EXHIBIT 1

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, **Case No. 13-20364**

v.

GUFRAN AHMED KAUSER MOHAMMED
and
MOHAMED HUSSEIN SAID

Defendants.

GOVERNMENT'S UNCLASSIFIED MEMORANDUM OF LAW AND MOTION FOR AN ORDER PURSUANT TO CIPA SECTION 4 AND RULE 16(d)(1) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Government respectfully moves pursuant to Section 4 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 4, and Federal Rule of Criminal Procedure 16(d)(1), for an order authorizing the Government to withhold certain classified material from discovery.[1]

As detailed below, the prosecution team has reviewed the Classified Materials and determined that they are not both relevant and helpful to the defense in this case. Accordingly, under the well-established case law, the Classified Materials may be withheld from discovery pursuant to CIPA Section 4 and Rule 16(d) – provided that the United States has properly invoked its national security and classified information privilege.[2] It has done so, based on the declarations that are attached hereto.

Based on the above-referenced materials, and for the reasons set forth below, the Government respectfully submits that the Court should, pursuant to CIPA Section 4 and Rule 16(d)(1): (i) conduct an *in camera* and *ex parte* review of the instant submission; and (ii) grant

[1] This unclassified memorandum of law includes only the unclassified information presented in the Government's Classified *In Camera*, *Ex Parte* Memorandum of Law and Motion for an Order Pursuant to CIPA Section 4 and Rule 16(d)(1) of the Federal Rules of Criminal Procedure, filed on January 6, 2014. All classified information contained in the *ex parte* motion has been removed from this memorandum.

the relief requested, as set forth in the Proposed Order.

I. INTRODUCTION

As part of the Government's ongoing effort to comply with its discovery obligations under the Constitution and the Federal Rules of Criminal Procedure, the Government has conducted an extensive search for potentially discoverable information within the possession of relevant components of the United States Government.

The Government is filing this motion and supporting materials *in camera*, *ex parte*, and under seal with the Classified Information Security Officer or his designee because an adversarial or public proceeding would result in the unauthorized disclosure of classified information. In particular, this pleading describes information classified at the "TOP SECRET" and "SECRET" levels. Under Executive Order 13526, the unauthorized disclosure of material classified at the "TOP SECRET" level, by definition, "reasonably could be expected to cause exceptionally grave to the national security" and the unauthorized disclosure of material classified at the "SECRET" level, by definition, "reasonably could be expected to cause serious damage to the national security." Exec. Order No. 13526, Sec. 1.2(a), 75 Fed. Reg. 707, 707-08 (Jan. 5, 2010), corrected in 75 Fed. Reg. 1013 (Jan. 8, 2010).

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[2] As explained *infra* at part III.C., Section 4 of CIPA allows for deletion or withholding of otherwise discoverable information that is not both relevant and helpful to the defense. *See United States v. Yunis*, 867 F.2d 617, 619-25 (D.C. Cir. 1989).

The Government is filing this motion *ex parte* and *in camera* pursuant to Section 4 of CIPA. Section 4 hearings are properly held *ex parte*, given CIPA's purpose of preventing the unnecessary disclosure of classified information in a criminal case: "The right that section four confers on the government would be illusory if defense counsel were allowed to participate in section four proceedings because defense counsel would be able to see the information that the government asks the district court to keep from defense counsel's view." *United States v. Campa*, 529 F.3d 980, 995 (11th Cir. 1980) (citing *United States v. Mejia*, 448 F.3d 436, 457-58 (D.C. Cir. 2006); H.R. Rep. No. 96-831, pt. 1, at 27 n.22 (1980)). "The legislative history [of CIPA] emphasizes that 'since the Government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.'" *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (quoting H.R. Rep. No. 96-831, pt. 1, at 27 n.3 (1980)).

