UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

MOTION FOR VICENTE JESUS ZAMBADA-NIEBLA TO BAR EX PARTE SUBMISSIONS UNDER CIPA § 4 WITHOUT A PARTICULARIZED SHOWING OF EXCEPTIONAL CIRCUMSTANCES

Defendant Vicente Jesus Zembada-Niebla, through his counsel, moves the Court under 18 U.S.C. App. III, § 4 (CIPA § 4) and the Fifth Amendment Due Process Clause for an Order barring the government from making ex parte submissions concerning discovery issues absent a particularized showing, through adversarial proceedings, of exceptional circumstances. If the Court permits the government to proceed ex parte, over our objection, it should afford the defense, in accordance with prior decisions, a corresponding opportunity to make an ex parte presentation to the Court in support of its discovery requests.

INTRODUCTION

The government has announced its intention to make an ex parte submission to the Court concerning classified discovery issues. Although we do not know precisely what relief the government will seek through the secret submission, we assume it will

argue that it should be excused from providing certain discovery or that it should be allowed to provide substitutions or redactions under CIPA § 4.

For the reasons that follow, the Court should reject the government's request to proceed ex parte unless it makes a particularized showing of exceptional circumstances in an adversarial proceeding. The defense believes that Humberto-Loya Castro had access to the information that the government now seeks to withhold throughout his many years of cooperation with the United States government and that high-ranking members of the Sinaloa cartel also had access to such information through Mr. Loya. Mr. Zambada-Niebla is alleged in the indictment to be a high ranking member of the Sinaloa cartel. We believe that the information is material to the defense in that it may, *inter alia*, contain information pertaining to agreements between agents of the United States government and the leaders of the Sinaloa cartel as well as policy arrangements between the United States government and the Mexican government pertaining to special treatment that was to be afforded to high ranking members of the Sinaloa Cartel. Thus, Mr. Zambada-Niebla's counsel should be granted high level security clearances to review the sensitive information.

Under these circumstances, barring Mr. Zambada-Niebla's counsel from participating in discovery determinations would cripple the adversarial process with no commensurate benefit to national security. Secret proceedings would constitute an abuse of discretion under CIPA § 4 and would violate Mr. Zambada Niebla's right to due process. To ensure both "the appearance and the reality of fairness," the Court should not permit the government to proceed ex parte without an adequate showing. *Abourezk v.*

Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 1 (1987).

To be clear, we do not object to in camera consideration of potentially discoverable classified documents by the Court. In camera review is a traditional means of determining whether documents are discoverable.[1] We do object, however, to any ex parte argument by the government that particular documents are not discoverable or that it should be permitted to redact or provide substitutions for discoverable documents. Once the Court determines that a document falls within the scope of Rule 16 or *Brady*, moreover, the defense should have access to the document for purposes of arguing that any redactions or substitutions the government proposes will not afford Mr. Zambada-Niebla substantially the same ability to make his defense as the complete document.

If the Court permits the prosecution to make discovery submissions ex parte, then it should level the playing field, as other courts have done under similar circumstances, by affording the defense a corresponding opportunity to make an ex parte presentation in support of our discovery requests.

ARGUMENT

I. THE COURT SHOULD EXERCISE ITS DISCRETION UNDER CIPA § 4 TO REFUSE TO ACCEPT EX PARTE SUBMISSIONS FROM THE GOVERNMENT EXCEPT ON A PARTICULARIZED SHOWING OF EXCEPTIONAL CIRCUMSTANCES.

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."

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[1] *See, e.g., Palermo v. United States*, 360 U.S. 343, 354 (1959) (in camera review of witness' prior statements); *Abourezk*, 785 F.2d at 1061 (noting that court may consider evidence "*in camera* and alone for the limited purpose of determining whether [an] asserted privilege is genuinely applicable"); Fed. R. Crim. P. 26.2(c) (in camera review of witness' prior statements).

