TOP SECRET [redacted]

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

UNITED STATES OF AMERICA	)	UNDER SEAL
	)	
v.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S OBJECTIONS TO STANDBY COUNSEL'S
DESIGNATION OF CLASSIFIED SUMMARIES

Pursuant to the Court's order, the Government respectfully submits its proposed list of summaries that should be included if standby counsel are permitted to introduce the list they submitted on May 8. We note, however, that the [redacted] has indicated that it will not de-classify entire summaries for use at trial, or disclosure to the defendant. Nonetheless, to comply with the Court's May 7 order, we include a list of summaries necessary to complete the statements contained in standby counsel's designated summaries.

In conjunction with this list, the Government makes two points. First, CIPA applies to classified testimony as well as classified documents. Second, the classified summaries are not necessary to provide standby counsel with the same ability to make a defense in this case, particularly in lieu of the Government's proposed substitutions. Accordingly, the Court should reject use of these summaries.

Application of CIPA to Classified Testimony

In answering the Court's inquiry during the May 7 CIPA hearing, it is clear that "[CIPA] applies to classified testimony as well as to classified documents." *United States v. North*, 708 F.

Supp. 399, 399-400 (D.D.C. 1988) (emphasis added). *See also United States v. Ivy*, 1993 WL 316215 at *1 (E.D. Pa. 1993) ("both documentary and testimonial evidence may be admitted [under CIPA] if admissible under the Federal Rules of Evidence.").

This conclusion derives from the plain language of CIPA. For example, the stated purpose of CIPA is to govern the use and disclosure of "classified information," which is defined as "any information or material" that is determined pursuant to "an Executive order . . . to require protection against unauthorized disclosure for reasons of national security . . . ." CIPA Section 1 (emphasis added). Executive Order 13292 "prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism." E.O. 13292 (Mar. 25, 2003). This Executive Order explicitly provides that information may be classified if it involves, *inter alia*, "intelligence sources or methods," "confidential sources," "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to the national security, which includes defense against transnational terrorism," and "weapons of mass destruction." *Id.* §§ 1.4(c), (d), (g), (h). Further, Executive Order 13292 amended Executive Order 12958, which itself defines classified "information" as "any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government." E.O., 12958 § 1.1(b) (emphasis added). Thus, the information at issue -- [redacted] used [redacted] to prevent future terrorist attacks -- is properly classified and therefore covered by the broad but plain language of CIPA.

See North, 708 F. Supp. at 400 ("Information, of course, includes knowledge derived from one's work experience and hence, proposed testimony falls under the restrictions of CIPA.").

Moreover, other provisions of CIPA make clear that the Act was enacted to protect classified testimony. For example, Section 8(c) governs the disclosure of classified information during the "[t]aking of testimony." Under this provision, "the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible." CIPA § 8(c). Upon such objection, "the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information." *Id.* One "suitable" action the court could take is the use of substitutes, as the Government has proposed in this case. *See United States v. LaRouche Campaign*, 695 F. Supp. 1282, 1288 (D. Mass. 1988) ("in fashioning 'suitable action' the court may invoke procedures explicitly described elsewhere in the Act (including those referred to in section 6) as well as any other procedures the court may fashion that are consistent with the terms and objectives of the Act.") (parentheses in original); *see also id.* at 1289 ("in proceeding under section 4, or under section 6, or under section 8, or under any combinations of those sections, a court may determine that an alternative means of protecting defendants' rights in lieu of disclosure even to defendants or their counsel is appropriate."). Therefore, the Court can consider substitutions in lieu of the relevant testimony [redacted] under CIPA.

Unnecessary Disclosure of Classified Summaries

Second, the substitutions proposed by the Government provide standby counsel with "substantially the same ability to make [their] defense," as they would from a deposition, or from

the classified summaries. CIPA § 6(c)(1)(B). Therefore, the wholesale use of the classified summaries is not required by CIPA and should be rejected. First, the Government's substitutions incorporate those statements the Court found to be material to the defense in both the guilt and penalty phases, and as noted in its Reply Brief, the Government is prepared to include any other statements [redacted] since the Court's initial ruling that the Court subsequently finds to be material to the defense. As such, the defense will be able to use the same information, and be able to cite the source of that information, as they would during a deposition. Since CIPA requires no more than the use of classified information, the defense has no valid complaint to the form in which that information is presented. *See United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (rejecting claim defendant was not in substantially the same position because substitutions deprived him of the "evidentiary richness and narrative integrity" of classified documents) (quoting *Old Chief v. United States*, 519 U.S. 172, 183 (1997)); *United States v. Fernandez*, 913 F.2d 148, 156 (4th Cir. 1990) ("§6(a) of CIPA requires the district court to determine the 'use, relevance, or admissibility *of classified information*', not particular classified documents.") (emphasis in original, but not in quoted section of statute).