II. CASE FACTS AND BACKGROUND

From in or about June through September 2011, Gufran Ahmed Kauser Mohammed sent wire transfers to Mohamed Hussein Said, who had connections within al-Shabaab, for the purpose of supporting al-Shabaab fighters. These wire transfers are the core of the historical al-Shabaab support activities, and the purpose of these transfers will be shown both by statements made about them at the time and by later statements by Mohammed and Said to the Online Covert Employee (OCE). Mohammed also sent wire transfers to the OCE, who had met Mohammed online and was posing as a Lebanese individual based in Beirut who could purchase weapons for, and facilitate the movements of, al Qaeda recruits in Syria. To this end,

Mohammed further introduced the OCE to Said, his partner in the support of al-Shabaab, who himself confirmed his historical connections to al-Shabaab while preparing to send experienced terrorist operatives through the OCE's pipeline to the al-Nusrah Front. Said discussed with the OCE sending a number of such recruits, each of whom is believed either to have conducted terrorist attacks in Kenya or to have fought with al-Shabaab in Somalia.

On December 15, 2012, an FBI undercover employee (UCE) met with Mohammed in a hotel room in al-Khobar, Kingdom of Saudi Arabia (KSA). During the meeting, Mohammed informed the UCE that the United States had "blacklisted" Jabhat al-Nusrah, that is, the al-Nusrah Front, so the UCE needed to be careful. It is clear from statements by both Mohammed and the UCE that this "blacklisting" is because of the relationship between the al-Nusrah Front and al Qaeda. Later in the meeting Mohammed gave the UCE 14,400 (about $3,800) Saudi Riyals for the al-Nusrah Front. Mohammed also made a number of comments, including:

- He knows "a brother in Shabaab in Kenya who was sending some money from here," almost certainly a reference to Said and Said and Mohammed's arrangement whereby Mohammed sends money to Said for al-Shabaab.

- He feels he was lucky to get out of the United States the last time he was there because his phone was searched and he had some "messages" on it. Since then, Mohammed has kept that number active and only uses it to talk to his workplace so "they" know that he is using it and not doing anything wrong. The other number he gave the UCE is a temporary number not associated with his name.

B. Charges, Potential Defenses, and Procedural History

On May 21, 2013, defendants Mohammed and Said were indicted on multiple counts of conspiracy to provide and attempting to provide material support to foreign terrorist organizations, in violation of 18 U.S.C. § 2339B. In particular, Count 1 charges both defendants

with conspiring to provide material support and resources to al Qaeda and al-Shabaab, Foreign Terrorist Organizations, in violation of 18 U.S.C. § 2339B; Counts 2-8 charge both defendants with attempting to provide material support and resources to al-Shabaab, a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; and Counts 9-15 charge Mohammed with attempting to provide material support and resources to al Qaeda, a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B. On or about August 7, 2013, the defendants were arrested overseas and brought back to the United States to face the charges. Defendants are currently detained pending trial in this case. No trial date has been set.

The charge of conspiracy to provide material support to foreign terrorist organizations, in violation of 18 U.S.C. § 2339B, will require the Government to prove that:

(1) The defendant joined in an agreement to knowingly provide material support or resources[3] to an FTO;

(2) The defendant knew that the organization was a designated terrorist organization, or that the organization had engaged or was engaging in terrorist activity[4] or terrorism;[5] and

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[3] The term "material support or resources" is defined to include "any property, tangible or intangible, or service, including currency or monetary instruments o financial securities, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." 18 U.S.C. §§ 2339B(g)(4), 2339A(b)(1).

[4] "Terrorist activity" is defined as, among other things, any activity that is unlawful where committed and involves, among other things, the use of (or conspiracy, threat or attempt to use) any "explosive, firearm, or other weapon or dangerous device .., with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." 8 U.S.C. § 1182(a)(3)(B); 18 U.S.C. § 2339B(a)(1).

(3) One of the jurisdictional requirements is satisfied:

(A) The defendant is a national of the United States, a permanent resident alien, or a stateless person whose habitual residence is the United States;

(B) After the conduct required for this offense occurred, an offender was brought back into the United States or found in the United States;

(C) The offense occurred in whole or in part within the United States;

(D) The offense occurred in or affected interstate or foreign commerce; or

(E) An offender aided and abetted any person over whom jurisdiction exists in committing an offense under this statute or conspired with any person over whom jurisdiction exists to commit an offense under this statute.

