KAREN P. HEWITT
United States Attorney
SANJAY BHANDARI
VALERIE H. CHU
JASON A. FORGE
PHILLIP L. B. HALPERN
California State Bar Nos. 189120/241709/181542/133370
Assistant U.S. Attorneys

Federal Office Building
880 Front Street, Room 6293
San Diego, California 92101-8893
Telephone: (619) 557-7042/7837/7463/5165

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. KYLE DUSTIN FOGGO (1), aka "Dusty" Foggo, and BRENT ROGER WILKES (2), Defendants.	Case No. 07CR0329-LAB **GOVERNMENT'S MOTION SEEKING CLARIFICATION OF COURT'S RULING ADDRESSING THE PRODUCTION OF CLASSIFIED DISCOVERY TO DEFENSE COUNSEL WHO HAS DECLINED TO OBTAIN A SECURITY CLEARANCE, SUBMIT TO THE TERMS OF A CIPA PROTECTIVE ORDER, OR SIGN A CIPA MOU** Date: July 2, 2007 Time: 2:00 p.m. Courtroom: 9 (2nd Floor) Judge: Honorable Larry A. Burns

Plaintiff the United States of America, by its counsel Karen P. Hewitt, United States Attorney, and Sanjay Bhandari, Valerie H. Chu, Jason A. Forge, and Phillip L.B. Halpern, Assistant U.S. Attorneys, hereby moves this Court for clarification of its ruling addressing the production of classified discovery to defense counsel for defendant Wilkes, who has, to date declined to: (1) obtain a security clearance; (2) submit to the restrictions outlined in the Court's Protective Order issued under the auspices of the Classified Information and Procedures Act ("CIPA"); or (3) sign a Memorandum of Understanding acknowledging his duty to avoid disseminating classified information.

This Motion is based upon the provisions of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, §§ 1-16 (1980); the Security Procedures established pursuant to Pub. L. 96-456, § 9, 94 Stat. 2052 (1980), by the Chief Justice of the United States for the Protection of Classified Information, *reprinted in* 18 U.S.C. app. § 3 (2006) [hereinafter "Security Procedures"]; Rules 16 and 57 of the Federal Rules of Criminal Procedure; the files and records of this case; and the general supervisory authority of the Court.

I

INTRODUCTION

Counsel for defendant Brent Roger Wilkes urges the Court to allow him to "opt-out" of the CIPA procedures designed by Congress and implemented by the Chief Justice of the United States Supreme Court as a framework for allowing the defense access to classified information without unnecessarily interfering with the government's obligation to safeguard such information. In particular, defense counsel requests that the Court require the government to provide him with classified discovery (as required by Rule 16, *Brady*, *Giglio*, and *Jencks*), despite his refusal to: (1) submit to a security clearance; (2) recognize the validity of a Court-imposed CIPA Protective Order; or (3) sign the MOU (referenced in the Court's CIPA Protective Order) binding him to protect against the improper dissemination of classified information. Such a course of conduct – as shall be discussed below – inevitably presents a parade of horribles that may include, but may not be limited to, the unintentional dissemination of classified information during trial, a reversal of defendant Wilkes's conviction due to his counsel's inability to represent him effectively, and delaying this trial to an extraordinary degree (during CIPA Section 4 proceedings) in what – at the end of the day – may prove to be a futile attempt to safeguard Wilkes's ability to obtain exculpatory information.

II

STATEMENT OF FACTS

From the outset of this litigation, the government has made clear that the instant indictment implicates a large amount of classified information and **requires the production of classified discovery**. *See Government's Motion Seeking Pretrial Conference and Protective Order Pursuant to*

CIPA at 4 (filed February 28, 2007) (alleging that, among other things, the nature of some of the contracts at issue, the location of the contracting authority, and defendant Foggo's improper dissemination of classified information to defendant Wilkes, all of which raise issues that implicate directly – and mandate the application of – the Classified Information Procedures Act). As detailed in the government's prior moving papers:

> This information includes classified information about the location and capability of CIA facilities, intelligence methods (such as the identities, positions, and functions of covert CIA officers), outside CIA contractors, and intelligence methods used in CIA support operations. Indeed, **the very discovery that the Government is required to turn over** to the defendants to satisfy its obligations under the Federal Rules **contains "significant amounts of classified information."**

Id. at 4-5 (emphasis added).

Responding to the concerns the government set forth in its filing and at the initial motion hearing, and operating within the CIPA framework, this Court entered a Protective Order (pursuant to CIPA Section 3) designed to safeguard the classified information related to this proceeding. This Order, *inter alia*, required: (1) secure storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed; (2) controlled access to the material during normal business hours and at other times upon reasonable notice; (3) the maintenance of logs recording access by all persons authorized by the court to have access to the classified information in connection with the preparation of the defense; and (4) the securing of notes taken from material containing classified information. Most importantly, it required that all defense counsel be "cleared" to receive classified information and sign memoranda acknowledging their responsibilities.

Defendant Wilkes objected – and continues to object – to the application of CIPA to this case. He has filed pleadings contending that CIPA Sections 5 and 6 violate his Fifth Amendment rights to remain silent and to testify on his own behalf, and his Sixth Amendment right to confront and cross-examine the prosecution's witnesses. *See e.g., Defendant's Wilkes's Motion to Declare CIPA Unconstitutional on its Face or as Applied, or in the Alternative Rejecting its Application to Defendant Wilkes.* He did not, however, raise a Sixth Amendment challenge to CIPA based on his client's right to choice of counsel.

After thorough briefing and lengthy argument, this Court overruled counsel's objections to the constitutionality of CIPA on all points raised by defendant Wilkes in his moving papers. *See Minute Order of the Honorable Larry A. Burns* (entered May 17, 2007). Despite this ruling, and despite failing to raise this issue in his pleading challenging the constitutionality of CIPA, defense counsel nevertheless urged the Court at the May 17 hearing to discard key provisions of CIPA and decide questions concerning classified discovery (as well as evidentiary issues that will undoubtedly crop up during trial) according to a pre-CIPA Rule 16 analysis.

