UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	**:**	
	:	
v.		**12-CR-231 (RC)**
	:	
JAMES HITSELBERGER	**:**	

DEFENDANT'S MOTION FOR DECLARATION THAT SECTIONS 5 AND 6 OF CLASSIFIED INFORMATION PROCEDURES ACT ARE UNCONSTITUTIONAL

Mr. James Hitselberger, the defendant, through undersigned counsel hereby moves this Honorable Court to issue the attached proposed order declaring the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III, §§ 5 and 6 unconstitutional as applied in this case. In support of this motion, counsel submits the following.

Introduction

Mr. Hitselberger is charged in a six count superseding indictment with three counts of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e) and three counts of unauthorized removal of a public record, in violation of 18 U.S.C. § 2071(a). The alleged national defense information is contained in three classified documents and the "public records" at issue are these three classified documents. Pursuant to the rules of discovery, the government also has produced numerous additional materials the government considers classified. The trial in this matter, including opening statements, cross-examination of prosecution witnesses, the defense case (including Mr. Hitselberger's potential testimony), and closing arguments, will require the disclosure and use of classified information.

As applied in this case, the notice and hearing requirements of CIPA §§ 5 and 6 impose

unconstitutional burdens on the defense. Section 5's statutory command to provide pretrial notice to the prosecution of all classified information that the defense expects to disclose -- under threat of preclusion if notice is not given -- forces Mr. Hitselberger to furnish the government with crucial and essential details of his case. Section 6 demands further disclosure of the defense case. Upon request by the prosecution, § 6 forces Mr. Hitselberger to explain to the Court and the government, before trial, the relevance and significance to the defense of all of the classified information set forth in the CIPA § 5 notice. As applied, these provisions violate Mr. Hitselberger's Fifth Amendment right to remain silent unless and until he decides to testify, and run afoul of his fundamental right to testify in his own defense. These provisions also violate Mr. Hitselberger's Sixth Amendment right to confront the witnesses against him by forcing him to notify the prosecution prior to trial (and to explain the significance) of all the classified information that he reasonably expects to elicit from prosecution witnesses on cross-examination and all such information that will be contained in defense counsel's questions to those witnesses. In addition, §§ 5 and 6 violate Mr. Hitselberger's Fifth Amendment right to due process of law because those provisions require him to disclose significant aspects of his case without imposing a mandatory reciprocal duty on the prosecution. Because CIPA §§ 5 and 6 violate Mr. Hitselberger's rights under the Fifth and Sixth Amendments to the United States Constitution, these provisions should be struck down as applied in this case.

Argument

The Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III, purports to establish a means of determining pretrial the use, relevance, and admissibility of classified information that the defense intends to use. As applied in this case, the notice and hearing

requirements of CIPA §§ 5 and 6 impose unconstitutional burdens on the defense. The statutory command to provide pretrial notice to the prosecution of all classified information that the defense expects to disclose – under threat of preclusion if notice is not given, *see id.* § 5(b) – forces a defendant to furnish the government with crucial details of his or her case, including:

1. The defendant's own anticipated classified testimony at trial – a disclosure requirement found nowhere else in American law;

2. the anticipated classified testimony of all other defense witnesses;

3. the contents of all classified documents that the defense intends to introduce at trial, both during the defense case-in-chief and on cross-examination during the prosecution case;

4. the classified information that the defense expects to elicit from prosecution witnesses on cross-examination and all classified information contained in counsel's questions to prosecution witnesses; and

5. all classified matter in defense counsel's opening and closing statements.

Following submission of the CIPA § 5 notice, the hearing requirement of § 6 demands further disclosure of the defense case. Upon request by the prosecution, § 6 forces the defense to explain to the Court and the government, before trial, the relevance and significance to the defense of all of the classified information set forth in the CIPA § 5 notice. Given the potential prominence of classified information in this case, the CIPA notice and hearing requirements compel the defense to disclose prior to trial the theory of its case, the means it will use to test the government's case, and virtually every detail of the supporting evidence.