Standby counsel have lodged two objections to the form of the Government's substitutions.[1] First, standby counsel complain that the substitutions deny them the "give and take" of live testimony. Standby counsel have interpreted this to mean that there might be other information [redacted] could provide at a deposition and that they should be given the

[1]Standby counsel have made broader objections to the use of any substitutions, based on the rules of evidence and the Confrontation Clause, but those objections are addressed in the Government's Reply brief of May 5.

opportunity to solicit this information. This objection, however, fails. First, as previously noted, CIPA contemplates the use of substitutes in lieu of classified testimony. As such, it only requires the defense be allowed to use the substance of the classified testimony. Since the Government's substitutions allow the defense to use those statements the Court found to be material, the Government has met CIPA's burden. Second, standby counsel's claim ignores their burden to identify specific information that they think the unavailable witness can provide, a substantial burden that cannot be met by speculation. *See United States v. Caballero*, 277 F.3d 1235, 1241 (10th Cir. 2002) (defendant "must show more than the mere potential for favorable testimony") (quotation marks omitted); *United States v. Iribe-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997) (rejecting as insufficient claims by defendant that another witness "might" have testified that only defendant's brother "could" have had sufficient knowledge to commit crime); *United States v. Blevins*, 960 F.2d 1252, 1259 (4th Cir. 1992) ("The defendant must explain to the court as precisely as possible what testimony he thinks the informer could give and how this testimony would be relevant to a material issue of guilt or innocence.") (quoting 2 Weinstein & Berger, *Weinstein's Evidence* ¶ 510[06] (1991)). Thus, while the Court has found, based on [redacted] statements to date, [redacted] likely will provide specific testimony that is material to the defense, standby counsel should not be allowed to use this finding as a hook to go on a fishing expedition. Put differently, there is no way to predict what [redacted] will say about matters [redacted] Thus, because standby counsel have failed to articulate any other specific testimony [redacted] likely will provide at a deposition, there is no cognizable prejudice to the defense from foregoing the mere dynamic of a "give and take" of a

deposition. *Compare United States v. Barker*, 553 F.2d 1013, 1021 (6th Cir. 1977) (defense motion for subpoena of witness granted only after "defendants presented more detailed reasons" to substantiate need for witness).[2] CIPA does not mandate that standby counsel be provided with the *opportunity* to make a better defense. Instead, it only requires they be in "substantially' the same position as if the specific classified information were made available.[3] As applied here, CIPA only requires that standby counsel not be worse off because the particular material statements [redacted] to date are classified. Because the Government is willing to admit [redacted] would make such statements if allowed to testify, standby counsel are entitled to nothing else.

Standby counsel also object to the "scripted" nature of the Government's proposed substitution, arguing that it improperly combines the various statements [redacted] into one cohesive statement. As an alternative, standby counsel propose the use of the summaries that reflect the various statements [redacted] This objection

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[2]As noted in the Government's Reply Brief, and as even conceded by standby counsel at oral argument, there is no legal requirement that a witness's statements be presented in the form of live or video recorded testimony. *See, e.g., United States v. Salim*, 855 F.2d 944 (2d Cir. 1988) (permissible to read transcript of witness's answers to questions posed by foreign magistrate, even though magistrate refused to pose all questions presented by counsel and witness refused to answer some of counsel's questions).

[3]Congress is presumed to give each word its own meaning and not add words superfluously. *See Scott v. United States*, -- F.3d -- , 2003 WL 1996106 at *5 (4th Cir. May 1, 2003). CIPA only requires that standby counsel be in "substantially" the same position to make a defense. "Substantially" does not mean precisely. *See United States v. Rosich Bachs*, 119 F. Supp.2d 52, 53 (D. P.R. 2000) ("substantially" verbatim is not same as "precisely" verbatim under 18 U.S.C. § 3500). Therefore, in the context of CIPA, a substitution is adequate if it "provide[s] the gist of the defense in virtual entirety although not necessarily the minutia." *United States v. Collins*, 603 F. Supp. 301, 305 (S.D. Fla. 1985).

lacks any merit, and the proposed alternative should be rejected. First, the Government's proposed substitutions accurately include those statements that the Court found to be material to the defense and those statements properly admitted under the Rule of Completeness.[4] The substitutions also properly exclude those statements that are either immaterial, cumulative or otherwise inadmissible.[5] Thus, there is no valid objection to the substance of the statements in the substitutions, regardless of the form in which they are presented. *See United States v. Fernandez*, 913 F.2d at 156 (defense not entitled to admission of particular classified documents if allowed to make use of information in those documents).