From the outset of that hearing, counsel for Defendant Wilkes dismissed somewhat cavalierly the notion that he needed access to classified information in order to defend his client. *See e.g., Motion Hearing*, attached as Exhibit A, at 43:17-19 (suggesting that it may be "fine and dandy" for the government to "wade through three terabytes . . . of useless information that they claim is classified or top secret" but that the defense had no need to review such material). Indeed, counsel went so far as to suggest that it was absurd to delay proceedings while the Court went "through all of the CIPA and all this other nonsense." *Motion Hearing* at 44:9-11.

Other than the constitutional arguments set forth in his papers (and summarily rejected by this, and various other courts), counsel pointed to only one other basis for his objection to CIPA – its provision that the government control to whom it would disseminate classified information. Counsel rejected the notion that he would be required

> to undergo any kind of a process by which my adversary in an adversarial system is going to determine whether or not I can represent my client. There's only one body that can determine whether I represent my client, and that's the California Supreme Court, period, end of story. The [government doesn't] have the ability to say "yes, you can" or "no, you can't."

Motion Hearing at 41:24 - 42:6.

In response to counsel's position, the Court (without the benefit of briefing on this topic) speculated that it most likely did not have the authority to order Mr. Geragos to "go through a clearance [process]" over his objection. *Motion Hearing* at 44:23-25. Rather than submit to these procedures, defense counsel claimed he could simply "opt-out" by declining to review classified discovery – except

for any classified discovery that might help prove his client's innocence. *See e.g., Motion Hearing* at 67:15-17.

Ignoring uncontroverted authority and analysis establishing that CIPA was enacted specifically to control the dissemination of this type of classified material (during both the discovery and trial phases), defense counsel neatly side-stepped this inconvenient fact by interjecting terminology more suited to card games than legal analysis.[1/] Specifically, counsel suggested repeatedly that CIPA does not "**trump"** the government's obligations under *Brady* and *Giglio*. *See e.g., Motion Hearing* at 43:19-20 ("just give me whatever is apparently *Brady* or *Giglio*); 51:5-7 ("May I add that to the extent, however, that it remains *Giglio* or *Brady*, I do not think that CIPA trumps that."); 56:15-16 ("If it's material to the defense, I'm interpreting it as *Brady*. If it's *Brady*, they have to turn it over); 56:19-21 (If it's something that's relevant, it's either helpful to me and they have to turn it over . . .); 64:12-13 ("We absolutely, categorically do not give up our right to *Brady* and *Giglio*); 64:17-18 ("I don't think they understand that *Brady* trumps CIPA and *Giglio* trumps CIPA").

As a result of counsel's *ad hoc* assertions, the Court – again without the benefit of briefing on this vital issue – merely reiterated the uncontested proposition that Congress did not intend by enacting CIPA to dispense with the government's requirement to provide *Brady* and *Giglio* to the defense. *See Motion Hearing* at 67:18-23 ("I think the constitutional obligations under those two cases to provide the defendant with exculpatory or impeachment material trump any statutory provision"); 70:1-2 ("I reiterate the government has stand-alone *Brady* and *Giglio* responsibilities").

As an alternative to CIPA, the Court suggested that "if there's some question about how [the government would] discharge [its discovery obligations] that implicates classified information," it should simply be addressed "under the auspices of Rule [16]." *See Motion Hearing* at 70:2-5. In other words, rather than use the CIPA procedures enacted to address the handling of classified materials in

---

[1/] As the government observed in its inaugural CIPA pleading, "CIPA was designed to reconcile a defendant's right to obtain and introduce exculpatory material with the government's duty to protect from disclosure sensitive information that could compromise national security." (citation omitted). *Government's Motion Seeking Pretrial Conference and Protective Order Pursuant to CIPA* (filed February 28, 2007), at p. 2-3. *See also* Government Exhibit "A" submitted *ex parte* and *in camera* due to its classified nature (demonstrating importance of safeguarding sensitive information involved in the instant case).

this very situation, the Court would simply "use the normal conventions that we use in other cases." *See Motion Hearing* at 60:20-22.

To the extent that this placed an additional burden on the government and the Court to determine what was exculpatory, the Court indicated that it wished to accept this burden. *See Motion Hearing* at 66:2-5 (the government would be left to its "own devices to determine what is apparently exculpatory, and any questions" would be run through the Court). Similarly, the Court also improperly shifted the burden to safeguard the inadvertent disclosure of classified information away from defense counsel and onto the government. *See Motion Hearing* at 46:25 -47:1 ("the government is going to have to be on their toes" to ensure that uncleared defense counsel does not ask trial witnesses questions that reveal, or call for answers that implicate, classified information).

III

LEGAL ARGUMENT

A. A No-Trump Contract

Like an ingenious tribal shaman reciting an ancient incantation, defense counsel repeatedly argued that "*Brady* and *Giglio* trump CIPA." In doing so, he attempts to use this pronouncement as a talisman exempting him from all the lawful obligations and restrictions built into CIPA – restrictions which were carefully and specifically designed to prescribe the correct method of handling classified national security information in a criminal case. Far from a protective talisman, however, this garden-variety observation is merely "fools' gold."

In examining this issue, it must be emphasized that CIPA does not trump the government's discovery obligations any more than those obligations trump CIPA. Simplifying these broad statutory provisions into a dichotomous catchphrase fundamentally ignores the purpose and role of each set of procedures. The government remains obligated to turn over all discovery mandated both by statute (*see e.g.,* Federal Rule of Criminal Procedure 16) and legal decision delineating the rights of defendants to obtain evidence material to their defense. See e.g., *Kyles v. Whittley,* 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland,* 373 U.S. 83(1963); *United States v. Agurs*, 427 U.S. 97 (1976); *Jencks v. United States,* 353 U.S. 657 (1957); and *United States v. Henthorne,* 931 F.2d

29 (9th Cir. 1991). Despite any suggestion to the contrary, the government has never contested this straightforward, abecedarian conclusion. *See Government's Response and Opposition to Defendant Foggo and Wilkes's General Requests for Discovery* at 14 (filed March 26, 2007).

