

No. 14-

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KWOK CHEUNG CHOW, a/k/a "Raymond
Chow," a/k/a "Hai Jai,"
a/k/a "Shrimpboy," et al.

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,

Respondent.

v.

UNITED STATES OF AMERICA,

Respondent.

ON MANDAMUS TO THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. CR 14-196 CRB

**KWOK CHEUNG CHOW'S PETITION FOR WRIT OF MANDAMUS
AND MOTION FOR REVELATION AND DISCLOSURE OF THE _____
UNDERCOVER AGENTS' TRUE IDENTITIES
IMMEDIATE RELIEF REQUESTED - FINAL WEEK OF TRIAL**

J. TONY SERRA #32639
CURTIS L. BRIGGS #284190
TYLER SMITH #289188
506 Broadway
San Francisco CA 94133
Telephone: 415/986-5591

Attorneys for Petitioner KWOK CHEUNG CHOW

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PETITION

Trial is underway for Defendant KWOK CHEUNG "Raymond" CHOW, who petitions this Court for a writ of mandamus directing the United States District Court for the Northern District of California to mandate the disclosure of the true identities of the undercover agents in this matter. Time is of the essence as the Government has rested their case.

The District Court has jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. Multiple pretrial motions, *in limine* motions, and renewed motions to reveal and compel the real identities of the undercover agents in this matter were filed with the Northern District of California. The Honorable Judge Breyer declined to require the disclosure and revelation of the agents' identities, or to reconsider the renewed motion for revelation and disclosure. The Government improperly relied on CIPA to protect the undercover agents' identities, in an unlawful attempt to circumvent the adversarial process, and without proper adherence to delineated procedural requirements,

under CIPA law. This Court has jurisdiction over the Defendant's petition for writ of mandamus under the All Writs Act, 28 U.S.C. § 1651.

The brief in support of this petition is filed contemporaneously herewith, and sets forth Mr. Chow's arguments in support of mandamus, urging this Court to require the District Court for the Northern District of California to mandate the revelation and disclosure of all relevant discovery relating to the true identities of the undercover agents in this matter. It is imperative that the United States Court of Appeals for the Ninth Circuit attends to this matter with urgency, as trial is a month away from completion, there is evidence on ongoing misconduct in this case, and defendant will be deprived of a fair trial and experience great prejudice if this Court does not hear this matter.

BRIEF FOR WRIT OF MANDAMUS

Preliminary Statement

Upon commencement of the exchange of discovery, it became evident that the Government had no intention of

revealing the undercover agents' true identities, or producing any discovery regarding their true identities.

Multiple motions were filed requesting such revelation; however, the prosecution, with the Northern District Court's assistance, successfully shielded the identities of the three primary undercover agents in this case.

Prior to the commencement of trial, Chow submitted a motion to compel [Dkt.1045] the real identifies of UCE 4773, "Michael Anthony King;" UCE 4527 "Jimmy Chen" and UCE 4599 "David Jordan." Without responding to the motion to compel, the Government made a last minute *ex parte* submission [Dkt. 1046] that was a *de facto* opposition to Chow's motion to compel; however, it was under seal so the contents of it were entirely unknown by Chow's counsel who never had a chance to respond until the Court's order on point was reviewed. This *ex parte* submission subverted adversarial requirements by the use of Classified Information Procedures Act ("CIPA") protocol, which is inconsistent with the

spirit of the protocol. Following, the Court granted the Government's CIPA request [Dkt. 1047], and issued a *de facto* ruling against Chow's motion to compel the identities of undercover agents [Dkt. 1046]. Several times, the Court indicated that it has no option under CIPA but to shield the identities.

As discussed herein, CIPA is not applicable to the agents' identity and assuming, *arguendo*, that it was, the court failed to follow critical guidelines and procedural policy to ensure that a member of the defendant's legal team, with proper security clearance, was made available to participate in discussions and in camera review of the CIPA material relating to the UCE's identity. Excluding material under CIPA comes with specific, delineated requirements intended to protect Mr. Chow's due process rights. These procedural and adversarial requirements were wholly ignored and never adhered to, in an attempt to circumvent Mr. Chow's due process rights and ensure that the UCE's true identities were not disclosed.