I. THE CIPA PROCEDURES.

CIPA establishes procedures for determining before trial the use, relevance, and

admissibility of classified information that the defense reasonably expects to disclose. *See United States v. Fernandez*, 913 F.2d 148, 151 (4th Cir. 1990) (describing procedures). The statute is intended to permit this determination without placing the defendant in a worse position than he otherwise would be if the case did not involve classified information. *See United States v. Libby*, 467 F. Supp. 2d 20, 24 (D.D.C. 2006) ("[In enacting CIPA,] Congress made clear that [the Act] 'rests on the presumption that the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without this [A]ct.'") (quoting S. Rep. No. 96-823, at 9 (1980), reprinted in 1980 U.S.C.C.A.N. 4294, 4302); *see also United States v. Moussaoui*, 382 F.3d 453, 477 (4th Cir. 2004).

The determination of use, relevance, and admissibility under CIPA involves four principal steps. First, the defense must file a notice briefly describing the classified information that it "reasonably expects to disclose or to cause the disclosure of" at trial. CIPA § 5(a). Classified information that the defense reasonably expects to disclose but does not list on the CIPA § 5 Notice may be precluded from use at trial. *See id.* § 5(b).

Second, at the prosecution's request, the district court must hold a hearing at which the court determines before trial the "use, relevance, or admissibility" of classified information listed in the defendant's CIPA § 5 Notice. *Id.* § 6(a). At the request of the Attorney General, the hearing must be held in secret. Following the hearing, the district court must "set forth in writing" the basis for its ruling as to each item of classified information at issue in the hearing. *Id.*

Third, as to any classified information for which the district court authorizes disclosure, the government may move to replace the information with a statement admitting relevant facts

that the information would tend to prove, or to substitute a summary of the information. The statute require the district court to grant the government's motion if it finds that the statement or summary would "provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." *Id*. § 6(c)(1).

Fourth, if the district court denies the government's motion for a statement or substitution, the court shall, upon objection by the Attorney General, prohibit the defendant from disclosing the classified information and impose sanctions on the prosecution, including, where appropriate, dismissal of the indictment or specified counts. *See id*. § 6(e). As to any classified information that the district court determines may be disclosed at trial, the court "shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information." *Id*. § 6(f).

It is the first and second of these four steps – the requirement that the defense provide pretrial notice of all classified information it reasonably expects to disclose, and that it explain the "use, relevance, [and] admissibility" of the classified information at a pretrial hearing – that are at issue here. As set forth below, the notice and hearing requirements violate Mr. Hitselberger's Fifth and Sixth Amendment rights as applied in this case.

II. SECTIONS 5 AND 6 OF CIPA VIOLATE MR. HITSELBERGER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS FIFTH AND SIXTH AMENDMENT RIGHT TO TESTIFY IN HIS OWN DEFENSE.

At this early stage in the proceedings, defense counsel cannot predict whether Mr. Hitselberger will testify at trial. If he were to testify, however, his proposed testimony could likely encompass classified information. The notice and hearing requirements set forth in CIPA

§§ 5 and 6 require that Mr. Hitselberger disclose any and all details of his potential testimony that might involve classified information. By compelling Mr. Hitselberger to notify the prosecution prior to trial of all classified information that he reasonably expects to disclose in his potential testimony, and to explain the "use, relevance, [and] admissibility" of that information to this Court and the government, CIPA §§ 5 and 6 violate Mr. Hitselberger's Fifth Amendment right to not be penalized for his pretrial silence and his Fifth and Sixth Amendment right to testify in his own defense.

A. Sections 5 and 6 of CIPA, as Applied, Violate Mr. Hitselberger's Fifth Amendment Right to Remain Silent Unless and Until He Decides to Testify.