This rather pedestrian observation concerning the government's discovery obligation, however, does not end the debate. To the contrary, it merely represents the starting point for determining the appropriate **manner** in which the government is expected to satisfy discovery obligations that encompass classified materials. The exact calculus to be used by this Court is, in fact, provided by CIPA. *See* e.g., *United States v. Mejia*, 448 F.3d 436, 455 (D.C. Cir. 2006) (finding that CIPA creates no new discovery rights or limitations, but clarifies the Court's powers to protect government privilege in classified information); *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998) (observing that CIPA "provides procedures designed to protect the rights of the defendant while minimizing the associated harm to national security."); *United States v. Yunis*, 867 F.2d 617, 621-23 (D.C. Cir. 1989) (holding that CIPA provides procedures governing defendant's access to classified information); *United States v. Wilson*, 571 F. Supp. 1422, 1426 (S.D.N.Y. 1983) ("The Act was designed to establish procedures to harmonize a defendant's right to obtain and present exculpatory material upon his trial and the government's right to protect classified material in the national interest."). Notwithstanding defense counsel's invitation, this Court cannot simply abdicate its duty to determine the appropriate parameters governing the dissemination of classified discovery. *See Yunis*, 867 F.2d at 622 (the Court must balance discovery rules against "specific limitations" enacted by Congress to preserve government's legitimate right to safeguard classified information).

The bottom line is that Congress designed CIPA for the express purpose of reconciling defendant Wilkes's right to obtain and introduce exculpatory material with the government's duty to protect from disclosure sensitive information that could compromise national security. *See United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998)*; Wilson*, 571 F. Supp. at 1426;.[2/] This purpose does not equate

---

[2/] CIPA was enacted to allow the federal government to protect its paramount interest in national security while also advancing its compelling interest in the prosecution of federal crimes. In order to reconcile these competing interests, CIPA establishes pretrial, trial and appellate procedures for federal criminal cases in which there is a possibility that classified information will be publicly (continued...)

to CIPA trumping *Brady* and *Giglio* (or *vice versa*). Rather, it establishes the crucial – and necessary – framework by which the government may fulfill its *Brady* and *Giglio* obligations. Although defendant Wilkes may wish to opt-out unilaterally from this Congressionally and Court-approved framework, such an option cannot be countenanced where the instant charges directly implicate sensitive classified information that is integral to our national security.[3/]

B. Providing Classified Brady, Giglio and Jencks

As indicated above, the government understands fully its obligation to provide defendant with all discovery mandated both by statute and legal decision. The government, however, also recognizes (and has repeatedly and consistently informed the Court and defense counsel) that the instant indictment implicates classified information and, as summarized above, **requires the production of classified discovery**. Indeed, it is the confluence of these two facts that inexorably mandates the application of CIPA in the present case.

It is for this exact reason that the government did not invoke CIPA on the basis of a generalized allegation that this case implicates classified information. Instead, the government provided the Court and parties with compelling and uncontroverted evidence regarding the specific consequences that flow from disclosing the sensitive material related to this Indictment. In particular, attached to its initial CIPA motion the government filed a declaration from the Information Review Officer ("IRO") for the National Clandestine Service ("NCS") attesting that the disclosure of information implicated in this trial could reasonably be expected to damage seriously the national security of the United States. *See Declaration of Suzanne M. Fleischauer* (attached as Government Exhibit "A" to its *Motion Seeking*

[2/](...continued)
disclosed. Under these procedures, issues concerning the discoverability and use of classified information by defendants and their counsel are resolved, and the government is informed prior to trial, through *in camera* hearings, whether classified information will have to be disclosed. The government can then make an informed decision concerning the costs of going forward with a prosecution. *See United States v. Collins*, 720 F.2d 1195, 1196-97 (11th Cir. 1983).

[3/] In his somewhat disingenuous ploy to opt-out (yet retain all the benefits and rights to full discovery and open cross-examination), defendant Wilkes is simply practicing a more subtle variation of graymail: forcing the government to provide classified discovery (and subjecting it to potential exposure during trial) without agreeing to be bound by the restrictions provided for in CIPA. As shall be discussed further herein, see *infra* at § III (C), this type of graymail is prohibited. *See generally United States v. Moussaoui*, 333 F.3d 509, 514 (4th Cir. 2003).

Pretrial Conference and Protective Order Pursuant to CIPA).

Furthermore, the government has specifically detailed that the **discovery involved in this case** – if not safeguarded by CIPA – may subject CIA officers and CIA contractors to scrutiny that endangers their contacts (*e.g.*, by virtue of these contacts then being subject to analysis by foreign governments' counterintelligence services). As documented, such an eventuality could result in the improper identification of a variety of intelligence sources and methods. *Id.* at 6-7 (the identities of CIA personnel and contractors are in particular danger of being disclosed as they are, in many cases, central to the alleged unlawful conduct and generally interspersed throughout the discovery in this case).[4/]

Finally, it must be re-emphasized that some of the information that the government must turn over pursuant to its discovery obligations (if not safeguarded) would implicate specific CIA operations along with the specific intelligence methods used to perform those operations. This discovery – detailing the manner in which the CIA conducts its operations – remains a prime example of the type of intelligence method that, if disclosed, would prove valuable to foreign intelligence services and damaging to the CIA. As the Court and defense counsel are aware, it is almost axiomatic that the particular intelligence methods used in many of the relevant transactions involving Foggo and Wilkes are effective only so long as they remain secret. Once the intelligence method is revealed, foreign intelligence services or other hostile groups are able to take countermeasures that render those methods ineffective. *See Fleischauer Declaration* at 10-11.