Moreover, during cross-examination of UCE 4599, "Dave Jordan," it became evident that he is not presently working in any undercover capacity, further eroding any need to protect his undercover identity.

As it stands, the undercover agents, who were involved in an investigation spanning over four years, have taken the stand and the Government has refused to reveal their true identities. Equally as important, the Government has not produced, to date, any materials probative of the agents' character for such things as truthfulness; disclosed any crimes and incidents of moral turpitude or material relating to any civil suits filed against the witnesses; any court martial proceedings; any evidence of credit card default or police reports filed against the witnesses; any evidence that the witnesses have lied to gain entry into the military or FBI; any material showing whether the witnesses cheated on any examination once admitted into the FBI; nor any information regarding psychiatric records, including any records of hospitalizations due to drug use.

It is not as if FBI undercover agent misconduct is unheard of. As the Government and court shields the identities of undercover agents in this prosecution, former FBI undercover agent Mathew Lowry has made headlines for stealing evidence and obstructing evidence. Even one of the agents in this case was the subject of a financial misconduct investigation which the court refused to disclose to defense counsel for Chow.

The defendant requested necessary information to prepare cross examination and investigate witnesses, even with identifying information redacted, and the Government did not comply. The District Court is steadfast in the misplaced reliance on CIPA as a means to circumvent such disclosures and Mr. Chow's due process rights. When challenged, the District Court has stated that it has shielded the identities because the agents may return to undercover work in the future.

Mr. Chow asserts that the Government's actions mock the very principles of CIPA, and violate his Sixth Amendment due process rights. Therefore, Mr. Chow

urges this Court to mandate revelation and disclosure of the agents' true identities at this time on an emergency basis before trial ends.

STATEMENT OF JURISDICTION

____The United States District Court, Northern District of California, San Francisco Division, has jurisdiction over the criminal case pursuant to 18 U.S.C. § 3231.

Defendant Raymond Kwok Cheung Chow urges this Court to mandate revelation and related disclosures of the identities of the undercover agents in this lengthy investigation, or *de minimus* compel adherence to CIPA procedure and protocol.

This Court has jurisdiction over the Defendant's petition for writ of mandamus under the All Writs Act, 28 U.S.C. § 1651.

ISSUES PRESENTED FOR REVIEW

1. Whether mandamus relief for emergency revelation of the undercover agents' true identities is warranted in light of the United States District Court's denial of such in reliance on CIPA, effectuating a violation of Mr. Chow's Sixth Amendment

due process rights.

2. In the alternative, whether mandamus relief compelling adherence to CIPA protocol, is warranted. Relief compelling such adherence requires the participation of a defense attorney, with security clearance, who is capable of participating in discussions and in camera review of CIPA material; a SCIF, a U.S. Government accredited facility housing Sensitive Compartmented Information (SCI) is available; and secure equipment, including any necessary safes and computers are provided.

STATEMENT OF CASE

Mr. Chow was arrested on March 26, 2014, and is charged by way of indictment with over 200 counts, ranging from money laundering, 18 U.S.C. § 1956(a) (3) (A), 18 U.S.C. § 1956(a) (1) (A) (I), and 18 U.S.C. § 1956(a) (1) (B) (I), conspiracies to sell either stolen liquor or cigarettes, 18 U.S.C. § 371, to conspiracy to murder and murder.

Leading up to the charges against Mr. Chow, the FBI engaged in over four years of extensive undercover

operations, yielding thousands of hours of audio recordings and potentially hundreds of witnesses. There are three primary undercover agents in this case, two of which are also the Government's key witnesses. Major discrepancies exist between one testifying agent, "Jimmy Chen," and the other, "David Jordan."