The notice and hearing requirements set forth in CIPA §§ 5 and 6 apply even to a defendant's own classified testimony. Section 5(a) commands Mr. Hitselberger to give notice of classified information that he expects to disclose "in any manner" and prohibits disclosure of "any" classified information until notice has been given. (Emphasis added). Section 5(b) authorizes the court to preclude "any classified information," including information contained in the defendant's testimony, for which notice has not been given. (Emphasis added). And the pretrial hearing required by § 6 applies to all classified information set forth in the § 5 notice, including classified information that may be contained in the defendant's own testimony. Thus, Mr. Hitselberger risks preclusion of crucial portions of his potential testimony unless he discloses to the prosecution prior to trial the classified information about which he reasonably expects to testify and explains to the Court, in the presence of the prosecution, the "use, relevance, [and] admissibility" of that information. By compelling Mr. Hitselberger to make a pretrial disclosure to the prosecution in order to keep open the option of testifying about classified matters, and by

threatening to preclude that testimony if he does not make such a disclosure, CIPA §§ 5 and 6 violate Mr. Hitselberger's Fifth Amendment right to remain silent without penalty unless and until he decides to testify at trial.

In *Brooks v. Tennessee*, 406 U.S. 605 (1972), the United States Supreme Court struck down a Tennessee statute that required a criminal defendant to testify as the first defense witness or not at all. The Court recognized that the statute reflected "a state interest in preventing testimonial influence," but found that the state interest was not sufficient to override the defendant's right to remain silent at trial. *Id*. at 611. In so ruling, the Court emphasized that "[p]ressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty." *Id*.; *see also id*. at 612 (statute "violates an accused's constitutional right to remain silent insofar as it requires him to testify first for the defense or not at all").

The Supreme Court's decision in *Brooks* rests upon the fundamental proposition that the Fifth Amendment guarantees a defendant's right "'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'" *Id*. at 609 (quoting *Malloy v. Hogan*, 373 U.S. 1, 8 (1964) (emphasis added)). The state law at issue in *Brooks* violated this basic rule because it "exacted[ed] a price for [the defendant's] silence by keeping him off the stand entirely unless he [chose] to testify first." *Id*. at 610 (footnote omitted). Thus, the Court concluded, the statute "'cut[] down on the privilege [to remain silent] by making its assertion costly.'" *Id*. at 611 (quoting *Griffin v. California*, 380 U.S. 609, 614 (1965)).

Brooks makes clear that a statute runs afoul of the Fifth Amendment when it penalizes a

defendant's silence at the beginning of the defense case by prohibiting him from testifying later. *See id*. at 611 n.6 ("[T]he Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the [Fifth Amendment] right.") (emphasis added). CIPA §§ 5 and 6 contain the identical defect, penalizing a defendant who remains silent rather than make the pretrial disclosures those provisions demand by prohibiting him from testifying at trial about classified information. *Brooks* makes clear that Mr. Hitselberger cannot be penalized in this manner for standing on his Fifth Amendment rights and refusing to make pretrial disclosure of his own classified testimony.[1]

B. Sections 5 and 6 of CIPA, As Applied, Violate Mr. Hitselberger's Fundamental Right to Testify in His Own Defense.

The requirement that Mr. Hitselberger disclose prior to trial his own classified testimony also places an impermissible burden on his "right to take the witness stand and to testify in [his] own defense," a right that is guaranteed by the Fifth and Sixth Amendments. *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987). CIPA §§ 5 and 6 require Mr. Hitselberger to pay a price – in the form of pretrial disclosure to the prosecution – solely to preserve his constitutional right to testify about relevant and admissible classified information. It is well settled, however, that a criminal defendant cannot be compelled to pay such a price to preserve his right to testify.

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[1] Some courts have declined to hold CIPA § 5 unconstitutional under *Brooks* because § 5 does not compel the defendant "to reveal as to when he will testify, or even whether he will testify." *United States v. Poindexter*, 725 F. Supp. 13, 33 (D. D.C 1989). This, however, misses the point. In *Brooks*, the Supreme Court held that a defendant cannot be penalized for his pre-testimony silence through preclusion of his testimony at trial. *See* 406 U.S. at 610-12. CIPA §§ 5 and 6 have precisely that forbidden effect. In addition, CIPA § 6 mandates that a defendant explain the "use, relevance, [and] admissibility" of his proposed classified testimony prior to trial, at a point when the Fifth Amendment protects the defendant's right to remain silent.