In addition to its obligation under *Brady* and *Giglio*, the government is required by the *Jencks* Act to provide all relevant witness statements. Many of these statements contain voluminous amounts of classified information. Indeed, many of these statements are rendered incomprehensible if the classified information is removed. For example, well over a dozen potential trial witnesses are current or former CIA covert officers or contractors, whose very affiliation with the CIA is classified. If Wilkes's counsel does not obtain a security clearance, he would be precluded from even learning the

---

[4/] In addition, information regarding CIA field installations, operational units, and CIA officers, their positions, and other potentially identifying intelligence characteristics are interspersed throughout documents that will be made available through the discovery process in this case. *See Fleischauer Declaration* at 6-7. *See United States v. Sims*, 471 U.S. 159, 175 (1985) (noting that improper disclosure could result in sources closing up like a clam).

identity of such covert witnesses (at trial, the government will request pursuant to CIPA that these witnesses testify using pseudonyms). Unless counsel submits to CIPA's framework, the witnesses' names, CIA functions, and other identifying information would be redacted from discoverable documents, including portions of statements from the witnesses themselves. Although the government would provide an unclassified substitution where the documents are essential for trial, such a substitution would not allow defense counsel to learn the identity of particular witnesses before trial. Among other things, this could prevent counsel from interviewing relevant witnesses before trial or adequately preparing for cross-examination.

Similarly, without receiving classified materials, defense counsel would be unable to view information that is substantively material to the defense. For example, all documents related to the aviation support proposal charged in the Superseding Indictment could only be provided to counsel in heavily redacted form. While the redacted document might be sufficient for distribution to the jury, those same documents might not illuminate all potential defenses that are available to the defendant.

In short, the government must provide defendant Wilkes with classified discovery to satisfy its obligations under Rule 16 and relevant caselaw.

C. Demanding Classified Discovery but Rejecting CIPA

As noted in the preceding section, the government concedes that it is obligated to provide Defendant Wilkes with classified discovery. At the same time, the government refuses to concede that it must provide defense counsel with this classified information absent his: (1) obtaining a security clearance; (2) recognizing the validity of the Protective Order entered by the Court; and (3) signing the Memorandum of Understanding acknowledging his obligation to protect classified information from improper disclosure. In insisting on his right to classified discovery, while refusing to abide by the Court's Protective Order, Defendant Wilkes continues to practice a subtle and pernicious version of graymail.[5/]

[5/] Thus, defendant Wilkes's offer to opt-out of CIPA (as long as he obtained all required discovery) is illusory, at best. It is precisely because the government is obligated by law to provide him with classified discovery that he cannot simply opt-out of complying with the regulations promulgated by Congress and the Chief Justice to safeguard the nation's security interests.

Even if Defendant's motivations are entirely benignant, the government is not prepared to submit to this form of graymail, which requires it to eschew the protected disclosures and formalized procedures allowed by CIPA. Indeed, it was precisely because of this concern that the government sought and obtained the Protective Order entered by this Court. This Order was designed specifically to enable the United States to limit the dissemination of any classified information that could reasonably be expected to damage the national security. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) (finding it "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.").

In this context, Wilkes's offer to opt-out of CIPA – while maintaining all the benefits and rights to full discovery and open cross-examination – is no offer at all. *See United States v. Moussaoui*, 333 F.3d 509, 514 (4th Cir. 2003) ("CIPA was enacted . . . to combat the problem of 'graymail,' an attempt by a defendant to derail a criminal trial by threatening to disclose classified information."). As summarized in the Senate Report accompanying the bill:

> The government's understandable reluctance to compromise national security information invites defendants and their counsel to press for the release of sensitive classified information the threatened disclosure of which might force the government to drop the prosecution. "Graymail" is the label that has been applied to this tactic.

S.Rep. No. 96-823, at 3, *reprinted in* 1980 U.S.C.C.A.N. 4294, 4296-97. *See also United States v. Hammoud*, 381 F.3d 316, 338 (4th Cir. 2004) (*en banc*), *vacated on other grounds*, 543 U.S. 1097 (2005), *reinstated on reh'g*, 405 F.3d 1034 (4th Cir. 2005). Forcing the government to provide classified information to uncleared defense counsel effectively sanctions graymail and stands CIPA squarely upon its head. *Cf. Tenet v. Doe*, 544 U.S. 1 (2005) (criticizing graymail that would induce the government to drop a case "out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations.").

The Court should also recognize that inviting the government to just provide *Brady* and *Giglio* to defense counsel is no solution at all. In addition to doing nothing to address the palpable dangers posed by providing classified materials outside of the CIPA framework, it places an untenable burden on the government to guess what materials will be considered by the defense (and the Ninth Circuit) to constitute *Brady* in this case. It is precisely for this reason that *Brady* and its progeny permit the

government to comply with its *Brady* obligation by making information within its control available for inspection by the defense, but imposes no additional duty on the prosecution to ferret out any potentially defense-favorable information from those materials. *United States v. Pelullo*, 399 F.3d 197, 212-13 (3rd Cir. 2005). Indeed, the exact determination of what materials constitute discovery cannot even be discerned with precision until after trial.[6/]

Stated less diplomatically, the government simply will not provide the defendant with the classified information required by statute and caselaw, except under the framework set forth by Congress in CIPA.