During pretrial litigation, defendant was joined in a motion to compel discovery by co-defendant Keith Jackson regarding UCE 4773's identity and misconduct investigation. The District Court ruled the motion premature. Defendant was again joined in the renewed motion but the District Court ordered the motion off calendar when Keith Jackson pled out. Prior to the commencement of trial, Chow submitted a motion to compel [Dkt.1045] the real identities of UCE 4773, "Michael Anthony King;" UCE 4527, "Jimmy Chen;" and UCE 4599, "David Jordan." Revelation of the agents' true identities and relevant disclosures thereto, are critical for an effective cross-examination of the witnesses.

In response to the defendant's motion, the Government made a last-minute *ex parte* submission [Dkt. 1046] that subverted adversarial requirements, claiming that disclosing the agents' identities raised national security concerns under CIPA. The Court granted the Government's CIPA request [Dkt. 1047] and issued a *de facto* ruling against Chow's motion to compel the identities of undercover agents [Dkt. 1046]. Defendant thereafter renewed the motion to compel the agents' identities after learning that UCE 4599 is not presently engaged in any undercover operations.

Due to a lack of resources on the part of defense this writ could not be filed until the present time.¹ The Government has rested its case and defense is in the process of examining witnesses. Defense does not have adequate information on the UCEs to properly refute their testimony or request them to be recalled.

¹ The District Court has been made aware that Chow's defense team, with the exception of pro bono counsel Tony Serra, have not received payment from CJA due to delays on the part of counsel and CJA. Lack of funding has been a constraint impacting Chow's ability to file motions as quickly as necessary.

Defense needs discovery that permits him to adequately call witnesses and exercise his Sixth Amendment right, pursuant to the confrontation clause, "to be confronted with the witnesses against him."

STATEMENT OF FACTS

With this Writ of Mandamus, Mr. Chow urges this Court to mandate the United States District Court in the Northern District of California, San Francisco Division, to order revelation of the undercover witnesses and produce all relevant discovery.

From the inception of this prosecution, Mr. Chow sought to compel [Dkt.1045] the true identities of UCE 4773, "Michael Anthony King;" UCE 4527 "Jimmy Chen;" and UCE 4599, "David Jordan." However, the Government, with this Court's assistance, has successfully shielded the identities of the three primary undercover agents in this case.

First, the identities of the agents remain erroneously protected under CIPA.

The public has a fundamental interest in the transparency of the present proceedings. See S.a.r.l.

v. United States Sec'y of Labor, 657 F. Supp 2d 1359, 1361 n. 1 (Ct. Int'l Trade 2009).

"Judges' decisions, in particular, must be open to public scrutiny. The public has a right to review a judge's rationale, not merely the outcome, in a case." Id. Moreover, any step that "withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification." Union Oil Co. V. Leavell, 220 F.3d 562, 567-568 (7th Cir. 2000).

The Government submitted a motion for *ex parte*, *in camera* presentation, pursuant to Section 4 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III, § 4. The Court issued an Order [Dkt. 1047] which is a *de facto* ruling on Chow's motion to compel the true identities of undercover agents [Dkt. 1046]. However, CIPA is not applicable to the present proceedings; the Order will prejudice defendant and impair his right to a fair trial; and it was an intentional strategic consideration by the Government that risks delay of trial.

The Government only invoked CIPA because they have failed to justify withholding discovery despite their efforts. Some of those efforts including wrongfully accusing Chow's counsel of violating the Protective Order on two occasions. Other efforts included accusing Attorney Briggs of putting two informants' lives in danger when it was actually the Government who disclosed their identities. CIPA is another method to deprive Chow of due process.

Over objection, defense counsel was never allowed to properly or adequately investigate the USA's witnesses, despite evidence of misconduct before the Court. Defense counsel was deprived of the ability to run a simple background check, which would be conducted on any witness as a standard procedure and which is frequently helpful in shaping an effective cross examination.

Second, the Government represented that there is a need to protect undercover agents' identities and safety because they are presently involved in ongoing undercover operations. During oral argument on the

issue of whether and how to protect the FBI agents' identities, heard on Friday, November 13, 2015, the Court justified closing the courtroom to the public based on representations made by the United States Attorneys' Office:

THE COURT: My understanding is that justification for this is that one or both - maybe both - of these individuals are engaged in **ongoing undercover operations**. And if their identity, either by name or by face, is known or available to the public, that that [sic] will destroy their - one, it will destroy their effectiveness as an undercover agent; and two, it may endanger their lives. That's the argument that the Government has.