The fundamental right of a criminal defendant to take the witness stand on his own behalf can be limited only by procedural and evidentiary rules designed to assure the fairness and reliability of the criminal trial. *See id*. at 55-56 and n.11; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (noting that even rules directed to assure accuracy of fact-finding process "may not be applied mechanistically to defeat the ends of justice"). Yet, CIPA contributes nothing to the fairness and reliability of the criminal trial. The statute's sole purpose is to "permit the government to ascertain the potential damage to national security of proceeding with a given prosecution before trial." S. Rep. No. 823, 96th Cong., 2d Sess. 4 (1980), *reprinted in* 1980 U.S. Code Cong. and Ad. News 4294, 4294; *see United States v. Wilson*, 721 F.2d 967, 975 (4th Cir. 1983) (same).

The governmental interest that CIPA serves – protecting national security – cannot justify the burden that the statute imposes on a defendant's constitutional rights at trial. The government cannot force a defendant to pay a price of constitutional significance when two asserted governmental interests – here, protecting national security and prosecuting Mr. Hitselberger – collide. "'[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . .'" *Jencks v. United States*, 353 U.S. 657, 671 (1957) (quoting *United States v. Reynolds*, 345 U.S. 1, 12 (1953)); *cf. Davis v. Alaska*, 415 U.S. 308, 320 (1974) (defendant cannot be forced to "bear the full burden" when state's interest in prosecution collides with its interest in protecting juvenile records).

As these cases make clear, CIPA advances no interest related to the fairness and accuracy

of the trial sufficient to overcome Mr. Hitselberger's right to testify on his own behalf. Without any such justification, §§ 5 and 6 force Mr. Hitselberger to surrender one right – his right to remain silent unless and until he decides to testify – solely to preserve his right to testify at trial about relevant classified matters. As the Third Circuit has declared in a related context, a criminal defendant "is entitled to all of [his rights]; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3rd Cir. 1977). Because CIPA §§ 5 and 6 force Mr. Hitselberger to make such a "Hobson's choice" without advancing the fairness and accuracy of the trial, those provisions are unconstitutional to the extent that they require Mr. Hitselberger to disclose prior to trial classified information that would be contained in his own testimony at trial.

III. SECTIONS 5 AND 6 OF CIPA VIOLATE MR. HITSELBERGER'S SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE WITNESSES FOR THE PROSECUTION.

CIPA §§ 5 and 6 also violate Mr. Hitselberger's Sixth Amendment right to confront the witnesses against him by forcing him to notify the prosecution prior to trial (and to explain the significance) of all the classified information that he reasonably expects to elicit from prosecution witnesses on cross-examination and all such information that will be contained in defense counsel's questions to those witnesses.

The Sixth Amendment guarantees that a criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him." A criminal defendant's right of confrontation includes the "fundamental right" to cross-examine witnesses for the prosecution. *Pointer v. Texas*, 380 U.S. 400, 404 (1965); *see Chambers*, 410 U.S. at 294 (right to confront and

cross-examine witnesses has "long been recognized as essential to due process"); *see also United States v. Begay*, 937 F.2d 515, 520 (10th Cir. 1991) (cross-examination is "critical for ensuring the integrity of the fact-finding process and is the principal means by which the believability of a witness and the truth of his testimony are tested") (quotation omitted).