The charge of attempting to provide material support to foreign terrorist organizations, in violation of 18 U.S.C. § 2339B, will require the Government to prove that:

(1) The defendant knowingly attempted to provide material support or resources to a foreign terrorist organization;

(2) The defendant knew that the organization was a designated terrorist organization, or that the organization had engaged or was engaging in terrorist activity or terrorism; and

(3) One of the jurisdictional requirements is satisfied.

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[5] "Terrorism" is defined as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d)(2); 18 U.S.C. § 2339B(a)(1).

III. LEGAL STANDARDS

A. The Government's Obligations Under *Brady*

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the Government must provide to the defense, in time for effective use at trial, any evidence favorable to the accused that is material to guilt or punishment. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (citations omitted). In other words, there must be a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). In *Kyles*, the Supreme Court held that, in analyzing materiality, the touchstone inquiry is whether, in the absence of the evidence at issue, the defendant could receive a fair trial, that is, a trial resulting in a "verdict worthy of confidence." *Kyles*, 514 U.S. at 434-35.

There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all investigation done on the case. *Moore v. Illinois*, 408 U.S. 786, 795 (1972); *see also Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no constitutional right to discovery in a criminal case, and *Brady* [] did not create one."); *United States v. Jordan*, 316 F.3d 1215, 1251 (11th Cir. 2003) ("defendant's right to the disclosure of favorable evidence, however, does not 'create a broad, constitutionally required right of discovery") (quoting *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985)) (footnote omitted). "Under *Brady*, the government need only disclose during pretrial discovery (or later, at the trial)

evidence which, in the eyes of a neutral and objective observer, could alter the outcome of the proceedings." *Jordan*, 316 F.3d at 1252. For example, the Eleventh Circuit has held that information that tends to substantially undermine or contradict the prosecution theory can be considered exculpatory. *United States v. Alzate*, 47 F.3d 1103, 1108-11 (11th Cir. 1995). In addition, information that substantially corroborates a defendant's version of events or an affirmative defense may constitute exculpatory material. *Id.* *Brady*'s principles also apply to evidence affecting key government witnesses' credibility, including impeachment material. *Youngblood*, 547 U.S. at 869 (citing *Bagley*, 473 U.S. at 676); *Giglio v. United States*, 405 U.S. 150, 153-55 (1972); *United States v. Dekle*, 768 F.2d 1257, 1263 (11th Cir. 1985).

The obligation to provide the *Brady* information exists, without a specific request, when the evidence is of obvious substantial value to the defense. *See Grossman v. McDonough*, 466 F.3d 1325, 1341- 42 (11th Cir. 2006). The Government has no obligation, however, to produce information that it does not possess or of which it is unaware. *See Halliwell v. Strickland*, 747 F.2d 607, 609-10 (11th Cir. 1984).

B. Background of the Classified Information Procedures Act and Federal Rule of Criminal Procedure 16(d)

The Classified Information Procedures Act, or "CIPA," codified at Appendix 3 to Title 18 of the United States Code, governs the discovery of classified information in federal criminal cases. *See United States* v. *Abu-Jihaad*, 630 F.3d 102, 140-41 (2d Cir. 2010). Congress enacted CIPA to enable the Government to fulfill its duty to protect national security information while simultaneously complying with its discovery obligations in federal criminal prosecutions. *See* S.

Rep. No. 96-823, 96th Cong., 2d Sess., at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4296. CIPA prescribes a set of particular "pretrial procedures to help resolve issues of discovery and admissibility of classified information." *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363 (11th Cir. 1994). CIPA "'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.'" *Abu-Jihaad*, 630 F.3d at 140 (quoting *United States* v. *Pappas*, 94 F.3d 795, 799 (2d Cir. 1996)); *see also United States* v. *Dumeisi*, 424 F.3d 566, 578 (D.C. Cir. 2005) ("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.'") (quoting *United States* v. *O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (alterations in original)).

