substitutions and redactions to trial evidence in the unclassified context. *See, e.g. Akinkoye*, 174 F.3d at 456-57 (affirming use of neutral substitutions for references to co-defendants to cure any potential *Bruton* concerns).

B. CIPA's Legislative History

The legislative history of CIPA supports the use of CIPA by the government to propose substitutions and redactions for its case-in-chief evidence. In 1978, the Senate Select Committee

on Intelligence Subcommittee on Secrecy and Disclosure, chaired by Senator Joseph Biden (who sponsored CIPA when it was introduced in the Senate), issued a report titled "National Security Secrets and The Administration of Justice." (95th Cong., 2d Sess. Report of the Senate Select Committee on Intelligence 1978) ("National Security Secrets"). That report, which detailed key problems with the use of classified information in criminal trials, was an important part of the legislative history of CIPA. *See* S. Rep. 96-823, at 1 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4295 (citing report). The Senate Report ("Senate Report") stated that the purpose of the bill was to provide

> pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of this evidence in open court. This procedure will permit the government to ascertain the potential damage to national security of proceeding with a given prosecution before trial.

Senate Report at 1. Thus, contrary to the defendant's argument, nowhere in the stated statutory purpose of CIPA's legislative history did Congress limit CIPA's statutory purpose solely to the defendant's use of classified information at trial. Response at 5-6.

The Senate Report further noted that the "key finding of the subcommittee report was that prosecution of a defendant for disclosing national security information often requires the disclosure in the course of trial of the very information the laws seek to protect." Senate Report at 2. The problems stemming from the use of classified information at trial identified by Congress were not limited to classified information sought to be introduced by a defendant. Congress's primary concern was that the scope of any potential disclosures of classified information at a trial was unknown, which deterred the prosecution of cases involving classified information. *Id.* at 3 ("[T]he deck is stacked against proceeding with cases because all of the

sensitive items that might be disclosed at trial must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks."). Although graymail, *see* Response at 2-3, was a significant concern of Congress, it was not Congress' only concern in resolving the issue of uncertainty surrounding the admissibility of classified information prior to trial. Congress expressly noted that the issue of uncertainty was "*further complicated in cases where the government expects to disclose some classified items in presenting its case . . .*" Senate Report at 4 (emphasis added). In fact, one of the problems identified by the Senate Select Committee on Intelligence in its review of criminal prosecutions involving classified information was that certain cases required, as part of the prosecution's case, the disclosure of classified information. National Security Secrets at 10.

Thus, in order to reduce this uncertainty, Congress sought to minimize the unnecessary disclosure of classified information, *see Apperson*, 441 F.3d at 1193 n.8, and make known the potential costs and benefits of proceeding with a criminal prosecution, not prohibit its use by the prosecution. Congress enacted CIPA to require that all determinations regarding any issues relating to classified information be subject to pre-trial resolution, under procedures outlined in CIPA Section 6. *See* H.R. Rep. No. 96-1436, at 2 (Conf. Rep.) *as reprinted in* 1980 U.S.C.C.A.N. 4307, 4310 (noting that Section 6 establishes procedures for requesting a hearing on classified information issues raised by the defendant "or about which the government has otherwise learned."); *see also O'Hara*, 301 F.3d at 568 ("CIPA's plain terms evidence Congress's intent to protect classified information from unnecessary disclosure at any stage of a criminal trial."); *United States v. Johnson*, 139 F.3d 1359, 1365 (11th Cir. 1995) ("This Act is designed to ensure that a trial court's evidentiary rulings on the use of classified information are made prior

to trial."); *United States v. Collins*, 720 F.2d 1195, 1196 (11th Cir. 1983) ("In 1980, the Congress enacted CIPA. Its purpose appears to be straightforward and clear. It is to provide procedures under which the government may be made aware, prior to trial, of the classified information, if any, which will be compromised by the prosecution.").

That Congress intended these procedures to apply to both the government's and the defendant's trial evidence is clear from the examples outlined by Congress in the legislative history. For example, in the section of the Senate Report discussing Section 6(a), the Senate specifically used the example of substituting the phrase "CIA agent" or "undercover intelligence agent" for the true name of an undercover government employee because of its presumed classification status. Senate Report at 7. Under the defendant's theory, while the government could ask the Court to require the defendant to use a substitution in lieu of publicly identifying the undercover agent after the defendant's filing of a Section 5 notice, the government must publicly disclose the true identity of the undercover agent, no matter how tangential to the government's case, or forego prosecution if the undercover agent's true name appeared in any of the government's case-in-chief evidence.