The Confrontation Clause guarantees not merely the formal opportunity to cross-examine, but rather the opportunity for effective cross-examination. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *United States v. Ayala*, 601 F.3d 256, 273 (4th Cir. 2010). Thus, courts have consistently reversed convictions where the defense was prohibited from cross-examining a prosecution witness about a particular subject, even though cross-examination was adequate in other respects. *See, e.g., Davis*, 415 U.S. at 316-21 (defendant denied constitutional right to confront witnesses where he was precluded from cross-examining key prosecution witness to show that witness was on probation following adjudication of juvenile delinquency, notwithstanding state statutory policy of protecting anonymity of juvenile offenders); *Begay*, 937 F.2d at 520-26 (Confrontation Clause violated when defendant denied opportunity to elicit on cross-examination testimony relating to alleged victim's prior sexual conduct). The Supreme Court has declared that the "denial or significant diminution" of a defendant's right to cross-examine witnesses calls into question "the ultimate integrity of the fact-finding process." *Chambers*, 410 U.S. at 295 (emphasis added) (quotation omitted).

CIPA §§ 5 and 6 work more than a "significant diminution" of Mr. Hitselberger's right to cross-examine the prosecution witnesses in this case. Under § 5(a), the defense must notify the prosecution of all classified information it expects to elicit from government witnesses on cross-examination, and it must even give notice of classified information that will be contained in

defense counsel's questions on cross-examination. In addition, § 6 requires the defense, at the pretrial CIPA hearing, to provide the Court and the prosecution with an explanation of the use, relevance, and admissibility of the classified information that it expects to elicit or use on cross-examination. In this case, effective cross-examination by defense counsel will necessarily and inevitably involve classified information, both in defense counsel's questions and the witnesses' answers. Under CIPA §§ 5 and 6, all such classified information – and all other classified information that the defense reasonably expects to elicit in cross-examining prosecution witnesses – must be disclosed and explained by defense counsel prior to trial.

Because the disclosure of classified information during the cross-examination of government witnesses will likely be extensive in this case, §§ 5(a) and 6 effectively require the defense to provide the prosecution with a detailed guide to the planned cross-examination of the key prosecution witnesses. If the defense fails to provide this information, the court "may prohibit the examination by the defendant of any witness with respect to any such information." CIPA, § 5(b). Armed with Mr. Hitselberger's § 5(a) notice and his explanations at a § 6 hearing, the prosecution can shape its case-in-chief to blunt the force of the defense cross-examination. The notice and hearing may alert the prosecution to specific areas of vulnerability of which it had not been previously aware. If a particular witness appears especially susceptible to cross-examination in light of the § 5(a) notice and the § 6 hearing, the prosecution can keep the witness off the stand altogether, using the time before trial to find alternative sources for whatever information the witness would have sought to provide.

As to those witnesses who do testify for the prosecution, the advance notice under CIPA will impede effective defense cross-examination. Effective cross-examination by defense

counsel depends, in large measure, on the element of surprise. A prosecution witness who knows in advance the information that defense counsel will seek to elicit, the substance of counsel's questions, and defense counsel's theories concerning the use, relevance, and admissibility of the anticipated questions and answers can avoid missteps that would expose the witness' lack of credibility. Moreover, prior disclosure would enable the prosecution to circumvent the rule on witnesses, Fed. R. Evid. 615, by coordinating the answers to be given by its witnesses in response to particular defense questions. *See Geders v. United States*, 425 U.S. 80, 87 (1976) (rule on witnesses prevents "tailoring" of testimony and exposes lack of candor); Fed. R. Evid. 615 advisory committee note (party may request exclusion of potential witnesses from courtroom to "discourag[e] and expos[e] fabrication, inaccuracy, and collusion"). Thus, the notice and hearing requirements of §§ 5(a) and 6 undermine the fundamental purpose of cross-examination: assuring "the integrity of the fact-finding process" by exposing fabrication and falsehood. *Chambers*, 410 U.S. at 295 (quotation omitted).[2]

Not only do the notice and hearing requirements alert the prosecution to the vulnerability of its witnesses; they also impose an enormous burden on the defense. The defense cannot possibly predict the direct testimony of all prosecution witnesses, yet the threat of preclusion forces defense counsel to make that effort. To be safe, the defense must anticipate every conceivable line of direct examination and furnish to the prosecution all of the classified information that the defense would reasonably expect to disclose in countering that testimony at

[2] This burden on Mr. Hitselberger's right to cross-examine the witnesses against him is particularly unfair because the prosecution bears no reciprocal burden. Neither CIPA nor any other provision of law requires the prosecution to disclose the questions it will ask defense witnesses or the information it expects to elicit on cross-examination.

trial. Before CIPA, there was no precedent for imposing such an obligation on the defense. It should not be imposed here solely to permit the government to avoid a conflict between its national security interest and its purported interest in prosecuting Mr. Hitselberger.