Importantly, "CIPA was not, however, intended to expand the traditional rules of criminal discovery under which the government is not required to provide criminal defendants with information that is neither exculpatory nor, in some way, helpful to the defense." *United States* v. *Varca*, 896 F.2d 900, 905 (5th Cir. 1990). Rather, CIPA applies the general law of discovery in criminal cases to classified information and further restricts discovery of that information to protect the Government's national security interests. *See United States* v. *Johnson*, 139 F.3d 1359, 1365 (11th Cir. 1998) ("CIPA has no substantive impact on the admissibility or relevance of probative evidence."); *Baptista-Rodriguez*, 17 F.3d at 1364 (holding that CIPA "simply ensures that questions of admissibility will be resolved under controlled circumstances calculated to protect against premature and unnecessary disclosure of classified information"); *see also*

United States v. *Klimavicius-Viloria*, 144 F.3d 1249, 1260-61 (9th Cir. 1998).

Accordingly, Section 4 of CIPA authorizes the Court to deny or modify discovery of classified information that ordinarily would be produced under Rule 16 of the Federal Rules of Criminal Procedure, or otherwise.[6] Specifically, Section 4 of CIPA provides that "upon a sufficient showing," a court may "authorize the United States to delete specified items of classified information from [discovery], . . . to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove." 18 U.S.C. App. 3 § 4. The legislative history of CIPA shows that Section 4 was intended to clarify the district court's power under Rule 16(d)(1) to deny or restrict discovery in order to protect national security. *See* S. Rep. No. 96-823 at 6, 1980 U.S.C.C.A.N. at 4299-4300; *see also United States v. Stewart*, 590 F.3d 93, 130 (2d Cir. 2009) (Section 4 "clarifies district courts' powers under Federal Rule of Criminal Procedure 16(d)(1) to issue protective orders denying or restricting discovery for good cause, which includes information vital to the national security") (internal quotation marks omitted).

In essence, Section 4 allows the United States to request that the court review, *ex parte* and *in camera*, classified information to determine whether it is discoverable under Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), or the

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[6] Rule 16 identifies specific categories of information or materials that are subject to disclosure after a defendant's request. Rule 16 excludes from discovery reports, memoranda, or other internal government documents and witness statements except as provided in the "Jencks Act." Moreover, Rule 16 is inapplicable to statements by witnesses, prospective witnesses, and non-witnesses. *See United States v. Jordan*, 316 F.3d 1215, 1227 (11th Cir. 2003); *United States v. Fort*, 472 F.3d 1106, 1110 (9th Cir. 2007).

Jencks Act, and to protect such classified information from disclosure through various means if it is discoverable. *See Campa*, 529 F.3d at 994-95; *Klimavicius-Viloria*, 144 F.3d at 1261-62; *Yunis*, 867 F.2d at 619-25. For example, the government may request the Court deny discovery of a classified document in its entirety pursuant to Section 4 because it is not discoverable under the relevant legal standard. Alternatively, the government may file a motion under Section 4 to delete specific classified information from a document that either the government or the Court has deemed discoverable, or to substitute an unclassified summary or admission in the place of the document. If the court determines that the disputed document is not subject to discovery or, if it is, permits deletion or substitution of the classified information, then the entire text of any *ex parte in camera* pleadings shall be sealed and preserved in the court's record to be made available to the appellate court in the event of an appeal. 18 U.S.C. App. 3, § 4; *see also Campa*, 529 F.3d at 996.

Similarly, Rule 16(d) permits a court, for good cause, to deny, restrict, or defer discovery or inspection, or grant other appropriate relief. Fed. R. Crim. P. 16(d). Under this provision and related principles, sensitive law enforcement information may properly be withheld from the defense. *See United States v. Van Horn*, 789 F.2d 1492, 1508 (11th Cir. 1986) (privilege against revealing sensitive information applies to nature and location of electronic surveillance equipment); *United States v. Toner*, 728 F.2d 115, 122 (2d Cir. 1984) ("trial court properly barred inquiry into informant's reasons for first coming to FBI, since such inquiry apparently would have jeopardized other ongoing FBI investigations"); *United States v. Harley*, 682 F.2d 1018, 1020 (D.C. Cir. 1982) (applicability of a surveillance location privilege following

balancing test controlled by "fundamental requirements of fairness") (citing *United States v. Roviaro*, 353 U.S. 53 (1957)). Additionally, "'[g]ood cause' includes the protection of information vital to the national security." *United States v. Moussaoui*, 591 F.3d 263, 281 (4th Cir. 2010).