The defendant's argument collapses when CIPA is viewed as a whole and its legislative history considered. To accept the defendant's interpretation of CIPA, the statutory purpose of CIPA and the plain language of Section 6(a) must support the fundamental premise of the defendant's argument: that CIPA only applies to "information the Government provides the defense in discovery and information that the defendant seeks to introduce into evidence." Response at 2. However, as described above, the statutory purpose of CIPA and its plain language contradict that interpretation, and nowhere in his Response does the defendant point to

or even cite a single phrase within CIPA that supports his novel theory. *Id*. at 2-3. In effect, without stating so expressly, the defendant's argument seemingly boils down to an argument that because Section 6(a) numerically follows Section 5, then Section 6(a) must depend upon a Section 5 notice. That argument fails in the face of CIPA's clear statutory purpose, plain language, and legislative history.

The defendant's interpretation of CIPA also would read certain provisions of CIPA out of the statute. For example, under the defendant's theory, if a defendant never filed a Section 5 notice, the government could never avail itself of Section 8(b) or its appellate rights under Section 7. Yet the plain language of Sections 7 and 8(b) do not require the filing of a defendant's Section 5 filing first or limit their reach *only* to classified information intended for use by the defendant. Similarly, under the defendant's theory, if Congress meant to order the CIPA subsections rigidly, the government would be barred from exercising its appellate rights under Section 7 for any orders issued by a court under Section 8(b).[2] Thus, the defendant's interpretation of CIPA effectively reads Sections 7 and 8(b) out of the statute, a result that Congress never could have intended under CIPA.

The thin reed upon which the defendant hangs much of his argument is the notion that substitutions and redactions under CIPA should place the defendant "with substantially the same ability to make his defense as would disclosure of the specific classified information." CIPA

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[2] The defendant makes much of the fact that CIPA is a "procedural" statute. Response at 2-4. However, as both the government's Motion and the caselaw make clear, the references to CIPA as a procedural statute simply reinforced the notion that Congress did not intend to alter the application of the existing rules of evidence to classified information or create any new discovery rights for a defendant. *See* Dkt. 150 at 3-4. The fact that CIPA is a procedural statute does not mean that Congress created a set of procedures to be followed lock-step by number.

Section 6(c). *See* Response at 2, 5, 6. But that argument confuses the relevant issues. Section 6(c) articulates the standard by which the court should measure *how* a substitution or redaction applies in a given case, not *if* a substitution or redaction can be proposed in the first instance. The statutory standard applies whether the government proposes a substitution or redaction for evidence intended for its case-in-chief or in response to a defendant's Section 5 notice. It simply carries no weight on the issue of whether the government can propose a substitution or redaction for its case-in-chief evidence in the first instance.

In addition to contradicting the plain text of the statute and its legislative history, the defendant's erroneous interpretation of CIPA will lead to absurd results. Under the defendant's theory, a defendant could defeat a prosecution based in part upon classified information that the government intends to use in its case-in-chief by simply not filing a Section 5 notice. By not filing a Section 5 notice, the government then must either declassify classified information that it intends to use in its case-in-chief or forego its use. Response at 6 n.1. This result, of course, simply reverts criminal prosecutions based upon the use of classified information back to pre-CIPA days, thus defeating the very purpose of CIPA itself. Senate Report at 3 ("[T]he deck is stacked against proceeding with cases because all of the sensitive items that might be disclosed at trial must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks."). By withholding a Section 5 notice, defendants could replace "graymail" with "no mail," effectively conferring absolute immunity upon individuals who illegally disclose classified information. *Id*. at 4, 5

Thus, the government's use of substitutions and redactions for its case-in-chief evidence accords with the purpose of CIPA and its legislative history. The provisions of CIPA must be

read broadly in light of the "particular facts of each case" and because the CIPA procedures vest "district courts with wide latitude to deal with thorny problems of national security in the context of criminal proceedings." *Abu-Ali*, 528 F.3d at 247. *See also United States v. North*, 713 F.Supp. 1452, 1453 (D.D.C. 1988) (stating that CIPA's legislative history "shows that Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems"). In short, CIPA empowers a district judge to prevent the unnecessary disclosure of classified information during judicial proceedings, whether the government or the defendant proceed first, so long as a defendant's right to a fair trial is not compromised. *See Abu Ali*, 528 F.3d at 255. The government's use of CIPA to propose substitutions and redactions for its case-in-chief evidence fits within the contours of CIPA and does not expand the statutory provisions of CIPA.