D. Requiring Counsel to Obtain Security Clearance

As noted above, this Court issued a Protective Order pursuant to CIPA Section 3 appropriately designed to safeguard the classified information that the government is required to provide to defense counsel. It is the government's position that this Order is entirely lawful and that this Court possesses the authority to enforce all of its provisions, including ordering defense counsel to submit to being cleared by the government (if he wishes to continue his representation of defendant Wilkes). *See e.g.*, *United States v. Al-Arian*, 267 F. Supp. 2d 1258, 1267-68 (M.D. Fla. 2003) (defense attorneys and their staffs could be compelled to submit to security clearance procedures to protect classified information); *United States v. Usama Bin Laden*, 58 F. Supp. 2d 113, 118 (S.D.N.Y. 1999) (court possesses authority to require Defense counsel to obtain security clearance); *United States v. Musa*, 833 F. Supp. 752, 755 (E.D. Mo. 1993) (court has authority to compel members of defense team to obtain security clearances); *See also United States v. Tenet*, 329 F.3d 1135, 1148 (9th Cir. 2003) (possible measures to avoid disclosing classified information include "requiring security clearances for court personnel and attorneys

---

[6/] *See United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001) (holding that because "materiality" turns on whether disclosure would have created a reasonable probability of a different result at trial, the actual scope of the government's *Brady* obligations can only be decided after the trial itself). *See also United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir.2004) ("there is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents within a larger mass of material that it has already turned over"); *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir.1997) (finding no *Brady* violation where government gave defense access to 500,000 indexed pages of discovery); *United States v. Parks*, 100 F.3d 1300, 1307 (7th Cir.1996) ("*Brady* [does not] require[ ] the Government to carry the burden of transcribing [65 hours of intercepted conversations]" because the defendants "had been given the same opportunity as the government to discover the identified documents" and "information the defendants seek is available to them through the exercise of reasonable diligence") (internal quotations and citation omitted).

with access to the court records"). *Cf. United States v. Smith*, 899 F.2d 564, 569-70 (6th Cir. 1990)(reversing lower court decision and holding that Executive Branch could conduct reasonable background investigations on judicial personnel before they are allowed to work on case involving classified information); *United States v. Pruner*, 33 M.J. 272, 274-75 (C.M.A. 1991) (upholding right of Military Review Court to compel civilian defense counsel to obtain security clearance).

These courts uniformly concluded that pursuant to CIPA Section 3, district courts have the authority to "issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States." CIPA at § 3. This general authority is illuminated and implemented through the Chief Justice's Security Procedures, which establish protocols protecting against the unauthorized disclosure of classified information.[7/] These procedures specifically and unequivocally provide that:

> The government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court for the court's consideration in framing an appropriate protective order pursuant to Section 3 of the Act.

See Security Procedures at ¶ 5. In other words, the express terms of the Security Procedures specifically authorize this Court to allow the government "to take information regarding the background of Defense counsel . . . to prevent disclosure of classified information." *Bin Laden*, 58 F. Supp. 2d 113, 118 (S.D.N.Y. 1999).[8/]

The decision in *Bin Laden* is particularly instructive. Similar to the present case, a number of the *Bin Laden* defendants argued that the district court **did not** have the authority to force defense counsel to submit to a security clearance procedure. Rather than relying on mere bravado fortified by righteous indignation, they argued "that the legislative history of CIPA and the circumstances surrounding Chief

---

[7/] As enacted, CIPA Section 9 required that the Chief Justice, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, establish procedures to protect against unauthorized disclosure of classified information in the custody of the United States courts.

[8/] *See also Background Material for Chairman Boland and Chairman Rodino on the Security Procedures for the Protection of Classified Information in the Custody of the Federal Courts*, at 2, appended to Letter from Chief Justice Burger to Rep. Peter W. Rodino (July 10, 1981) [hereinafter "*Memo to Boland and Rodino*"] ("[Ii]t is proper for the court to receive and consider any information in the possession of the government which relates to the trustworthiness of persons associated with the defense.").

Justice Burger's promulgation of the Security Procedures create an inference that neither Congress nor the Chief Justice vested the Court with the authority to compel defense counsel to undergo a DOJ-initiated security clearance procedure." 58 F. Supp. at 118. The *Bin Laden* court, however, rejected the defendants' arguments and held that the Security Procedures in fact allowed "the Court to direct Defense counsel to participate in any clearance process." *Id.*

In a well-reasoned opinion, the *Bin Laden* court noted that "CIPA and the accompanying Security Procedures create a system by which the trial court has wide latitude to impose reasonable restrictions likely to prevent the unauthorized disclosure of classified information." *Id.* (citations omitted). After analyzing the legislative history and the text of the Act, Judge Sand concluded that the "text and structure of both CIPA and the Security Procedures create a presumption that the Court possesses the authority to require Defense counsel to seek security clearance before the Court will provide them with access to classified materials." 58 F. Supp. at 118-19.[9/] Equally significant, Judge Sand observed that there was "simply little to support the contention that Congress or the Chief Justice acted to *prohibit* the courts from utilizing a clearance requirement in every circumstance." *Id*. (citing *Memo to Boland and Rodino*, at 2, in which the Chief Justice discussed how CIPA might not "require defense personnel to obtain security clearances" but that "an inquiry concerning defense personnel obviously may be appropriate in some cases").

In rejecting defendants' contention that the Court lacked the authority to order them to submit to security clearance procedures, Judge Sands concluded:

> We simply see no indication that Congress or the Chief Justice aimed to preclude resort to compulsory clearance of counsel in all circumstances. To the contrary, both CIPA and the Security Procedures consistently leave the most sensitive questions surrounding classified information to be resolved in the sound discretion of the District Courts. We therefore conclude that our authority under the Federal rules of Criminal Procedure, CIPA, and the Chief Justice's Security Procedures encompasses a power to require counsel to seek security clearance.

58 F. Supp. at 119. This conclusion is in accord with virtually every single court that has considered this same issue. *See United States v. Al-Arian*, 267 F. Supp. 2d at 1267-68; *United States v. Musa*, 833 F. Supp. At 755; *See also United States v. Tenet*, 329 F.3d at 1148; *United States v. Smith*, 899 F.2d at

---

[9/] Among other sources, Judge Sand considered the *Memo to Boland and Rodino* (referenced in note 18) in which Chief Justice Burger explained that , the court should "determine who may have access to classified materials" and "under what conditions the materials may be reviewed".

569-70; *United States v. Pruner*, 33 M.J. at 272.