United States v. Dumeisi, 424 F.3d 566, 578 (7th Cir. 2005) (quoting *United States v. O'Hara,* 301 F.3d 563, 568 (7th Cir.2002)). Courts have declared unequivocally that "[e]x parte communications between a district court and the prosecution in a criminal case are greatly discouraged, and should only be permitted in the rarest of circumstances." *United States v. Rezaq*, 899 F. Supp. 697, 707 (D.D.C. 1995); *see, e.g., United States v. George*, 786 F. Supp. 11, 16 (D.D.C. 1991) ("Ex parte proceedings are generally disfavored, even when the federal rules expressly permit them."). In accordance with this principle, rooted in the Fifth Amendment Due Process Clause, the Court should reject ex parte submissions from the prosecution absent a showing, through adversarial proceedings, of exceptional circumstances. *See Rezaq*, 899 F. Supp. at 707.

The government proposes to proceed ex parte under CIPA § 4. That provision allows the Court to authorize the government, "upon a sufficient showing," to delete classified information from the discovery it provides or to furnish substitutions for the classified information in the form of summaries or admissions. The statute adds that "[t]he court *may* permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone." CIPA § 4 (emphasis added).

The use of the permissive "may" in CIPA § 4, rather than the mandatory "shall," makes clear that the Court has discretion to reject ex parte submissions.[2] Congress patterned the ex parte provision of CIPA § 4 on a similar provision in Fed. R. Crim. P.

[2] When Congress intends to *require* ex parte procedures in the national security setting, it knows how to say so. In the Foreign Intelligence Surveillance Act, for example, Congress declared that the Court "shall" review FISA applications, orders, and related materials ex parte if the Attorney General submits an affidavit asserting that an adversarial proceeding would harm national security. 50 U.S.C. § 1806(f).

16(d)(1), which governs protective orders in criminal cases. *See* S. Rep. No. 823, 96th Cong. 2d Sess. 6 (discussing relation between CIPA § 4 and Fed. R. Crim. P. 16(d)(1)), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4294, 4299-4300. Rule 16(d)(1) states that a court "may" permit a party to show good cause for a protective order through an ex parte statement. Congress amended the language of proposed Rule 16(d)(1) from *requiring* ex parte proceedings on the request of a party to *permitting* such proceedings. The House Judiciary Committee observed that in determining whether to proceed ex parte, a court should "bear[] in mind that ex parte proceedings are disfavored and not to be encouraged." Fed. R. Crim. P. 16, Advisory Committee Notes, 1975 Enactment. Ex parte proceedings are similarly discretionary and disfavored under CIPA § 4. *See, e.g., United States v. Rezaq*, 156 F.R.D. 514, 526 (D.D.C. 1994) (under CIPA § 4 and Rule 16(d)(1), "ex parte filings are not required . . . nor even favored"), *modified,* 899 F. Supp. 697 (D.D.C. 1995).

Ex parte discovery proceedings will damage the adversarial process and reduce the accuracy of the Court's determinations. The Supreme Court has observed that "'[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'" *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)).

In the Fourth Amendment context, courts have rejected the use of ex parte proceedings on grounds that apply here. In *Alderman v. United States*, 394 U.S.165 (1969), the Court addressed the procedures to be followed in determining whether government eavesdropping in violation of the Fourth Amendment contributed to its case

against the defendants. The Court rejected the government's suggestion that the district court make that determination ex parte. The Court observed that

> [a]n apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances.

Id. at 182. In ordering disclosure of improperly recorded conversations, the Court declared:

> Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny that the Fourth Amendment exclusionary rule demands.

Id. at 184; *see also Franks v. Delaware*, 438 U.S. 154, 169 (1978) (permitting adversarial proceeding on showing of intentional falsehood in warrant affidavit because the magistrate who approves a warrant ex parte "has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations").