MR. HASIB: That is precisely the argument. And I think-

THE COURT: And so for that reason, I'm going to allow - I'm going to opt for Option Number One, which is simply that the courtroom be closed[.]"

Transcript of Proceedings Nov. 13, 2015 at 1091, 13-25.

Despite the Government's representation that the agents' were presently working in an undercover capacity, on Monday, November 23, 2015, during cross-examination of the primary undercover agent, "David Jordan," he stated that he was not currently involved

in an undercover operation.

Q: You're not undercover now?

A: No.

Transcript of Proceedings, Nov. 23, 2015 at 1720, 1-2.

"David Jordan"'s statement directly contradicts the representation made to the Court by Assistant U.S. Attorney Hasib on November 13, 2015. Those misstatements were relied upon by the Court. Defendant submits that this court should order the Government to reveal all undercover agents' identities.

Third, there has been a long standing controversy in this case surrounding UCE 4773, "Michael Anthony King." The prosecution went through great lengths to not disclose to any attorney on this case the nature of 4773's financial misconduct investigation, which led to his removal from this operation midway through. UCE 4773 is no longer with the FBI for reasons which are also undisclosed. The Government shifted the language surrounding 4773's misconduct to a "program review" and this Court eventually agreed with Government, and determined that the misconduct need not be released to

defense counsel.

Defendant asserts that the requested discovery materials are intrinsically connected to the criminal process and play a critical role in the present case.

This prosecution has already been tarnished by covering up political corruption and shielding unindicted politicians. In shielding the undercover agents, the criminal process is tainted with the stench of corruption, while undermining public confidence in the courts and denying justice. The erroneous reliance on CIPA and or the justification that the agents may resume undercover activities one day, allows the Government to hide both the agents' true identities as well as all potential impeachment evidence, while Mr. Chow sits back with his hands tied and mouth gagged.

ARGUMENT

I.

DEFENDANT'S DUE PROCESS RIGHTS REQUIRE
THIS COURT TO MANDATE THE DISTRICT
COURT TO ORDER REVELATION AND
DISCLOSURE OF THE UNDERCOVER AGENTS IN
THIS CASE

The lack of disclosures and misplaced reliance on CIPA in the present case, is an affront to notions of a defendant's right to a fair trial and due process, and casts a dark shadow over the ideal of transparency and fairness extolled by the American criminal justice system.

For the criminal justice system to work effectively, the process must appear just, open, inclusive and transparent. See Offutt v. United States, 348 U.S. 11 (1954). Here it does not.

A. THE COURT ERRONEOUSLY RELIED ON CIPA PROTOCOL WITHOUT ADHERING TO PROCEDURAL AND ADVERSARIAL REQUIREMENTS

Chow submitted a motion to compel [Dkt. 1045] the undercover agents' identities and the Government failed to submit an opposition or objection. Previously unknown and unavailable to defense counsel was the fact

that the Government's sealed *ex parte* submission [Dkt. 1046] was actually a *de facto* opposition to Chow's motion to compel, which subverted and circumvented the adversarial requirements by the use of CIPA protocol.

The agents' identities were erroneously protected under CIPA protocol, without following procedural and adversarial requirements. The Court incorrectly ruled that any FBI employee who may in the future serve as an undercover agent warrants concealing of the identity. A blanket *per se* rule that erodes the defendant's rights in every instance where an agent might work undercover bypasses any inquiry as to what undercover capacity he might serve. There was no balancing of interests as to the defendant's due process rights in relation to security and CIPA concerns. As trial commenced and continues, the identities of the agents remain protected under CIPA.

Over defense's objection, defense counsel was never allowed to properly or adequately investigate the USA's witnesses despite evidence of misconduct before the Court. Defense counsel was deprived of the ability to

run a simple background check which would be conducted on any witness as a standard procedure, and which is frequently helpful in shaping an effective cross examination.

