

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA

v.

SAMI AMIN AL-ARIAN,
SAMEEH HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATIM NAJI FARIZ

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CASE NO.: 8:03-CR-77-T-30-TBM

**GOVERNMENT'S MOTION FOR A PRETRIAL CONFERENCE
AND A PROTECTIVE ORDER PURSUANT TO
THE CLASSIFIED INFORMATION PROCEDURES ACT**

The United States of America, by and through Paul I. Perez, United States Attorney for the Middle District of Florida, respectfully submits its Motion for a Pretrial Conference and Protective Order pursuant to the Classified Information Procedures Act and Rule 16(a) of the Federal Rules of Criminal Procedure, and states as follows:

1. The Classified Information Procedures Act (hereafter, "CIPA"), codified at 18 U.S.C. App. III, establishes procedures necessary for the handling of classified information by parties in a criminal case. These procedures permit a federal district court to hold a pretrial conference to consider matters relating to classified information that may arise in connection with a criminal prosecution, and permit the court to enter protective orders that govern the use and dissemination of classified information. The Federal Rules of Criminal Procedure also provide that a district court may enter a protective order in connection with discovery and trial matters relating to a criminal prosecution. See, e.g., Fed. R. Crim. P. 16(d).

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2. In the instant case, the defendant has made a discovery request and counsel for the United States has concluded that classified information may arise in connection with the prosecution of the case. As a result, the United States respectfully requests that the Court hold a pretrial conference to consider matters relating to the classified information at a time mutually convenient to the Court and the parties.

3. The United States also requests that the Court enter a Protective Order to prevent unauthorized disclosure and dissemination of such classified information. Most cases involving the disclosure of classified information arise in the context of a “greymail” situation; where a criminal defendant who has obtained classified information before being charged with a crime threatens to disclose such information during the course of the trial, hoping the United States will decide to abandon the prosecution rather than risk disclosure of the classified information. In such situations, the United States’ principal concern is with ensuring that the defendant disseminates the classified information no further than necessary for the purposes of the litigation.

4. Here, however, by way of contrast, neither the defendants nor their counsel knowingly possesses classified information. During the pretrial proceedings in the instant case, the United States has concluded that certain classified information is discoverable. As a result, the entry of a Protective Order will be required, in order to prevent the unauthorized disclosure of such classified information by the defendants and/or their counsel.

5. Based upon a review of the Indictment in the instant case, the United States alleges that the defendants were members of an organization which engaged in acts of terrorism. This organization is still in existence and is still actively engaged in

acts of terrorism. Thus, the United States seeks a particularized Protective Order, that will deny the defendants themselves, but not their counsel, access to classified information. Without such a particularized Protective Order, there is simply no effective method of ensuring that disclosure of national security information to the defendants will not ultimately be communicated to others inside or outside the United States who belong to or sympathize with the organization to which the defendants belonged at the time they are alleged to have committed the offenses charged in the indictment.

6. The circumstances present in the instant case are similar to those present in United States v. Rezaq, 93-0284 (D.D.C. 1994), where the district court entered a Protective Order that authorized counsel for the defendant to obtain access to classified information, but not the defendant himself without an additional order of the Court. In United States v. Moussaoui, 2002 WL 1987964 (E.D.V.A), the district court judge entered a CIPA protective order denying access by the defendant to classified information. This proposed order is patterned after the Moussaoui order.

7. Paragraph 23 of the proposed protective order pertains to the now - declassified information produced or to be produced which was a product of the FISA intercepts. Whether classified or declassified, this information is sensitive and is deserving of the special protection set forth in paragraph 23. See, e.g., United States v. Moussaoui, 2002 WL 1311736 (E.D.V.A).

MEMORANDUM OF LAW

1. The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, provides procedures designed to protect the rights of the defendant while minimizing the associated harm to national security in cases where classified information may be

relevant to the criminal proceedings. See United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998).

2. Section 3 of CIPA and Federal Rules of Criminal Procedure 16(d)(1) and 57 authorize the Court to issue a protective order to prevent disclosure or dissemination of sensitive information that could compromise national security. See United States v. Rezaq, 156 F.R.D. 514, 523 (D.D.C. 1994). The legislative history of CIPA reflects the type of protection that can be sought in a protective order to ensure that classified information is not improperly revealed and disseminated:

The court is given authority to issue orders protecting against the disclosure of classified material in connection with the prosecution by the United States. . . . The details of each order are fashioned by the trial judge according to the circumstances of the particular case. The terms of the order may include, but need not be limited to, provisions: (1) prohibiting the disclosure of the information except as authorized by the court; (2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed; (3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice; (4) requiring the maintaining of logs recording access by all persons authorized by the court to have access to the classified information in connection with the preparation of the defense; (5) requiring the making and handling of notes taken from the material containing classified information; and (6) authorizing the assignment of government security personnel and the provision of government storage facilities. Punishment for violation of a protective order would be a contempt of court.

S. Rep. No. 96-823, reprinted in 1980 U.S. Code Cong. & Ad. News 4294, 4299 (96th Cong. 2d Sess.).

3. The purpose of CIPA is to minimize threats by the defendant to disclose classified information in the course of litigation by requiring rulings, before trial, on the

admissibility of such information. See id. Such threats can arise in various circumstances, such as the following: (1) in pretrial discovery the defendant pressures the government to release classified information the threatened disclosure of which might force the government to abandon the prosecution; (2) the government expects to disclose classified information in the prosecution, and endeavors to restrict the dissemination of the information; and (3) the defendant has acquired classified information before the initiation of prosecution and seeks to disclose such information during the litigation. See United States v. Pappas, 94 F.3d 795, 799-800 (2d Cir. 1996). Section 3 of CIPA provides that, on motion of the government, the court must issue a protective order to guard against the disclosure of classified information disclosed by the government to the defendant during criminal litigation. See id. at 800.

4. To the extent that the defendant himself does not need to know classified information to effectively assist in his defense, a protective order issued pursuant to CIPA may prohibit defense counsel from disclosing classified information to the defendant that has been provided by the government in discovery. See United States v. Rezaq, 156 F.R.D. at 524.

WHEREFORE, the United States respectfully moves the Court to grant its Motion for a Pretrial Conference and a Protective Order pursuant to CIPA.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney

By:


TERRY A. ZITEK
Executive Assistant U. S. Attorney
Florida Bar No. 0336531
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6000
Facsimile: (813) 274-6246

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by facsimile, this 7th day of July, 2003, to the following:

Frank Louderback, Esquire
Louderback & Helinger
150 2nd Avenue North, Suite 840
St. Petersburg, Florida 33701
Counsel for Sami Amin Al-Arian

Daniel Mario Hernandez, Esquire
902 N. Armenia Avenue
Tampa, Florida 33609
Counsel for Sameeh Hammoudeh

Bruce G. Howie, Esquire
5720 Central Avenue
St. Petersburg, Florida 33707
Counsel for Ghassan Zayed Ballut

Donald E. Horrox, Esquire
Federal Public Defender's Office
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Counsel for Hatim Najj Fariz



TERRY A. ZITEK
Executive Assistant U. S. Attorney