II. Even if CIPA Does Not Apply, the Federal Rules of Evidence Allow the Court to Redact or Summarize Privileged Classified Information.

Even CIPA does not provide the exclusive means for protecting classified information or national security information. CIPA is not the single authority through which courts have exercised the power to protect classified information from disclosure, and the Court would not be precluded from applying federal common law because CIPA does not preempt the field with regard to the protection of classified information. Other courts have protected classified information from disclosure outside the provisions of CIPA.

In *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), the Fourth Circuit held that the question of access to enemy combatants and the use of the summaries of their information as substitutes for testimony was not subject to CIPA. *Id*. at 477, 482. Nonetheless, the Fourth

Circuit held that CIPA provided an analogous framework within which to fashion a remedy that would allow the defendant to use the information he needed and still allow the government to protect its national security interests. *Id*. at 476. The court stated, "CIPA thus enjoins district courts to seek a solution that neither disadvantages the defendant nor penalizes the government (and the public) for protecting classified information that may be vital to national security." *Id*. at 477. The Fourth Circuit ordered the district court to fashion suitable summaries of the enemy combatant information that would then be used as substitutes for the enemy combatant testimony along with appropriate instructions advising the jury of the nature of the summaries and the substitution. *Id*. at 480, 482. This demonstrates that the Fourth Circuit endorsed a broad and flexible use of substitutes, including summaries of material live witness testimony, to allow a "measured approach" so that the case could proceed to trial. In so doing, while the Fourth Circuit used the CIPA as an analogous framework, it found that courts have power outside of CIPA to protect the information from disclosure at trial.

In *United States v. Smith*, 780 F.2d 1102, 1108-10 (4th Cir. 1985), the court held that the government may properly assert a national security privilege, that this privilege exists independent of CIPA, and that CIPA did not diminish the court's power to protect that privilege. In *Smith*, the court held that because the national security privilege existed at common law when CIPA was enacted, an assertion of that privilege would require a balancing of the privilege against the admissibility of the evidence. The court held that CIPA was not intended to, and did not change the substantive law as it existed when CIPA was enacted. *Id*. at 1110. Consequently, CIPA cannot be read to extinguish protections otherwise available to protect the government's national security privilege. *See also United States v. Pelton*, 696 F. Supp. 156 (D. Md. 1986)

(holding that even though CIPA did not provide for closure of the courtroom, the court found that the government had established a "compelling reason" to permit certain recorded conversations to be played non-publicly).

Thus, even if CIPA did not authorize the procedure requested here, the Court could admit the government's substitutions into evidence under the Federal Rules of Evidence. Summaries and substitutions for privileged or inadmissible evidence are common in criminal cases. For instance, the government may include a substitution for the name of a co-defendant when a defendant's confession is admissible only as to the defendant. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (holding that there is no confrontation clause violation when a redacted confession is introduced at a joint trial). The government may, and in some cases must, use a short factual statement or summary in place of evidence that may cause undue prejudice. *See Old Chief v. United States*, 519 U.S. 172, 187 (1997). Privileged information is routinely omitted from exhibits, such as Title III intercepts, medical records or even business records, introduced at trial.

Here, the classified information included in the government's trial exhibits is privileged. The government possesses a classified information privilege, and the government has the obligation and the right to protect that privileged information from disclosure to the public. *Smith*, 780 F.2d at 1108-10. *See also* FRE 501. The defendant has no basis to complain about this procedure outside of CIPA. If CIPA does not apply, any decisions regarding privileges, the scope of disclosures, or availability of substitutions or redactions, will have to be made in the middle of trial. This is precisely the problem that CIPA was drafted to prevent. Because defendant's potential objections relate to classified information, the proper place for them is at a

pre-trial hearing pursuant to CIPA section 6(a).[3]

III. Since the Government Does Not Know if It Will Need to Use the Silent Witness Rule, the Defendant's Objection is Premature at this Time.