There was no legal basis supporting the filing of the Government's motion *ex parte*, *in camera*, and under seal, under CIPA, greatly prejudicing Raymond Kwok Cheung Chow in violation of his Sixth Amendment rights. CIPA calls for advanced planning and conferences to avoid exactly what happened here. Moreover, CIPA safeguards, intended to protect classified information, while not compromising defendant's right to a fair trial, were altogether ignored by the Government and the court.

B. CIPA IS NOT APPLICABLE TO THE PRESENT MATTER
AND THE ERRONEOUS APPLICATION VIOLATES
DEFENDANT'S DUE PROCESS RIGHTS

In the present matter CIPA is not applicable, and rather the Government relied on CIPA "to create an impermeable *ex parte* system of justice that distorts the roles of the courts, eliminates effective advocacy by defense counsel, and ultimately threatens the very

integrity of the adversary process." The Wayne Law Review; Dratel, Joshua; pg. 1041; Vol 53: 1041; 2007, accessed 9/28/2015.

CIPA protects classified information that is material and requires protection against disclosure that would cause serious damage to the national security - national defense and foreign relations - of the United States.

Defendant submits that there is no such security risk, and objects to characterizing the protective order as "classified information." Defense further rejects the contention that this is a matter of "national security."

The Court has wide latitude in this area, and in the following instances, district courts have issued protective orders that divulge specific classified information to defendants (who lack security clearance) in the interests of justice and a fair trial: United States v. Padilla, No. 04-6001-CR. (S.D. Fla. July 5, 2006); United States v. Sadequee, No. 1:06-CR-14-CC (N.D. Ga.); United States v. Rezaq, 156 F.R.D. 514, 524

(D.D.C. 1994) (denying defendant access to classified material but providing material to the extent the defendant himself does need to know the information for his defense). The Wayne Law Review; Dratel, Joshua; pg. 1045; Vol 53: 1041; 2007, accessed 9/28/2015.

Critically, even with traditional cases that raise CIPA concerns, involving terrorism and espionage, courts nevertheless were inclined to divulge classified information to defendants.

This is not a case of terrorism; this is not a case of espionage; and this is not a case where the national defense and foreign relations of the United States are at risk. Furthermore, all parties have been aware that defendants allege FBI misconduct as a primary tenant of the defense.

The Government and the Court have conveniently ignored the purpose, premise and requirements of CIPA. As set forth in United States v. Demeisi, 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," and

Raymond Kwok Cheung Chow must not "stand in a worse position, because of the fact that classified information is involved, than he would without the Act." 424 F.3d 566 (7th Cir. 2005); United States v. Lopez-Lima, 738 F. Supp. 1404 1407 (S.D. Fla. 1990); United States v. North, 698 F. Supp. 316, 320 (D.D.C. 1988); *see also* S. Rep. No. 96-823, at 9; reprinted in 1980 U.S. Code Cong. & Ad. News 42941 126 Cong. Rec. 26504 (1980) (Rep. Edwards notes that the House version of CIPA "is primarily a procedural bill," which "does not attempt to alter substantive rights or to change the rules of evidence or criminal procedure.").

C. THE GOVERNMENT AND THE COURT IGNORED PROPER PROCEDURAL AND ADVERSARIAL CIPA REQUIREMENTS

Application of CIPA protocol requires the participation of a defense attorney with security clearance who is capable of participating in discussions and *in camera* review of CIPA material, because the Government cannot shield the classified discovery as well as the legal arguments that it makes in support of keeping such material from the defense.

United States v. Libby, 429 F. Supp. 2d 18 (D.D.C. 2006). After such clearance is granted, the CSO must take necessary steps to ensure that a U.S. Government-accredited facility housing Sensitive Compartmented Information (SCI), is available for defense use and is equipped with any necessary safes, computers, and other secure equipment.

Defendant disputes that the Government's CIPA concern has any legal basis at all; however, the Defendant was not provided with the opportunity to appoint an attorney with proper security clearance to participate and review the CIPA material, during the *in camera* review of "classified information." Nor was the Defendant provided with a secure facility to review SCI or other secure equipment. Such safeguards, enacted to protect Mr. Chow's due process rights, were completely and erroneously ignored. To be perfectly clear, the Defendant was deprived of any knowledge that CIPA was being used as a basis to prevent disclosure of identities.