IV. SECTIONS 5 AND 6 OF CIPA VIOLATE MR. HITSELBERGER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BECAUSE THOSE PROVISIONS REQUIRE HIM TO DISCLOSE SIGNIFICANT ASPECTS OF HIS CASE WITHOUT IMPOSING A MANDATORY RECIPROCAL DUTY ON THE PROSECUTION.

As noted above, the trial in this case will almost certainly require the disclosure and use of classified information. Classified information likely will be used in the defense opening, cross-examinations of prosecution witnesses, the defense case (including Mr. Hitselberger's potential testimony), and closing arguments. Even the basic facts of the case involve classified information. Given the classified information that this case will likely involve, the one-sided burden that CIPA §§ 5 and 6 impose on the defense violates Mr. Hitselberger's constitutional right to due process of law.

A. The Defense Cannot Be Made to Disclose Its Case Without a Reciprocal Duty on the Government to Do So.

The Supreme Court has traditionally been "particularly suspicious" of "trial rules which provide nonreciprocal benefits to the [government] when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Wardius v. Oregon*, 412 U.S. 470, 474 n.6 (1973). In *Wardius*, the Supreme Court applied this principle of reciprocity and struck down a statute that required a criminal defendant to give pretrial notice of his or her intention to put forth an alibi defense and the names and addresses of supporting witnesses (apparently including the defendant), without either imposing an initial burden on the prosecution to specify the location,

date, and time of the offense, or requiring the prosecution to disclose its rebuttal evidence once the defendant had given his alibi notice. *See id*. at 472 and n.3, 475. Declaring that the government "may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses," the Court held that the statute violated the defendant's right to due process. *Id*. at 475 (footnote omitted); *see Mauricio v. Duckworth*, 840 F.2d 454, 457-60 (7th Cir. 1988) (defendant's due process rights were violated when state did not disclose identity of alibi rebuttal witness even though defendant had been required to disclose all of his witnesses, including rebuttal witnesses). *See also Washington v. Texas*, 388 U.S. 14, 15-23 (1967) (invalidating procedural statute that barred persons charged as principals, accomplices, or accessories in the same crime to testify as witnesses for each other, but permitted them to testify for the prosecution).

In contrast to *Wardius*, in *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court upheld a state notice-of-alibi rule that (1) required the prosecutor to make an initial written demand on the defendant, specifying the place, date, and time of the alleged offense; (2) required the prosecutor to provide the defense with the names and addresses of witnesses that the government intended to use in rebutting the alibi defense; and (3) excluded the defendant himself from the notice requirement. *See id*. at 80-105. In *Wardius*, the Court distinguished *Williams* primarily on the ground that "Oregon, unlike Florida, has no provision which requires the State to reveal the names and addresses of witnesses it plans to use to refute an alibi defense." 412 U.S. at 475 (footnote omitted). The Court declared that "if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Id*. at 475 n.9.

As set forth below, this case falls squarely under the principles established in *Wardius*.

But see United States v. Rosen, 518 F. Supp. 2d 798, 801-02 (E.D. Va. 2007) (rejecting due process challenge to CIPA based on *Wardius*). The notice provision upheld in *Williams* is distinguishable on several grounds.

B. As Applied in This Case, CIPA Violates Mr. Hitselberger's Right to Due Process of Law by Imposing Vastly Greater Burdens on the Defense Than It Does on the Prosecution.