The government does not know if it will need to use the silent witness rule at trial. When the government filed its Section 6 motion, the government very clearly stated that it "*may* move the court to allow the admission of certain evidence pursuant to the 'silent witness rule" and only "*if needed*." Dkt. 150 at 14, 15 (emphasis added). Of course, the operative words in the government's motion were "may" and "if needed," not that it "*will* move the court to allow [the admission of certain exhibits] pursuant to the 'silent witness rule.'" Response at 8.

Among other proposed trial exhibits, the government has proposed summaries to replace classified information appearing within three proposed trial exhibits, Exhibits 129, 130, and 131. Exhibits 129 through 131 are all documents marked "Secret" that the government found and seized during the execution of a search warrant at the defendant's personal residence in Missouri in October 2006. The defendant's retention of these documents has not been charged because he possessed these classified documents in Missouri, not the Eastern District of Virginia, at the time of their seizure. These uncharged documents are relevant because they tend to establish his

[3] The rule of lenity does not apply in this case because CIPA is not ambiguous. *United States v. Peterson*, 607 F.3d 975, 982 (4th Cir. 2010) (citing *United States v. Helem*, 186 F.3d 449, 455 (4th Cir.1999)(stating that the "rule of lenity, which requires the court to strictly construe criminal statutes, does not apply in this case because the statute is not ambiguous.") In addition, the rule of lenity requires the courts to strictly construe criminal statutes, not procedural statutes. *Bass v. United States*, 404 U.S. 336, 347 (1971) ("'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'")(quoting *Revis v. United States*, 401 U.S. 808, 812 (1971)). Because the defendant has conceded that CIPA is a procedural statute, the rule of lenity does not apply. *See also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995) ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement").

identity, knowledge and intent for the charged crimes, and the uncharged documents inferentially tend to prove his retention of, and consequently venue for, the classified document charged in Count Four.

If the Court authorizes the government's proposed summaries for Exhibits 129 through 131, then there will be no need for the silent witness rule. Similarly, if the Court orders that Risen must testify about venue, *see Motion for Clarification and Reconsideration,* Dkt. 162 at 13-14, and depending upon Risen's actual testimony, then the government may not need to introduce Exhibits 129 through 131 or use the silent witness rule.

Accordingly, the defendant's objection is premature at this point. Depending upon the Court's future rulings, the government requests leave to file a separate response to the defendant's objection in the event that the government may need to use the silent witness rule. At that time, the government will address the Court's authority to permit the use of the silent witness rule (or some other alternative) and will satisfy the *Press-Enterprise* test in doing so. *See Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501 (1984).

IV. The Security Measures Proposed By the Government Are Reasonable, Necessary and Not Prejudicial to the Defendant.

Closure of a trial may occur where (i) a compelling interest exists to justify the closure, (ii) the closure is no broader than necessary to protect that interest, and (iii) no reasonable alternatives exist to closure. *Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501 (1984); *Waller v. Georgia,* 467 U.S. 39, 48 (1984). At least one court has held that a partial closure of a courtroom only requires a showing of a substantial interest, rather than a compelling interest, to justify closure. *United States v. Galloway*, 937 F.2d 542, 546 (10th Cir. 1991).

Assuming arguendo that the *Waller* test applies to the use of initials, pseudonyms and a portable screen for certain government witnesses, the government's application is justified because (i) partial closure is necessary to protect the national security interests and personal safety concerns of these witnesses in this case; (ii) the government's application is narrowly tailored to serve these interests; and (iii) no reasonable alternatives exist.

A. National Security Is A Compelling Interest

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

Because national security is such a compelling interest, it is one such exception that justifies closure. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 598 n.24 (1980) (concurring opinion of Justices Brennan and Marshall citing "national security concerns" as an example of a possible basis for closure); *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165, 1179 (6th Cir. 1983) (stating that "courts have carved out several distinct but limited common law exceptions to the strong presumption in favor of openness", including privacy rights, trade secrets and national security); *United States v. Rosen*, 520 F.Supp.2d 786, 797 (E.D.Va. 2007) (finding national security a justification for partial closure).