C. Standard for Discovery of Classified Information

In order to determine whether the Government must disclose classified information, many federal courts have adopted the "relevant and helpful to the defense" test set forth in *Yunis*, 867 F.2d 617, which borrowed from principles outlined in *United States v. Roviaro*, 353 U.S. 53, concerning the government's informant's privilege. *See, e.g.*, *United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008); *Varca*, 896 F.2d at 905; *United States v. Hanna*, 661 F.3d 271, 295 (6th Cir. 2011); *Klimavicius-Viloria*, 144 F.3d at 1261; *Mejia*, 448 F.3d at 455-57; *Yunis*, 867 F.2d at 623; *United States v. Libby*, 429 F. Supp. 2d 18, 22-23 (D.D.C.), op. amended by 429 F. Supp. 2d 46 (D.D.C. 2006) ("Libby II"); *see also United States v. Pringle*, 751 F.2d 419, 426-28 (1st Cir. 1984) (upholding district's court exclusion of classified evidence that "'was not relevant to the determination of the guilt or innocence of the defendants, was not helpful to the defense and was not essential to a fair determination of the cause'") (quoting district court's opinion) (citing *Brady*, 373 U.S. 83; *Roviaro*, 353 U.S. 53); *United States v. Pelton*, 578 F.2d 701, 706 (8th Cir. 1978) (pre-CIPA case–affirming protective order to deny disclosure of voice recordings to protect cooperating witnesses and because "the tapes contained no exculpatory evidence and [that

the] Government made no direct or derivative use of tapes").[7] "Under this test, information meets the standard for disclosure 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Klimavicius-Viloria*, 144 F.3d at 1261 (quoting *Bagley*, 473 U.S. at 682). A court applying this standard should, however, "err on [the] side of protecting the interests of [the] defendant." *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998); *see United States v. Rahman*, 870 F. Supp. 47, 51 (S.D.N.Y. 1994) (court reviewed classified information as potentially discoverable "in the light most favorable to defendants").

In *Roviaro*, the United States Supreme Court considered the application of the informant's privilege to the general discovery rules, pursuant to which the government may withhold from disclosure the identity of its informants. *Roviaro*, 353 U.S. at 55. The Court noted that the privilege implicates two fundamental competing interests: (1) the interest of the defendant in mounting a defense; and (2) the public interest in enabling the government to protect its sources. The Court relied on two basic principles to resolve the competing interests. First, it noted that the defendant's interest was triggered *only* when information in the government's possession was "relevant and helpful." *Id.* at 60. Second, when the evidence is deemed relevant and helpful, the Court held that resolving the interests "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62.

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[7] The Eleventh Circuit does not appear to have ruled on this issue.

The Court of Appeals for the District of Columbia in *Yunis* applied the reasoning of *Roviaro* in interpreting the statutory requirements of CIPA and held that classified information may be withheld from discovery when the information is not relevant or when the information is relevant but not helpful to the defense. *Yunis*, 867 F.2d at 622-23. In *Yunis*, which involved a defendant accused of hijacking an airplane on an international flight, the government asserted its classified information privilege to protect from discovery certain transcripts of the defendant's recorded statements. *Id.* at 618-20. During the course of the investigation, conversations between the defendant and an associate were recorded by an undisclosed intelligence-gathering source or method. *Id.* at 618. After the government produced some of these recorded statements, the defendant sought disclosure of all of the conversations. *Id.* at 619. The district court ordered disclosure of the transcripts "after appropriate redactions of all sensitive and classified national security matters and information." *Id.* at 620.

The government appealed this order to the District of Columbia Circuit Court of Appeals. *Id.* at 621. In ruling on the government's appeal, the Court of Appeals noted that the withheld conversations discussed many matters that were "completely unrelated to the hijacking or any other terrorist operation or criminal activity." *Id.* at 618. The court applied the *Roviaro* standard to the classified information at issue:

> [C]lassified information is not discoverable on a mere showing of theoretical relevance in the face of the Government's classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information, like a defendant seeking the informant's identity in Roviaro, is entitled only to information that is "at least helpful to the defense of the accused."

