

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No. 09 CR 383
)	
v.)	Judge Ruben Castillo
)	
VICENTE JESUS ZAMBADA-NIEBLA,)	
)	
Defendant.)	
)	

**MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEFS
UNTIL AFTER THE CIPA PROCESS HAS BEEN COMPLETED**

Defendant has filed motions to dismiss the Superseding Indictment (Dkt. 88), for pretrial discovery (Dkt. 89), for disclosure of exculpatory evidence (Dkt. 91), for discovery regarding the defense of public authority (Dkt. 93), a motion to dismiss all counts against him on the grounds that the government conferred immunity on him (Dkt. 95), and for *in camera* inspection of probation and pretrial services files (Dkt. 97). The government responded to these motions on September 9, 2011, the same day it filed its Memorandum of Points and Authorities Regarding Pretrial Conference Pursuant to the Classified Information Procedures Act (“CIPA”) and Request for Pretrial Hearing. Defendants reply briefs currently are due on October 17, 2011.

Defendant respectfully requests an extension of time to file his reply briefs for two reasons. First, the substance of the defense motions raise issues that may be significantly impacted by classified discovery. Second, the CIPA process imposes unique burdens on the defense and the Court, which cannot be completed (or, perhaps, even started) before the current reply deadline.

ARGUMENT

1. CLASSIFIED DISCOVERY COULD SIGNIFICANTLY IMPACT THE OUTCOME OF DEFENDANT’S PENDING MOTIONS.

The defendant’s motions implicate potential classified information, as is evidenced by the timing of the government’s request for a CIPA section 2 hearing. Rather than provide the discovery when requested, the government waited until after the defense filed its discovery and other substantive motions to raise the possibility that classified discovery is at issue, thereby depriving the defense of using valuable relevant and exculpatory information in support of its motions. The legislative history of CIPA declares that the defendant “should not stand in a worse position, because of the fact that classified information is involved, than he would without this Act.” S. REP. No. 96-823, at 9, *reprinted in* 1980 U.S.C.C.A.N. 4294, 4302; *see United States v. North*, 698 F. Supp. 316, 320 (D. D.C. 1988); *United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (“The CIPA’s fundamental purpose is to ‘protect [] and restrict[] the discovery of classified information in a way that does not impair the defendant’s right to a fair trial.’”); *United States v. O’Hara*, 301 F.3d 563, 569 (7 Cir. 2002) (“When a criminal defendant seeks access to confidential ... files, we rely particularly heavily on the sound discretion of the trial judge to protect the rights of the accused as well as the government.” (internal citations omitted)).

The central contention of all of defendant’s motions is that Humberto Loya-Castro, a high-ranking member of the Sinaloa Cartel, entered into an agreement on behalf of the Cartel (including the defendant) with several agencies of the United States Government to serve as an informant against rival Mexican Drug Trafficking Organizations. In return for the information he, the defendant, and others provided, the government agreed it would not share any of the information that it had about the Sinaloa Cartel and/or the leadership of the Sinaloa Cartel with

the Mexican government in order to ensure that the Cartel's operations would not be disrupted and its leaders would not be apprehended. In addition, the government extended the defendant immunity for his activities on behalf of the Cartel as a result of his cooperation. Information related to the government's use of sources, the methods implemented to combat international drug conspiracies, and inter-governmental cooperation regarding those efforts inevitably raises national security issues.

The defense cannot adequately respond to the government's oppositions and support its motions without first understanding the nature, scope, and substance of the classified information in the possession of the government. The government's obligation to produce documents is not limited to those in the possession of the DOJ and FBI, but includes documents in the possession, custody, and control other agencies, including the CIA, DEA, ATF, ICE, IRS, NSA, and the Department of Justice OCDETF. Courts have held that documents are in the possession, custody, or control of the government (for the purposes of Rule 16 of the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963)) when the agency that holds the documents participated in the investigation of the defendant, or when the prosecutor has "knowledge of and access to the documents." *United States v. Santiago*, 46 F. 3d 885, 893-94 (9th Cir. 1995) (quotation omitted); see also *United States v. Marshall*, 132 F. 3d 63, 69 (D.C. Cir. 1998); *United States v. Libby*, 429 F. Supp. 2d 1, 5-11 (D. D.C. 2006) (holding that prosecution must produce otherwise discoverable documents in the possession of the CIA, because the CIA referred the matter to the DOJ for prosecution and cooperated with the investigation); see also 9 USAM, *Criminal Resource Manual* § 2052(B)(1) (2002). These agencies alone have relevant and material information to establish that they had knowledge that

the leaders of the Sinaloa Cartel were allowed to engage in drug trafficking activity but did nothing to prevent the trafficking or to arrest those leaders.

The defense here will be disadvantaged if required to file replies before the CIPA process has been initiated, much less completed, because it will not have the benefit of the very information that supports its motions.

2. THE CIPA PROCESS NECESSITATES AND EXTENSION.

The government's brief outlines the CIPA process, which can be onerous. The parties and the Court must take several steps to address the logistics. The Court first must enter a protective order setting the conditions under which defense counsel and potential defense witnesses may review classified discovery, establishing procedures for filing classified pleadings, and prohibiting anyone associated with the defense from revealing publicly the classified information to which access is granted. 18 U.S.C. app. 3 § 3.

The protective order requires defense counsel and other members of the defense team to obtain security clearances before receiving access to classified discovery, which may take weeks or months to complete. Courts have uniformly rejected the argument that requiring defense counsel to obtain a security clearance violates the defendant's Sixth Amendment right to counsel of choice or counsel's right to privacy. *See, e.g., United States v. Al-Arian*, 267 F. Supp. 2d 1258, 1266-67 (M.D. Fla. 2003); *United States v. Bin Laden*, 58 F. Supp. 2d 113 (S.D. N.Y. 1999); *cf. United States v. Joliff*, 548 F. Supp. 232, 233 (D. Md. 1981); *United States v. Smith*, 899 F. 2d 564, 570 (6th Cir. 1990).

The procedure also imposes other practical difficulties. For example:

The protective order requires the defense to maintain all classified information in a Sensitive Compartmented Information Facility, or SCIF. The SCIF consists of one or more secure rooms, usually in the federal courthouse where the case is being heard. It is protected by locks and

other security devices. . . . The SCIF contains safes to hold classified documents, secure computers on which to prepare classified pleadings, an approved copier, and a shredder. In cases involving large amounts of classified material . . . defense counsel and the defendant must do the bulk of their work in the SCIF. This creates practical problems, ranging from obtaining the necessary office supplies to maintaining defense counsel's involvement in other cases. If defense counsel want to discuss classified information with potential witnesses, those discussions generally must occur in the SCIF--and the witnesses must have (or obtain) a security clearance and sign a memorandum of understanding accepting the terms of the CIPA protective order.

See Criminal Prosecutions and Classified Information, 29 L.A. Lawyer 36, 38 (2006).

CONCLUSION

The government request for a CIPA Section 2 hearing indicates that classified discovery exists in this case. The defense is entitled to the benefit of that discovery to support its pending motions and respectfully requests an extension of time to file its reply briefs until after the CIPA process has been completed.

Dated: September 29, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for defendant Vicente Jesus Zambada-Niebla certifies in accordance with Fed. R. Crim P. 49, Fed. R. Civ. P. 5, LR 5.5 and the General Order on Electronic Case Filing (ECF), the attached Motion for Extension of Time to File Reply Briefs Until After The CIPA Process Has Been Completed was, on September 29, 2011, served pursuant to the district court's ECF system as to ECF filers:

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