Sections 5 and 6 of CIPA violate Mr. Hitselberger's due process right under *Wardius* to a fundamentally fair trial by imposing ill-defined, one-sided notice and hearing obligations on the defense that do nothing to enhance the accuracy of the fact-finding process. At the outset, it is important to note that the government controls the scope of a defendant's notice obligation under CIPA through its power to decide what information will be classified. It is widely recognized that "'the Federal Government exhibits a proclivity for overclassification of information[.]'" *Ray v. Turner*, 587 F.2d 1187, 1209 (D.C. Cir. 1978) (Wright, J., concurring) (quoting former Sen. Baker). Under CIPA, the defense "cannot challenge this classification. A court cannot question it." *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984), *rev'd on other grounds*, 780 F.2d 1102 (4th Cir. 1985) (en banc); *see United States v. Collins*, 720 F.2d 1195, 1198 n.2 (11th Cir. 1983) ("It is an Executive function to classify information, not a judicial one."). By virtue of its authority to classify information, the government has significant control over the extent to which the defense will be compelled to disclose and explain its case under §§ 5(a) and 6. The more information the government classifies, the greater the defendant's notice and hearing obligations under CIPA.

Once the defense gives notice under § 5(a) of its intention to use classified information pretrial or at trial, then the prosecution "may request the court to conduct a hearing" prior to trial

to determine the "use, relevance, or admissibility" of the classified information. CIPA § 6(a) (emphasis added). The prosecution has unfettered discretion in deciding whether to seek a pretrial hearing under § 6(a), and, if it does request a hearing, in selecting the classified information that will be the subject of the hearing. CIPA § 6(b)(1) expressly recognizes this discretion, directing the government to "identify the specific classified information" that it will place in issue at the § 6(a) hearing. As to any classified information that the government chooses to place at issue at the hearing, the defendant has the burden of establishing its "use, relevance, [and] admissibility." If the prosecution, in its sole discretion, chooses to request a hearing as to some or all of the classified information listed in the defendant's § 5(a) notice, and if at the hearing (following the defendant's explanation) the court determines that some portion of the listed information is relevant and admissible at trial, then as to that information only "the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information." *Id*. § 6(f).[3]

Sections 5 and 6 of CIPA, as applied in this case, violate the principle of reciprocity mandated by the Supreme Court in *Wardius*. In this case, Mr. Hitselberger will be compelled to set forth in his § 5(a) notice and to explain at the § 6 hearing many details of his case, including his own potential classified testimony, the classified information he expects to elicit from prosecution witnesses on cross-examination, classified documents he expects to use, and all classified information that he reasonably expects to disclose through counsel's opening

[3] In addition, CIPA § 10 provides that "[i]n any prosecution in which the United States must establish that material relates to the national defense . . . the United States shall notify the defendant, within the time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense . . . element of the offense."

statement, closing argument, and questions to prosecution witnesses. The prosecution bears no remotely comparable disclosure obligation. It has complete freedom in deciding whether to seek a § 6(a) hearing and, if it seeks a hearing, in deciding what items of classified information will be considered. In stark contrast to the mandatory duty of disclosure imposed on Mr. Hitselberger, the prosecution can choose to disclose or not to disclose largely as it wishes. These grossly unequal burdens plainly do not constitute full reciprocity, as mandated by *Wardius*.

A comparison of the CIPA notice and hearing requirements with the notice-of-alibi rule upheld in *Williams* demonstrates that CIPA is unconstitutional as applied in this case. First, the *Williams* rule required, as a precondition to any disclosure by the defense, that the prosecution specify "'the place, date and time of the commission of the crime charged[.]'" 399 U.S. at 104 (quoting Florida rule). By requiring the prosecution to come forward with this information, the rule substantially narrowed the factual issue concerning which the defense was required to make disclosure to the government. CIPA, by contrast, imposes no comparable burden on the prosecution to specify information with respect to its case, much less particular types of classified information to which the defendant's notice can be limited. To avoid the possibility of preclusion if the trial should take an unforeseen turn, Mr. Hitselberger must include in his § 5(a) notice every conceivably relevant piece of classified information. And, at the hearing under § 6, he must explain the "use, relevance, [and] admissibility" of that classified information, providing the prosecution with an extraordinarily detailed roadmap to the defense strategy, including the means by which the defense contemplates meeting anticipated approaches by the prosecution.

