IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 12-231 (RC)**
	:	
v.	:	
	:	
JAMES F. HITSELBERGER,	:	
	:	
Defendant.	:	

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR A DECLARATION THAT SECTIONS 5 AND 6 OF CIPA ARE UNCONSTITUTIONAL

The defendant, James Hitselberger, has filed a motion seeking a declaration that Sections 5 and 6 of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III §§ 5 and 6, be declared unconstitutional because those provisions allegedly infringe upon his Fifth Amendment rights to remain silent and to testify on his own behalf, upon his Sixth Amendment right to confront and effectively cross-examine witnesses, and upon his Fifth Amendment Due Process right.

No court has ever accepted the arguments Hitselberger raises here. In fact, every court that has considered the same constitutional challenges Hitselberger makes to §§ 5 and 6 of CIPA has rejected them. Most recently, in *United States v. Drake*, 818 F. Supp.2d 909 (D.Md. 2011), the defendant filed the identical motion and memorandum as Hitselberger has filed here. The district court, relying in part on decisions from this District and the D.C. Circuit, ruled that CIPA was constitutional and violated none of a defendant's Fifth and Sixth Amendment rights. *See* 818 F. Supp.2d at 912-915. This Court should reach the same conclusions and deny Hitselberger's motion.

Overview

Notwithstanding Hitselberger's claim (Motion at 19) that, at trial, "a significant volume of classified information may be relevant," the heart of the case for both parties is the four documents that underlie the counts in the Superseding Indictment, portions of each of which contain classified information. If the Court grants the government's motion under Rule 404(b), Fed. R. Evid., three other similar documents might come into play. Moreover, although the defense suggests that Hitselberger is likely to disclose classified information if he chooses to testify (*id.* at 6), he has consistently told investigators and friends and colleagues that he was unaware that the materials he removed from the Restricted Access Area where he worked were classified. Thus, it is uncertain how much classified information he really would reveal if he testified. It is true that the government has produced over a thousand pages of classified discovery. However, much of that discovery is classified because it consists of investigative reports that incorporate the same pieces of classified information and because the Federal Bureau of Investigation did a wide-ranging counterintelligence investigation, in addition to its criminal investigation. Accordingly, the government believes that neither party will seek to introduce a large quantity of classified information.

Argument

A. CIPA Sections 5 and 6 Do Not Violate Hitselberger's Fifth Amendment Rights to Silence and to Testify

In *United States v. Poindexter*, 725 F. Supp. 13 (D.D.C. 1989), the prosecution of President Reagan's national security advisor for obstructing Congress and making false statements in the investigation of the Iran-Contra affair, Judge Greene considered the same Fifth Amendment attack on CIPA Hitselberger makes here – *viz.*, that it infringes on his Fifth

Amendment rights to remain silent and to testify. *See* Motion at 6-10. In analyzing the issue, the court began with an overview of CIPA:

> Congress enacted CIPA as a means for coping with the so-called "graymail" problem – the problem of defendants in criminal cases threatening to introduce classified information at trial, thus confronting the government with the choice between permitting highly sensitive national security information to become publicly known, on the one hand, and capitulating to the graymail by dismissing the charges, on the other hand.
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> [CIPA] establishes a carefully balanced framework for consideration of the difficult issue of the use of classified information by the defense.
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> ***
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> Moreover, the protection of the rights of the defendant is paramount under the statutory scheme.

Id. at 31-32. Addressing the claim that CIPA places an impermissible burden on a defendant's right to remain silent, Judge Greene concluded:

> [S]ection 5 of CIPA does not require a defendant to specify whether he will testify or what he will testify about. The statute requires merely a general disclosure as to what classified information the defense expects to use at trial, regardless of the witness or the document through which that information is to be revealed. In other words, defendant need *not* reveal what he will testify about or whether he will testify at all.

Id. at 33 (emphasis in the original).

The district court in *Poindexter* also addressed the argument Hitselberger makes here (Motion at 7-8) that the Supreme Court's decision in *Brooks v. Tennessee*, 406 U.S. 605 (1972), invalidating a statute that had the effect of compelling a defendant to testify, leads to the conclusion that CIPA §§ 5 and 6 render the law unconstitutional:

> But here, as noted above, there is no compulsion on the defendant to reveal as to when he will testify, or even whether he will testify. All he is required to do under CIPA is to identify the classified information on which his side intends to rely in the course of its overall presentation, not who will disclose it as part of any particular testimony. In short, it is simply not true that, as the defendant asserts, he "like the defendant in *Brooks*, is

> compelled to choose . . . whether he will testify at trial. The leap from the requirement of disclosure – similar to the disclosure of an alibi defense or an insanity defense – to a violation of defendant's right to testify or not to testify, is too wide to be justified.

725 F. Supp. at 33-34.

As noted at the outset of this memorandum, the district court in *Drake* came to the same conclusion as Judge Greene in *Poindexter* with respect to Hitselberger's contention that CIPA's notification requirement violates his Fifth Amendment rights to be silent and to testify at trial. The court ruled: "The requirement that Mr. Drake disclose certain classified information or risk the possibility that this Court may preclude it at trial does not amount to a violation of his constitutional right to remain silent or testify in his own defense." 818 F. Supp.2d at 913. Every other court to consider the issue has reached the same result. *See United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984) ("We see no constitutional infringement in the pretrial notification requirements of Section 5); *United States v. Wilson*, 721 F.2d 967, 976 (4th Cir. 1983) (CIPA provisions do not infringe on defendant's confrontation rights or privilege against self-incrimination); *United States v. Hashmi*, 621 F. Supp.2d 76, 81 (S.D.N.Y 2008) ("The potential of precluding the disclosure does not amount to a 'penalty' for the defendant's exercising of his right to remain silent, as the Defendant argues."); *United States v. Lee*, 90 F. Supp.2d 1324, 1326-27 (D.N.M 2000) ("CIPA requires no more revelation of the defendant's thoughts or plans than do the notice of alibi and similar rules of federal criminal procedure."); *United States v. Ivy*, 1993 WL 316215 at *3 (E.D. Pa. 1993) (upholding constitutionality of CIPA § 5). *See also United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (affirming denial of motion to dismiss on claim that CIPA's discovery provisions infringed on defendant's Fifth and Sixth Amendment rights).