The same considerations that the Supreme Court found compelling in *Alderman* and *Franks* militate against ex parte procedures in the CIPA context, at least absent powerful national security considerations that have not been shown to exist here. This Court necessarily lacks familiarity with "the information contained in and suggested by the materials" that the government seeks to withhold. *Alderman*, 394 U.S. at 184. The Court, which has had no opportunity to review the discovery, consult with Mr. Zambada-Niebla, or otherwise investigate the facts of this case, cannot be expected to surmise the factual nuances of the defense---the ways in which "[a]n apparently innocent phrase, a

chance remark, [or] a reference to what appears to be a neutral person or event" might be critical to Mr. Zambada-Niebla's defense. *Id.* at 182. As the Supreme Court remarked in rejecting ex parte review of a witness' grand jury testimony, "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis v. United States*, 384 U.S. 855, 875 (1966).

We recognize, as did the court in *Rezaq*, that exceptional circumstances could arise that might justify ex parte proceedings. But the Court should permit the government to proceed ex parte only on a particularized showing that such circumstances exist, and it should direct that "the government file future motions for leave to file submissions ex parte, with the understanding that such motions must be served on the defendant and then litigated in an adversarial hearing before this court." *Rezaq*, 899 F. Supp. at 707; see also *United States v. Hanjuan Jin*, 08 CR 192, 2011 WL 2349863 (N.D. Ill. June 14, 2011) ("Importantly, because of the *ex parte* nature of this motion, the Court will err on the side of protecting the interests of the Defendant in applying these standards."). No basis exists here to abandon the usual presumption against ex parte proceedings.

II. IF THE COURT PERMITS THE GOVERNMENT TO MAKE AN EX PARTE SUBMISSION UNDER CIPA § 4, OVER MR. ZAMBADA-NIEBLA'S OBJECTION, IT SHOULD PERMIT THE DEFENSE TO MAKE AN EX PARTE PRESENTATION IN SUPPORT OF ITS CLASSIFIED DISCOVERY REQUESTS, AS OTHER COURTS HAVE DONE.

"CIPA is a procedural statute, and the legislative history of it shows that Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems." *United States v. Libby*, 429 F. Supp. 2d 18, 22 *opinion amended*

on reconsideration, 429 F. Supp. 2d 46 (D.D.C. 2006), quoting *United States v. North,* 713 F. Supp. 1453 (D.D.C.1989) (citing H.R. Conf. Rep. No. 96-1436 (96th Cong., 2nd Sess., 11, 14 (1980), U.S. Code Cong. & Admin. News 1980, p. 4294.)).

To the extent the Court permits the government to make an ex parte submission under CIPA § 4, this case will require creative solutions that should properly balance the defendant's right to receive a fair trial and the government's need to protect classified information. In doing so, it should level the playing field by permitting the defense to proceed ex parte in support of the requested discovery. Other courts have adopted this approach. In *United States v. Clegg*, 740 F.2d 16 (9th Cir. 1984), for example, the district court accepted ex parte submissions from both parties on discovery issues. *See id.* at 17. In *Poindexter*, the court permitted the defense to explain ex parte the relevance of certain Presidential and Vice-Presidential documents. *See* 727 F. Supp. at 1479 & n.16. And in *United States v. North*, 698 F. Supp. 322 (D.D.C. 1988), the court (with the agreement of the prosecution) heard a four hour ex parte defense presentation concerning the defendant's need for classified discovery he had requested. *Id.* at 324.

Although we consider ex parte submissions by either party to be generally inappropriate, we request the opportunity, as permitted in *Clegg*, *Poindexter*, and *North*, to make such a presentation in support of our classified discovery requests if the Court permits the government to proceed ex parte in opposition. An ex parte defense presentation will go some distance toward remedying the perceived and real unfairness of allowing the government to challenge Mr. Zambada-Niebla's discovery requests in secret.

CONCLUSION

For the foregoing reasons, the Court should bar the government from making ex parte submissions concerning discovery issues absent a particularized showing, through adversarial proceedings, of exceptional circumstances. If the Court permits the government to proceed ex parte, over our objection, it should afford the defense a corresponding opportunity to make an ex parte presentation to the Court in support of its discovery requests.

October 24, 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 Vicente Jesus Zambada-Niebla to Bar Ex Parte Submissions under CIPA § 4 Without A Particularized Showing of Exceptional Circumstances, served pursuant to the district court's ECF system as to ECF filers:

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