National security interests and personal safety risks in the present case justify the use of

initials, pseudonyms, and portable screens to conceal the true identities of certain former and present CIA employees as well as any CIA human assets that may testify, or any witnesses whose testimony would reveal the identities of any human assets. As an initial matter, Congress clearly recognized these national security concerns and personal safety risks by statutorily protecting the true identities of former and present CIA employees and criminalizing the unlawful disclosure of identifying information of covert agents. *See* 50 U.S.C. §§ 403g, 421(a). *See* Declaration of Elizabeth A. Culver (hereinafter "Culver Declaration"), ¶ 64.

In addition, the true identities of many of these individuals are classified and protected from disclosure for national security reasons. *See* Culver Declaration at ¶¶ 61 -65. *See also United States v. Moussaoui*, 382 F.3d 453, 480 n.37 (4th Cir. 2004)("we leave it to the district court to determine whether national security mandates non-substantive changes, such as designating alternate names for people or places, in order to accommodate national security concerns articulated by the Government when the substitutions are being compiled"). Disclosure of the true identifies of these types of witnesses could jeopardize the security of current and past intelligence operations and diminish the effectiveness of current or future operations. *See United States v. George*, 1992 WL 200027 at 1 (D.D.C. 1992); Culver Declaration at ¶ 61. Disclosure can expose intelligence activities, reveal sources with whom CIA employees may have had contact, divulge intelligence methods, and allow foreign adversaries to determine the precise location where CIA employees may work. *Id*. at ¶ 61. Disclosure can negatively impact foreign liaison relationships, limit the CIA employees' ability and opportunity to meet with sources and assets, detrimentally affect operational activities, and reveal other CIA employees or possible locations. Culver Declaration at ¶ 63. Finally, disclosure of the true identifies of certain former

and present CIA employees as well as any CIA human assets exposes them to harassment and counter-intelligence targeting by foreign adversaries. Culver Declaration at ¶ 63. Thus, the use of initials, pseudonyms, and a portable screen to protect the true identities of certain individuals is nothing more than a CIPA-authorized substitution under Sections 6 and 8. *See Marzook*, 412 F.Supp.2d at 925-26. *See also Rodriguez v. Miller*, 537 F.3d 102, 110 (2nd Cir. 2008) ("it is clear that the State has an 'overriding interest' in protecting the identity of undercover officers" that suffices to establish the first prong of the *Waller* test).

Second, independent of national security concerns, legitimate concerns exist over the personal safety of these individuals, their immediate family, and other innocents to justify the use of initials, pseudonyms, and a portable screen to protect their identities. *See* Culver Declaration, ¶¶ 61, 63. Those concerns are real, not illusory. As found by the district court in *George*,

> [p]ublicly disclosing the identities and CIA affiliation of officers under cover could jeopardize the safety of those officers and their families. The threat of violence to CIA officers is very real. These individuals must live and work in foreign countries in which affiliation with CIA could endanger their lives or personal safety. For example, in 1975, a CIA officer was murdered after his name was publicly revealed by a group intent on exposing the names of CIA officers serving under cover. The homes of several CIA officers were attacked in 1980 after their cover was similarly exposed. In 1984, the CIA station chief in Beirut was kidnapped and subsequently murdered by a group that knew his CIA affiliation.

George, 1992 WL 200027 at *1. These real and legitimate concerns are equally present in this case. *See* Culver Declaration, ¶ 63. Personal safety is a sufficient factor to meet the first element of the *Waller* test. *United States v. Farmer*, 32 F.3d 369, 371-72 (8th Cir. 1994); *Galloway*, 937 F.2d at 546; *United States v. Holy Land Foundation*, 2007 WL 2004458 at *1 (N.D.Tex. 2007); *United States v. Holy Land Foundation*, 3:04-CR-240-G, Dkt. 628, pgs. 7-8 (N.D. Tex. 2007);

Marzook, 412 F.Supp.2d at 926.