Id. at 623 (quoting *Roviaro*, 353 U.S. at 60-61); *see also Yunis*, 867 F.2d at 625 (noting that the "relevant and helpful" phrase was the preferred articulation of the term "materiality" also used in *Roviaro*).[8]

In *Yunis*, the court found that the government had an interest in protecting not only the contents of the conversations, but also the sources and methods used to collect them. 867 F.2d at 623. The court recognized that–as in cases in which the United States invokes its informant privilege–much of the government's national security interest in the recorded conversations "lies not so much in the contents of the [Rule 16] conversations, as in the time, place, and nature of the government's ability to intercept the conversations at all." *Id.* at 623; *see also United States v. Felt*, 491 F. Supp. 179, 183 (D.D.C. 1979) ("Protection of sources, not information, lies at the heart of the claim [of privilege] by the Attorney General."). As the *Yunis* Court explained:

> Things that did not make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what [the documents withheld from discovery] revealed about sources and methods. Implicit in the whole concept of an informant-type privilege is the necessity that information-gathering

[8] Exculpatory or impeachment information discoverable under *Brady*, *Giglio*, and their progeny are subsumed within the category of information that is "at least helpful" to the defense. *See Mejia*, 448 F.3d at 456-57.

> agencies protect from compromise "intelligence sources and methods."

Yunis, 867 F.2d at 623.

As the legislative history of Section 4 of CIPA makes clear, CIPA and Rule 16(d)(1) encourage courts to weigh national security interests in determining the scope of permissible discovery under Section 4. Indeed, Congress plainly intended to allow the Court to take into account national security interests in considering motions filed under Section 4:

> When pertaining to discovery materials [Section 4 of CIPA] should be viewed as clarifying the court's powers 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. 96-823, at 6 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4299-4300.

Under CIPA Section 4 and Rule 16(d), the first step is for the Government to identify the national security interest at stake (*see* Exhibits 1-3). Because CIPA governs the handling of classified information,[9] any motion under CIPA must establish that the information at issue is indeed classified and subject to a claim of privilege. *Klimavicius-Viloria*, 144 F.3d at 1261; *Sarkissian*, 841 F.2d at 966. In order to establish these facts, the Government ordinarily submits

[9] "Classified information," as used in CIPA, includes "any information or material that has been determined by the United States Government pursuant to an Executive order, statute or regulation, to require protection against unauthorized disclosure for reasons of national security." 18 U.S.C. App. 3, § 1(a). "National security" means the national defense and foreign relations of the United States. *Id.* § 1(b).

a declaration that, *inter alia*: "(1) describes the reasons for the classification of the information at issue; and (2) sets forth the potential harm to national security that could result from its disclosure." *Libby*, 429 F. Supp. 2d at 25 (citation omitted); *see also United States v. Rahman*, 870 F. Supp. 47, 50 (S.D.N.Y. 1994). Appropriate declarations have been filed with this memorandum. Second, the court must determine whether the evidence is "'relevant and helpful to the defense of the accused, *i.e.*, useful 'to counter the government's case or bolster a defense.'" *Aref*, 533 F.3d at 80 (quoting *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1983) (interpreting materiality standard under Fed.R.Crim.P. 16(a)(1))); *see Yunis*, 867 F.2d at 624-25 (second step is to determine helpful or beneficial character of classified material).