The government was able to unearth only one case which in *dictum* suggested that the Court might not have the "authority to make submission to a security clearance a prerequisite to representation of a defendant in a case involving classified information." *See United States v. Jolliff*, 548 F. Supp. 232, 233 (D. Md. 1981). In *Jolliff* – as pointed out by the *Bin Laden* court – the government did not seek to have the district court compel defense counsel to submit to a security clearance. The *Jolliff* court, in fact, ultimately acceded to the government's request that it be allowed to use its "optional apparatus for gathering data relating to the trustworthiness of defense counsel" to ensure compliance with CIPA, as such a procedure did not violate Jolliff's Sixth Amendment right to counsel. 548 F. Supp. at 233. In other words, the *Jolliff* court's holding was limited to **affirming the ability** of the government to perform its own background check on defense counsel (which did not include his active participation).[10/]

The text and structure of both CIPA and the Security Procedures promulgated by the Chief Justice – as well as the extant caselaw considering the issue – make it clear that this Court possesses the authority to compel defense counsel to submit to security clearance procedures. Moreover, given the highly classified information contained in the discovery that the government is required to provide to defense counsel, it is clear that the Court should exercise this authority to ensure that the country's legitimate national security interests are not harmed. *See generally Snepp v. United States*, 444 U.S. 507, 512-13 (1980) (noting that it easier and more effective to prevent the release of classified information in advance than to attempt to undo the damage of unauthorized disclosures after the fact).[11/]

[10/] The only other case even remotely suggesting that the court may not have the authority to compel defense counsel to submit to security clearance procedures is *United States v. Smith*, 706 F. Supp. 593, 596 n.1 (M.D. Tenn. 1989), *rev'd on related grounds 899 F.2d 564 (6th Cir. 1990)* (indicating in a footnote that it would follow *Jolliff* when interpreting the court's power under Section 5 of CIPA). However, as noted above, *Smith* was summarily reversed by the Sixth Circuit; which, in fact, **affirmed** the government's authority under CIPA to require clearances even of judicial branch personnel. 899 F.2d at 569-70. In light of this holding, and by this same logic, the Sixth Circuit would have certainly concluded that the district court possessed the power to compel clearance of defense counsel.

[11/] If the Court is unconvinced that it possesses the authority to compel defense counsel to obtain a security clearance, it could always invite the government to seek review from a denial of this requirement. Indeed, CIPA Section 7(a) provides for an interlocutory appeal from any decision or order "authorizing the disclosure of classified information, or for refusing a protective order sought by the United States to prevent the disclosure of classified information." The term "disclosure" within the meaning of Section 7 includes both information which the court orders the government to divulge as well as information already possessed by the defendant which could be made public. *See United States*

(continued...)

E. Removing Counsel

If the Court exercises its authority to order defense counsel to obtain a security clearance, defense counsel has two options: (1) obtain a clearance; or (2) face being disqualified from representing his client. Moreover, to the extent that this Court believes the case of *Wheat v. United States*, 486 U.S. 153 (1988) limits its ability to remove – or otherwise impose conditions upon – Wilkes's chosen counsel, the government respectfully suggests that the Court is mistaken. *See e.g., Motion Hearing* at 52:17-21 (where Court implied that its ability to remove counsel was "limited to those instances where there would be an appearance of injustice to the public at large").

To the contrary, *Wheat* merely addresses "the extent to which a criminal defendant's right under the Sixth Amendment is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy." 486 U.S. at 160. Although *Wheat* is clearly one of the seminal case on the **dangers of joint representation**, it provides little or no guidance in determining whether Mr. Geragos is **qualified to represent** Wilkes in the absence of an appropriate security clearance. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 482 (1978) (noting that "multiple representation of criminal defendants engenders special dangers"); Federal Rule of Criminal Procedure 44 (c) (directing judges to investigate particularly cases involving joint representation).

Further, to the extent that *Wheat* does shed some weak light on the issues confronting this Court, it illuminates the basic principle that Wilkes's right to counsel of choice is not absolute. *Wheat*, 435 U.S. at 159-60. In carrying out its important duty of ensuring that defendant Wilkes obtains a fair trial, *see Strickland v. Washington*, 466 U.S. 668, 689 (1984), this Court must keep in mind the Supreme Court's admonition that "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States v. Cronic*, 466 U.S. 648, 657, n. 21 (1984). As noted by Chief Justice Rehnquist:

> [W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

[11/](...continued)
v. Clegg, 740 F.2d 16 (9th Cir. 1984). Further, Section 7(b) allows the Ninth Circuit to give expedited treatment to an interlocutory appeal filed under Section 7(a).

Wheat, 435 U.S. at 160 (citations omitted). Indeed, the *Bin Laden* court cited *Wheat* (in its decision upholding the right of the Court to compel defense counsel to obtain a clearance) for the well-established proposition "that the Sixth Amendment does not promise a defendant his choice of counsel . . ." 58 F. Supp. 2d at 120.[12/]

In *Wheat* itself, the Chief Justice observed that the right to choose one's counsel is circumscribed in several important respects. For example, an advocate must be a member of the bar in order to represent clients in court. *See Faretta v. California*, 422 U.S. 806 (1975). Similarly, defendants may not insist on representation by an attorney they cannot afford, one who for other reasons declines to represent them, or one who has a previous or ongoing relationship with an opposing party. *Id. See also Gallo v. U.S. Dist. Court for Dist. of Arizona*, 349 F.3d 1169, 1178 (9th Cir. 2003) (finding that district court had authority to require membership in local State bar); *Warden v. State Bar*, 21 Cal 4th 628, 634-38 (1999) (upholding mandatory continuing legal education requirement).