B. The Use of Initials, Pseudonyms and a Portable Screen is Narrowly Tailored

The use of initials, pseudonyms, and a portable screen as applied in this case is narrowly tailored and no broader than necessary to protect national security interest and personal safety concerns. *United States v. Lucas*, 932 F.2d 1210, 1217 (8th Cir. 1980) (use of portable screen permissible to protect undercover activity and safety of undercover drug officer); *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1980) (use of pseudonyms permissible "where it is necessary to, however, to protect a person from harassment, injury, ridicule, or personal embarrassment"); *Holy Land Foundation*, 2007 WL 2004458 at *1 (use of pseudonyms permissible to protect safety of foreign intelligence officers); *Holy Land Foundation*, 3:04-CR-240-G, Dkt. 628 at 7-8 (same); *Marzook*, 412 F.Supp.2d at 926 (same); *United States v. Abu Ali,* 395 F.Supp.2d 338, 344 (E.D.Va. 2005) (on motion to suppress, court considered testimony from witnesses who, for security reasons, used pseudonyms); *George*, 1992 WL 200027 at *1 (use of pseudonyms and a portable screen permissible to protect the identity of undercover CIA officers).

In *United States v. Jacobson*, 785 F.Supp. 563, 568-69 (E.D.Va. 1992), the district court upheld the use of pseudonyms for the parents of children who had been fathered unwittingly by a medical doctor. The court found that

> referring to the parent witnesses by assigned pseudonyms is necessary to protect the children from harm. The use of pseudonyms is a narrowly tailored measure because it shields the identity of the witnesses from the press and the public only. Significantly, the defendant and his counsel will know the true identity of the parents. Use of the pseudonyms will not interfere with the defendant's preparation for trial, with his ability to cross-examine witnesses at trial, or with the scope of the examination. In other words, his Sixth Amendment right to confront all witnesses

> will be preserved. Any suggestion that the court, by the use of pseudonyms, is placing a "seal of disapproval" on defendant's conduct or implying that such conduct was "heinous" . . . can be cured by an appropriate instruction to the jury.

Id. at 569.

The present case is no different than the facts and circumstance of the afore-mentioned cases. The court, the jury, the defendant, and counsel for the government and the defendant will be able to see and question the witness. The public will be able to hear the witness; they simply will not be able to see the witness. The defendant has already received full discovery of the witness statements of all potential witnesses. The government easily can identify for the defendant (and the Court) in advance of trial the initials or the pseudonyms for the various witnesses. Therefore, there would be no infringement upon the defendant's Sixth Amendment rights.

C. No Reasonable Alternatives Exist

No reasonable alternative exist. To disclose the true identities of certain former and present CIA employees as well as any CIA human assets, whether or not they appear as witnesses, would create real and legitimate national security and personal safety risks. The "all or nothing" approach advanced by the defendant has no support under the law or the facts.

First, while the Confrontation Clause guarantees the opportunity for effective cross-examination, it does not guarantee cross-examination "that is effective in whatever way, and to whatever extent, the defense may wish.'" *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985). Consistent with the Confrontation Clause, the defendant will be able to physically confront each witness and cross examine him or her. Although the defendant will not know their true

identities, the defendant will have received full discovery for each and every witness and will remain free to cross examine these witnesses based on their direct testimony or any other proper basis. *See Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986) (courts can "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.").

Second, the true identities of these witnesses are largely irrelevant and immaterial. After all, the defendant has now stated repeatedly that his defense will be that someone else committed the charged crimes. Dkt. 131 at 3 (stating that "it was one of the [SSCI] staff members and *not* Mr. Sterling who unlawfully disclosed classified information"); Dkt. 160 at 2 (stating that "one obviously likely defense at trial will be that individuals other than [the defendant] are responsible" for the charged crimes). If the defense is that he did not commit the crimes, then the true identities of the various witnesses are largely irrelevant and immaterial given that Risen's sources were confidential. The defendant certainly has not proffered the relevancy or materiality of the true identity of any witness.

The true identities of these witnesses are also largely irrelevant and immaterial because the defendant never knew the true identities of most of the witnesses any way. Covert CIA employees, like the defendant formerly, work under pseudonyms, and the defendant never knew the true identities of most of the witnesses while an employee at the CIA. Therefore, the fact that the defendant never knew their true identities in the first instance mitigates any potential prejudice. *Marzook*, 412 F.Supp.2d at 926 (noting defendant never knew true identities of foreign service officers in overruling Sixth Amendment objections to use of pseudonyms).