If the Court does not find the defense is entitled to discovery of this information under *Roviaro*, then the defense would not have a "need-to-know" as required by Section 4.1 of Executive Order 13526. Exec. Order 13526, § 4.1(a)(3), 75 Fed. Reg. 707, 720 (Jan. 5, 2010), corrected in 75 Fed. Reg. 1013 (Jan. 8. 2010); *see, e.g., United States v. Amawi*, 2009 WL 961143, at *2 (N.D. Ohio 2009) ("Clearance simply qualifies counsel to view secret materials. It does not, however, *entitle* counsel to see anything and everything that the government has stamped classified even if it has something to do with a client.") (citing *United States v. Bin Laden,* 126 F.Supp.2d 264, 287 n. 27 (S.D.N.Y.2000) (security clearances enable "attorneys to review classified documents, 'but do not entitle them to see all documents with that classification.'") (other citation omitted), *aff'd*, *United States v. Amawi*, 2012 WL 3602313 (6th Cir. 2012) ("a clearance would not have entitled the defense to see any of the [classified] information," which was not deemed discoverable); *Badrawi v. Dep't of Homeland Sec.*, 596

F.Supp.2d 389, 400 (D. Conn. 2009) (upholding denial of classified information to counsel who held Top Secret security clearance but did not have a "need to know" information).

D. CIPA Section 4 Authorizes the Production of Summaries and Substitutions of Classified Documents

Under CIPA Section 4, if a court determines that certain classified information is discoverable under the *Roviario/Yunis* standard,[10] the court then must assess in what format the information must be produced. When a defendant's interests are adequately protected by the disclosure of a summary of the classified information, or by a statement admitting the relevant facts the classified document would tend to prove, the statutory language, legislative history, and case law interpreting CIPA Section 4 all support a finding that the public interest in protecting classified document outweighs the defendant's need for access to it. In particular, where courts have found classified information, as opposed to a classified document itself, to be helpful to the defense, they have permitted production of a substitution in the form of: (1) a redacted version of the classified document; (2) a summary of the classified document; or (3) a statement of admissions of relevant facts. The substitution is to provide the defense with the discoverable information contained in the classified document without compromising sensitive sources and methods. *See United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005); *United States v. Moussaoui*, 382 F.3d 453, 476-78 (4th Cir. 2004) (applying CIPA's substitution approach to district court rulings that defendant have access to certain witnesses for deposing them pursuant to Federal Rule of Criminal Procedure 15); *Rezaq*, 134 F.3d at 1142-43 (approving district

court's CIPA substitution rulings where "[n]o information was omitted from the substitutions that might have been helpful to Rezaq's defense"); *Rahman*, 870 F.Supp. at 53 ("[I]t is sufficient to disclose the substance of the information [in the CIA's possession] ... The document itself need not be disclosed.").

When authorizing the government to produce a summary or statement of admissions in lieu of the original classified materials, the court must evaluate the sufficiency of the substitution. The summary or statement of admissions should provide the defendant "with 'substantially the same ability to make his defense as would disclosure of the specific classified information.'" *Dumeisi*, 424 F.3d at 578 (quoting from district court's order). Substitutions are not to require "precise, concrete equivalence." H.R. Conf. Rep. No. 96-1436, at 12-13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4307, 4310-11.

While substitutions must convey the arguably discoverable classified information, they need not summarize the entire classified document. The *Roviaro/Yunis* principle applies not only to whole documents, but also to "sub-elements" of documents: "[I]f some portion or aspect of a document is classified, a defendant is entitled to receive it only if it may be helpful to his defense." *Rezaq*, 134 F.3d at 1142. In *Rezaq*, the district court concluded that the substitutions "fairly stated the relevant elements of the classified documents." *Id.* The D.C. Circuit Court of Appeals, reviewing for abuse of discretion, found that the district court's orders "protected [the defendant's] rights very effectively." *Id.* at 1143.

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[10] *See United States v. Roviaro*, 353 U.S. 53 (1957); *United States v. Yunis*, 867 F.2d 617, 620 (D.C. Cir. 1989).

A summary or statement of admission by definition will not contain exactly the same information as the original classified document. However, "[t]he fact that insignificant tactical advantages could accrue to the defendant[s] by the use of the specific classified information should not preclude the court from ordering alternative disclosure." H.R. Conf. Rep. No. 96-1436, at 12-13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4307, 4310-11, It is often the case that contextual information is precisely the type of information that the government most wishes to protect; frequently, "the government's security interest . . . lies not so much in the contents of [a] conversation[], as in the time, place and nature of the government's ability to intercept the conversation[] at all." *Yunis*, 867 F.2d at 623.

VII. CONCLUSION

Dated this __th day of January 2014.

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