Moreover, it has long been the law that the right to counsel of one's choice gives way if it interferes with the Court's ability to control the orderly administration of justice. *United States v. Burton*, 584 F.2d 485, 490 (9th Cir. 1978). *See also United States v. Bentvena*, 319 F.2d 916, 937 (2nd Cir. 1963) (finding that accused right to select counsel cannot be insisted upon or manipulated so as to obstruct orderly procedure in court or interfere with fair administration of justice). In refusing to submit to the congressionally-mandated procedures set forth in CIPA, Wilkes's choice of counsel is affirmatively impeding the orderly administration of justice and Wilkes's constitutional right to obtain materials in discovery. *Id.*

Simply stated: If the Court concludes that it is necessary for defense counsel to review classified materials in order to adequately represent defendant Wilkes – and defense counsel refuses to submit to clearance procedures – the Court would be well within its authority to disqualify counsel from representing Wilkes. To the extent that *Wheat* is relevant to this discussion, it supports this Court's implicit authority to remove counsel, if necessary.

[12/] In discussing *Wheat*, the *Bin Laden* Court also concluded that it was consistent with the Sixth Amendment "to impose a clearance requirement on Defense counsel." 58 F. Supp. 2d at 119-20. *See also Al-Arian* at 1267-68 (concluding that government's interest in protecting classified information outweighs defense counsel's right to confidentiality).

F. Available Options

The government does not wish to see defense counsel removed from the case. Mr. Geragos is a nationally renowned advocate and the choice of defendant Wilkes. The government believes that defendant Wilkes should – if at all possible – be defended by his counsel of choice. The government's interests are limited to: (1) protecting sensitive classified information that could damage the national security of the United States if improperly disseminated; and (2) ensuring that Mr. Wilkes's counsel receives all requisite discovery to ensure a fair trial and unassailable verdict. Only a few options are available to this Court that can satisfy these related interests.

1. **Compelling Counsel:** The government continues to believe that the easiest solution to the present impasse is for the Court to simply require defense counsel to submit to all provisions contained in the Court's Protective Order. These provisions (including requiring appropriate clearance for counsel and signing an MOU) are supported by the various CIPA provisions, the express terms of the Security Regulations, and the relevant caselaw. More importantly, it allows the Court to safeguard the relevant classified information while ensuring that defense counsel is given all required discovery necessary to mount a full and effective defense. To accommodate Mr. Geragos's objection to having his "adversary in an adversarial system" conduct the clearance procedure, the Court could order that the security clearance be directed by the Court Security Officer, a representative of the Judicial Branch.

As a result of this practice, defense counsel can be assured that "his adversary" will not improperly try to tip the scales.[13/] In this regard, the government is willing to agree that nobody connected with the present prosecution should have any involvement whatsoever with the background check. This check should be: (1) conducted by agents with expertise in this area; (2) entirely independent of the ongoing criminal case; and (3) run by the CSO. Moreover, if the Court harbors any uneasiness over this course of action, it could invite Mr. Geragos to seek review in the Ninth Circuit.

[13/] A similar issue arose in *Bin Laden* and the Court determined that the security review was not to be performed by the United States Attorney's Office, but would be a "DOJ-initiated procedure." 58 F. Supp. 2d at 122-23 ("We find it entirely preferable to allow experts in clearance matters – who will be bound by strict rules of confidentiality – to consider each counsel's application initially rather than to resort to a system whereby the Court and the United States Attorney's Office are forced to act as amateur sleuths.").

2. **Clearance without Compulsion:** A related solution might also be found in the Court simply enforcing Chief Justice Burger's Security Regulations that allow the government to "obtain information by any lawful means concerning the trustworthiness of [defense counsel and] and bring such information to the attention of the court." *See* Security Procedures at ¶ 5. If such a procedure is acceptable to the CSO and the Court, the government could perform a background check without requiring "defense counsel to participate actively in certain phases of the review." *See Bin Laden*, 58 F. Supp. 2d at 123. In this manner, the Court would relieve defense counsel of having to actively participate in any clearance process.

The government suggests this alternative as yet another demonstration of its willingness to accommodate present defense counsel in any appropriate manner – as long as such accommodation does not conflict with the obligation to protect the classified information at issue in this case.

3. **Utilizing CIPA Section 4:** A far more onerous option that is not recommended by the government would be to utilize CIPA Section 4 procedures in an effort to redact all classified discovery and then provide substitutions for the redacted portions that satisfy the government's discovery obligations. Section 4 of CIPA provides, in pertinent part, that "[t]he court, upon sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting the relevant facts that classified information would tend to prove." CIPA at § 4.

Like Rule 16(d)(1) of the Federal Rules of Criminal Procedure, Section 4 of CIPA provides that the United States may demonstrate, in an *in camera, ex parte* submission to the court, that the use of such alternatives is warranted. *Yunis*, 867 F.2d at 622-23; *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (*ex parte* proceedings under CIPA concerning national security information appropriate where "the government is seeking to withhold classified information from the defendant and an adversary hearing with defense knowledge would defeat the purpose of the discovery rules"). *See also United States v. Klimavicious-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998); *United States v. O'Hara*, 301 F.3d 563 (7th Cir. 2003).

The Ninth Circuit has held that a court may properly balance the defendant's interests in obtaining or using classified information against the government's obligation to protect the national security in evaluating whether to allow discovery of classified matters. *See Sarkissian*, 841 F.2d at 965 As noted in *Sarkissian*, "Congress intended section 4 to clarify the court's powers under Fed.R.Crim.P. 16(d)(1) to deny or restrict discovery in order to protect national security." *Id*. (citation omitted). "On issues of discovery, the court can engage in balancing." *Id*. *See also United States v. Pringle*, 751 F.2d 419, 426-27 (1st Cir.1984). The legislative history of Section 4, cited in *Sarkissian*, makes it clear that the court may take national security interests into account when considering the government's requests to preclude discovery of classified information:

> [W]hen pertaining to discovery materials, [Section 4] should be viewed as clarifying the court's power under Federal Rule of Criminal Procedure 16 (d)(1). This clarification is necessary because some judges have been reluctant to use their authority under the rule although the advisory comments of the Advisory Committee on Rules states that "among the considerations taken into account by the court" in deciding on whether to permit discovery to be "denied, restricted or deferred" would be the protection of information vital to the national security.