Finally, the true identities of these witnesses are also largely irrelevant and immaterial because the defendant never met or had very minimal contact with most of the witnesses. To the best of the government's knowledge, the defendant never met approximately seven former or current CIA employees and one CIA human asset for whom the government seeks to protect their identities, and had minimal contact with another six former or current CIA employees and a second CIA human asset. Thus, the fact that these witnesses had only a tangential connection to the defendant again mitigates any potential prejudice.

The defendant claims that he has been unable or will not be able to investigate some of these witnesses. This is a surprising fact given that the government: (1) produced under CIPA the true identities of overt CIA employees so that the defendant could contact and attempt to interview those witnesses; and (2) agreed to pass on defense requests for interviews to covert CIA employees. As of August 19, 2011, the date of the defendant's filing, the government knew of only three or four potential witnesses who the defendant attempted to contact for an interview. Moreover, as stated, the government has agreed to identify the *Jencks* materials for any witness whose identity was protected in advance of trial so that there would be no infringement upon the defendant's Sixth Amendment rights.

Finally, this is a criminal case involving the unlawful disclosure of national defense information. The jury will be constantly reminded that those are the allegations in this case through virtually every witness and every document admitted at trial. To suggest that the protection of the true identities of certain witnesses and the use of a portable screen is so inherently prejudicial to bar its use does not square with the facts or allegations of this case. The Court also can fashion an appropriate limiting instruction that would cure any potential prejudice

flowing from such security measures. For example, the Court could instruct the jury as follows:

> The Court has permitted certain witnesses to use their initials or pseudonyms to identify themselves. There are various reasons why this has been done, and those reasons should be of no concern to you. You should draw no adverse inference from this.

See Jacobson, 785 F.Supp. at 569 (limiting instruction can cure any potential prejudice). There is no reason to believe that a jury could not or would not follow those limiting instructions. *See United States v. Johnson*, 587 F.3d 625, 631 (4th Cir. 2009)(stating that "[w]e presume that juries follow such instructions) (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)); *United States v. Basham*, 561 F.3d 302, 335 n.15 (4th Cir. 2009)(stating that "we presume the jury follows instructions, *Jones v. United States,* 527 U.S. 373, 394 (1999) ("The jurors are presumed to have followed ... [the] instructions.")).

D. Other Security Measures

Initials, pseudonyms, and a portable screen would have little value if a sketch artist could draw the features of the witnesses during the testimony. Accordingly, the government requests that no sketch artist will be allowed in the courtroom during the testimony of the protected witnesses. *See Jacobson*, 785 F.Supp. at 569 (protective order applies to sketch artists); *George*, 1992 WL 200027 at *1 (same).

Finally, the government requests that these protected witnesses be allowed to use non-public entrances to the courtroom. *Holy Land Foundation*, 2007 WL 2004458 at *1 (non-public entrance permissible to protect identities); *Holy Land Foundation*, 3:04-CR-240-G, Dkt. 628 at 8 (same); *Marzook*, 412 F.Supp.2d at 928 (same); *George,* 1992 WL 200027 at *3 (same). This procedure will further assist in protecting the identity of these witnesses and ensuring their safety.

V. The Defendant Waived Any Objection to the Use, Relevancy and Admissibility of the Government's Proposed Trial Exhibits.

The defendant's motion on August 19, 2011 was his opportunity to object in writing to the use, relevancy and admissibility of the government's proposed trial exhibits. Rather than doing so, the defendant elected to attack the CIPA process, the silent witness rule, and the security measures requested by the government. Having raised no objection in writing to the actual use, relevancy and admissibility of the proposed trial exhibits, the defendant must have no dispute with the actual substitutions and redactions proposed by the government.

The scheduling order was clear. Neither the Court nor the government should be subjected to a protracted, "multiple bite at the apple" approach to the government's proposed substitutions and redactions. Since the defendant raised none, then the Court should so find after addressing their purely legal arguments first.

CONCLUSION

Based upon the foregoing, the government requests that the Court deny the defendant's Response.

Respectfully submitted this 26th day of August, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2011, I electronically filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to the following:

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