B. CIPA Sections 5 and 6 Do Not Infringe on Hitselberger's Sixth Amendment Right to Cross-Examine and Confront Witnesses

Hitselberger also argues that CIPA §§ 5 and 6 impermissibly interfere with his Sixth Amendment confrontation rights by (1) allowing the government to plan for cross-examination of his witnesses and (2) depriving him of the element of surprise when cross-examining government witnesses. Motion at 10-14. *Poindexter* considered the same argument and rejected it: "'[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish.'" 725 F. Supp. at 34, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (emphasis in the original). So, too, *Drake*: "The requirement that Mr. Drake disclose certain classified information he reasonably expects to obtain from witnesses does not amount to a violation of his constitutional right to confront witnesses against him." 818 F. Supp.2d at 914. *See also Lee*, 90 F. Supp.2d at 1328 (the "Confrontation Clause does not guarantee the right to undiminished surprise with respect to cross-examination of prosecutorial witnesses.")

C. CIPA Sections 5 and 6 Do Not Violate Hitselberger's Fifth Amendment Due Process Right

Hitselberger further contends that CIPA §§ 5 and 6 violate his Fifth Amendment right to due process because the statute purportedly places a disclosure burden on the defense without a reciprocal obligation on the government. Motion at 14-20. Both *Poindexter* and *Drake* rejected the identical argument. *See Poindexter*, 725 F. Supp. at 35 ("As discussed at some length above, the CIPA burdens are not one-sided, but they are carefully balanced, and there is therefore no basis for a due process complaint."); *Drake*, 818 F. Supp.2d at 915 ("Sections 5 & 6 of CIPA do not violate Mr. Drake's fundamental right to due process under the Fifth Amendment.").

Lee also denied the same due process challenge Hitselberger raises here. The court stated that "due process is only denied where the balance of discovery is tipped against the defendant and in favor of the government." 90 F. Supp.2d at 1329. The district court addressed *Wardius v. Oregon*, 412 U.S. 470 (1973), the principal case on which Hitselberger relies for his due process argument (Motion at 14-16), in which the Supreme Court struck down Oregon's notice of alibi statute because Oregon granted no discovery rights to criminal defendants and made no provision for reciprocal discovery. 412 U.S. at 475. The *Lee* court reasoned that CIPA was different because:

> [T]he CIPA burdens are not one-sided. First, the government has already agreed to allow Defendant and his counsel access to all classified files at issue in the indictment. Second, the government must produce all discoverable materials before the defense is required to file a § 5(a) notice. Third, before a § 6 hearing is conducted, the government must reveal details of its case so as to give the defense fair notice to prepare for the hearing. Specifically, the government must provide the defense with any material it may use to establish the "national defense" element of any charges against Lee. Fourth, under § 6(f), the government is required to provide notice of any evidence it will use to rebut classified information that the court permits the defense to use at trial. Finally, in addition to the discovery obligations under § 6 of CIPA, the government must also comply with the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Id. (internal citations omitted). Accordingly, the court concluded that the "overall balance of discovery is not tipped against Lee," and "the burdens of discovery under CIPA and the Federal Rules of Criminal Procedure are carefully balanced." *Id*. *See also Ivy*, 1993 WL 316215 at *5 ([L]ike the Florida statute upheld in *Williams [v. Florida*, 399 U.S. 78 (1970)], and unlike the Oregon statute struck down in *Wardius*, CIPA provides for a narrowing of factual issues . . . [and] like the Florida statute, CIPA authorizes the Court to impose on the Government a continuing duty to disclose rebuttal evidence and failure to comply with that obligation may result in the exclusion of evidence not made the subject of a required disclosure.").

It is important to note that, in addition to the disclosures the government will be making in any proceedings under CIPA §§ 5 and 6, it has already given the defense substantial discovery. Among other things, it has provided the defense with every investigative report, every witness statement, and all underlying agent notes. The defense has every document the government subpoenaed through the grand jury and the fruits of the e-mail search warrants it executed. In the classified discovery, the government has produced memoranda and communications from original classification authorities identifying and confirming the properly classified information in the documents underlying the charges. Through its discussion in various pleadings of the facts supporting the counts against Hitselberger, the government has been quite transparent in its theory of the case. This is as it should be because, as Judge Greene observed in *Poindexter*, "the government has discovery obligations not incurred by a criminal defendant." 725 F. Supp. at 32. But it also demonstrates why the procedures of CIPA §§ 5 and 6, in combination with the government's discovery obligations, do not deprive Hitselberger of due process of law.

Conclusion

For the foregoing reasons, the Court should deny Hitselberger's motion for a declaration that CIPA §§ 5 and 6 are unconstitutional.

Respectfully submitted,

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Certificate of Service

I, Jay I. Bratt, certify that I served a copy of the foregoing Government's Memorandum in Opposition to Defendant's Motion for a Declaration that Sections 5 and 6 of CIPA are Unconstitutional by ECF on Mary Petras, Esq., counsel for defendant, this 5th day of April, 2013.

_____/s/_____
Jay I. Bratt