Second, unlike the notice-of-alibi rule upheld in *Williams*, the § 5(a) notice in this case is not restricted to a narrow, discrete factual issue concerning a physical event, such as the location

of the defendant at a particular time. This case may turn largely (although by no means exclusively) on the question of Mr. Hitselberger's intent, a wide-ranging issue to which a significant volume of classified information may be relevant. There is no comparison between the narrow factual disclosure at issue in *Williams* and the disclosure that CIPA compels Mr. Hitselberger to make here.

Third, the preclusion sanction provided in the notice-of-alibi rule in *Williams* did not extend to the defendant's testimony. Thus, if the defendant failed to provide the required notice of an alibi defense, a court could still not bar the defense from attempting to establish the alibi through the defendant's own testimony. *See id*. at 80, 104. By contrast, CIPA § 5 does not exclude the defendant's testimony either from the notice requirement of § 5(a) or from the preclusion sanction of § 5(b). If in this case the defense fails to notify the prosecution of the classified information that Mr. Hitselberger may disclose in his own potential testimony, then CIPA purports to authorize the Court to preclude that testimony. And if the defense fails to explain the significance at a § 6 hearing of the classified testimony that Mr. Hitselberger may provide, the Court can also rule that proposed testimony inadmissible.

Fourth, the notice-of-alibi rule in *Williams* imposed a mandatory duty on the prosecution to provide "'the names and addresses . . . of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause.'" *Id*. at 104 (quoting Florida rule). By contrast, the prosecution has no reciprocal duty under CIPA unless it decides to request a § 6(a) hearing, and then the duty only extends to information used to rebut classified information that the court determines to be relevant and admissible. Unlike the Florida prosecutor invoking the notice-of-alibi rule, the prosecution in this case has substantial discretion over whether and to

what degree it will be subject to the § 6(f) reciprocity provision.

Fifth, the notice-of-alibi rule in *Williams* was "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Id*. at 82. Thus, the rule was directly related to the fundamental purpose of ensuring the accuracy of the criminal proceeding. By contrast, the sole purpose of CIPA is to protect national security, a matter wholly extraneous to the fairness and accuracy of the criminal trial. CIPA adds nothing to the "search for truth in the criminal trial," and, by imposing a one-sided disclosure burden on the defense, substantially impedes the adversarial process.

Contemplating a nonreciprocal disclosure obligation far less onerous than the notice provision of § 5(a) and the hearing requirement of § 6, the Supreme Court declared in *Wardius* that "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed" to the government. 412 U.S. at 476. Yet precisely such unfairness results from the application of CIPA §§ 5(a) and 6 to this proceeding – Mr. Hitselberger must disclose crucial details of his case, while the prosecution has no comparable disclosure obligation under the statute, and can even withhold for tactical advantage the information that it will use to rebut the defense evidence. Under these circumstances, the Court should declare CIPA §§ 5 and 6 unconstitutional as applied.[4]

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[4] In *United States v. North*, 910 F.2d 843, *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990), the United States Court of Appeals for the District of Columbia declined to reverse the defendant's conviction under *Wardius*, largely because the district court imposed disclosure requirements on the prosecution that went beyond what CIPA requires. *See id*. at 902-03. *But see id*. at 936 (Silberman, J., dissenting in part) ("*Wardius* does not stand for the proposition that

Conclusion

For the foregoing reasons, the Court should enter the attached proposed order declaring §§ 5 and 6 of CIPA unconstitutional as applied in this case.

Respectfully submitted,

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a defendant can be required to disclose details about his case so long as the defendant receives a certain amount (obviously unquantifiable) of 'bonus' discovery about issues unrelated to the evidence he had to disclose.").