Second, the substitutions are intended to be replacements for both the deposition testimony and the classified summaries. Indeed, the very point of CIPA is to allow substitutions to minimize the quantum of classified information that is disclosed at trial. *See* S. Rep. 823, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News, 4294, 4302 ("[I]f there is no prejudice to the defendant's right to a fair trial as a result of the substitutions, they are clearly preferable to disclosing information that would do damage to the national security."). Therefore, unless standby counsel can identify any material statement from the summaries that is either inaccurately portrayed in, or improperly omitted from, the substitutions, they should not be

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[4]As outlined in the Government's Reply Brief, standby counsel's so-called variances between the summaries and the proposed substitutions are simply non-existent.

[5]As the Government previously has noted, the summaries were intended to provide standby counsel with the statements [redacted] that might be considered *Brady*. Thus, it should surprise nobody that there are statements in the summaries that would not be admissible at a deposition, and therefore properly excluded from a proposed substitution for deposition testimony.

allowed to force the declassification of the more substantial summaries at trial. *See United States v. Rezaq*, 134 F.3d at 1142 (materiality "principle applies to sub-elements of individual documents; if some portion or aspect of a document is classified, a defendant is entitled to receive it only if it may be helpful to his defense").

Third, the narrative form in which the substitutions are presented is more appropriate precisely because it is a cohesive presentation of the classified summaries. As noted, the substitutions accurately include only those statements that are material or otherwise admissible for completeness. That they derive from the several classified summaries is irrelevant for CIPA purposes. On the other hand, the classified summaries contain information that is cumulative, irrelevant and otherwise inadmissible. For example, [redacted] Thus, their introduction will merely the confuse the jury and divert their attention from the truly relevant statements. This is condoned neither by CIPA nor the Rules of Evidence. *See United States v. Rezaq*, 134 F.3d at 1142. For example, Rule 611(a) provides that, "[t]he court shall exercise reasonable control over the mode . . . of . . . presenting evidence so as to . . . make the . . . presentation effective for the ascertainment of the truth. *See also* Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Thus, the substitutions represent precisely the type of common sense approach that CIPA and the Rules of Evidence promote in the search for the truth, and they should be adopted in lieu of standby counsel's list of

summaries. *See United States v. Rezaq*, 134 F.3d at 1143 ("No information was omitted from the substitutions that might have been helpful to Rezaq's defense, and the discoverable documents had no unclassified features that might have been disclosed to Rezaq."); *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987) ("it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties while remaining ever mindful of the court's obligation to protect the interest of society in the 'ascertainment of the truth.'").

Finally, it bears noting that standby counsel have failed to propose their own "script" of statements that properly incorporate the Court's findings of materiality, let alone follow the Rule of Completeness. Instead, in their Response to the Government's proposed substitutions, standby counsel initially provided a proposed list of "admissions," which as they described it at oral argument was for illustrative purposes only. However, many of these so-called "admissions" are simply inferences standby counsel wish to argue to the jury and not statements that can be found in the summaries. In fact, many of the inferences are contradicted by statements in the summaries. Moreover, as is true of the illustrative list of admissions, the list of summaries submitted by standby counsel fail to respect the Rule of Completeness, as they omit summaries which contain several critical statements [redacted] This proposed list, like the earlier list of admissions, will simply mislead the jury and should therefore not be accepted.[6]

[6]The Government also objects to standby counsel's blanket statement that standby counsel may use some of the summaries during cross-examination. (5/8/03 Pleading at 2-3). CIPA does not permit standby counsel to hide the ball about their intentions to disclose, or cause the disclosure of, classified information. Indeed, the failure to identify which particular statements standby counsel intend to disclose precludes them from doing so at trial. *See* CIPA § 5; *United States v. North*, 708 F. Supp. 389, 395 (D.D.C. 1988) (precluding defense from disclosing classified information for failure to comply with § 5 of CIPA).

List of [redacted] Summaries to be Added to Standby Counsel Designations

Summary Bates Number:

[redacted]

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CERTIFICATE OF SERVICE

I certify that on May 12, 2003, a copy of the foregoing Government's pleading was provided to the Court Security Officer for service upon:

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