S. Rep. No. 823, 96th Cong., at 6, *reprinted in* 1980 U.S.C.C.A.N. at 4299-4300. Given this background, it is unfortunate that Section 4 is entirely unsuited for dealing with the volume of classified materials present in the instant case.

The futility of applying Section 4 procedures to the present case is illustrated well by the decision of *United States v. Clegg*, 740 F.2d 16, 17 (9th Cir. 1984). In *Clegg*, the government supplied the district court with one proposed substitution that the government wished to provide the defense in lieu of a limited number of classified documents. The documents and the "proposed alternative substitution" were then reviewed *in camera* by the district court. Following its review, the district court found the government's proposed substitution deficient. 740 F.2d at 17. The government filed an interlocutory appeal pursuant to CIPA Section 7. On appeal, the Ninth Circuit affirmed, finding that: (1) the unredacted materials were relevant to the development of a possible defense; and (2) the government's proposed summaries were inadequate. *Id*. at 18.

In the present case, the government has presently segregated for discovery approximately 1,763 classified documents totaling approximately 12,429 pages. It is anticipated that prior to trial, the government may amass as much as 15,000 pages of classified discovery. If the Court were to insist that

the government provide discovery pursuant to Section 4, it would result in: (1) the CIA taking several months – at a minimum – to come up with "proposed alternatives substitutions" for the 15,000 pages of discovery; (2) the substitutions running into the hundreds of pages; (3) the Court having to review 15,000 unredacted pages of classified discovery and then to compare them to the several hundred pages of proposed substitutions; and (4) forcing the Court to rule on each and every one of the proposed substitutions.

As seen in *Clegg*, preparing, ruling on, and litigating even one proposed substitution can be a difficult and hazardous undertaking for all parties concerned.[14/] To attempt this procedure with approximately 15,000 pages would be foolhardy for several reasons. First, the amount of time and effort required of the government and the Court would be enormous. Second, and more importantly, the likelihood for these efforts to be second-guessed is manifest. In this regard, it places an almost impossible burden on the government and the Court to determine with this volume of documents what would be and what would not be material to the defense. *Brady*, like beauty, is often in the eye of the beholder. *See, e.g., Coppa,* 267 F.3d at 140 (what constitutes *Brady* can be determined with certainty only after trial).

It must also be noted that because defense counsel would not have the requisite clearances to see the underlying documents, the proposed redactions or substitutions would be "inspected by the Court alone." 18 U.S.C. App. III, § 3. Thus, without the benefit of cleared defense counsel, the Court alone would be compelled to review and adjudge the adequacy and completeness of redactions and substitutions of approximately 15,000 pages of discoverable documents. In doing so, it is almost certain that the Court would need to hold in-depth *in camera, ex parte* hearings to aid in its determination of whether the government's substitutions were adequate and in the interests of justice. Adopting these procedures would almost certainly call into question any trial date before the end of 2008.[15/]

[14/] *But see, United States v. Rezaq*, 134 F.3d 1121, 1142-43 (D.C. Cir. 1998) (United States ordered to submit *ex parte* and *in camera* an index listing the contents of each classified document along with substitute admissions for all documents identified by district court as discoverable).

[15/] The government does not wish to rehash its previous filings addressing CIPA Sections 5 and 6. However, it should be noted that the current schedule drafted by the Court does not allow any time for these complicated and important hearings. Section 5 hearings in other similar cases have been known to take many months to complete. Among other things, the defendants must provide *specific*

(continued...)

4. **Obtaining Additional Counsel:** The last option that the government believes may be available would be for the Court to request that defense counsel obtain "cleared" counsel to assist with the case. Cleared counsel could review all the classified discovery, make any objections to the government's proposed alternative substitutions that the defense wishes to use at trial, and file any necessary Section 5 motions for defendant Wilkes. Such a procedure might allow defense counsel to have his cake and eat it too.[16/]

IV

CONCLUSION

For the above reasons, the government respectfully requests that this Court take appropriate steps to safeguard the classified information that the government believes should be disclosed to defense counsel for defendant Wilkes, and set a CIPA Section 5 briefing and hearing schedule.

DATED: June 8, 2007.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

Sanjay Bhandari
SANJAY BHANDARI
Assistant U.S. Attorney

Valerie H. Chu
VALERIE H. CHU
Assistant U.S. Attorney

Jason A. Forge
JASON A. FORGE
Assistant U.S. Attorney

Phillip L.B. Halpern
PHILLIP L. B. HALPERN
Assistant U.S. Attorney

[15/](...continued)
pretrial written notice of the classified information they reasonably expect to disclose. The government may then seek a ruling as to whether the proffered classified information is relevant and admissible. If any of the information is ruled admissible, the government may move that a summary be substituted for it or, alternatively, it may substitute a statement admitting facts that the classified information would tend to prove, thereby obviating the need for disclosure of the specific sensitive information. At the government's request, part or all of these proceedings are held *in camera*. *See generally Pringle*, 751 F.2d at 425-28.

[16/] The Court should be forewarned that this procedure is not without its dangers. If Mr. Geragos does not obtain clearance, his communications with his co-counsel would necessarily be impeded and this inability to freely communicate could potentially interfere with defendant Wilkes's right to obtain a fair trial.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. KYLE DUSTIN FOGGO (1), aka "Dusty" Foggo, and BRENT ROGER WILKES (2), Defendants.	CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Phillip L.B. Halpern, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the **GOVERNMENT'S MOTION SEEKING CLARIFICATION OF COURT'S RULING ADDRESSING THE PRODUCTION OF CLASSIFIED DISCOVERY TO DEFENSE COUNSEL** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Mark Geragos (Counsel for Defendant Wilkes)
Geragos & Geragos, PLC
350 S. Grand Avenue, 39th Floor
Los Angeles, CA 90071-3480

2. Mark J. MacDougall (Counsel for Defendant Foggo)
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036-1564

I hereby certify that I shall cause to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

NONE

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 8, 2007.

/s/ Phillip L.B. Halpern
PHILLIP L.B. HALPERN