II.

THERE IS NO LAWFUL JUSTIFICATION TO
WITHHOLD THE TRUE IDENTITY OF UCE 4599
BECAUSE HE IS NOT UNDERCOVER AND
ADMITTED ON THE RECORD THAT HE PREFER
TO NOT BE UNDERCOVER

Presumed Innocence is a fleeting concept in America, as illustrated in this prosecution where the District Court has given deference to the interests of the Government and undercover agents at all times in contrast to any weight given to the defendant's rights. However, when the Government chooses to prosecute, it puts the credibility of its agents at issue and a defendant who is presumed innocent should be able to, at the very least, know the identity of the accuser. Anything less makes the American court system a dog and pony show and not a laboratory of justice.

As the United States Supreme Court has stated:

[W]hen the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness *who he is* and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is

effectively to emasculate the right of cross-examination itself.

Smith v. Illinois, 390 U.S. 129, 131 (1968)
(emphasis added).

In Smith, the Supreme Court reversed the narcotics conviction of the defendant because the trial judge permitted the prosecution to withhold the true identity of its principal witness, an informant. In addition to the right to cross-examine adverse witnesses emphasized in Smith, the use of anonymous testimony offends three other constitutional guarantees: the right to present a defense;² the right to a public trial;³ and the right to

² The United States Constitution guarantees criminal defendants a meaningful opportunity to present a defense. Crane v. Kentucky, 476 U.S. 683, 690 (1986). Accordingly, the Supreme Court has long held that criminal defendants have, at a minimum, "the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987).

³ The Sixth Amendment right to a public trial serves to discourage perjury and ensure that judges, lawyers, and witnesses carry out their respective functions responsibly. Waller v. Georgia, 467 U.S. 39, 46 (1984). See also Lee v. Illinois, 476 U.S. 530, 540 (1986) ("[T]he Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial.")

disclosure of all exculpatory evidence in the government's possession, including information impeaching the credibility of a key government witness.⁴

"Under almost all circumstances, the true name of the witness must be disclosed." United States v. Palermo, 410 F.2d 468, 472 (7th Cir. 1969). In those exceptional cases where the use of aliases has been permitted, the testimony of the anonymous witnesses was not key to the government's case, and thus their credibility or lack thereof was not a crucial issue at trial.

Here, "David Jordan" is the bedrock of the prosecution's case. The jury's verdicts are likely to turn on whether jurors find "Dave Jordan" credible. The defense thus must be assured its Constitutional right to fully pursue the "countless avenues of in-

⁴ Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence that may be used for impeachment also falls within the Brady rule. United States v. Giglio, 405 U.S. 150, 154 (1972); see also United States v. Bagley, 473 U.S. 667, 676 (1985) (Evidence favorable to the accused is any evidence that - if disclosed and used properly - may make the difference between conviction and acquittal.")

court examination and out-of-court investigation" that will be opened by obtaining "Dave Jordan"'s true identity for pretrial investigation and use at trial. Smith, 390 U.S. at 131.

Permitting a principal prosecution witnesses to testify anonymously, violates a defendant's right to confront the witnesses against him. Id. The Smith Court quoted Alford v. United States, 282 U.S. 687, 688-689 (1931):

It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . .* The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but, on its face...was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. . . .

390 U.S. at 132 (emphasis added)

To permit a key witness to testify without disclosing his true identity requires a defendant to

"rely exclusively on the Government for information about [the witness]. . . It also leaves the Defense with no way of testing the veracity or completeness of the Government's disclosures.⁵ This complete reliance on the prosecution is, in our view, inimical to our adversary process and to the checks on government prosecution embedded in our constitutional framework." United States v. Fuentes, 988 F. Supp. 861, 865 (E.D. Pa. 1997).

Despite this firmly established law, the Government has insisted anonymity of FBI agents "Jimmy Chen" and "Dave Jordan" is necessary because the agents are currently involved in undercover operations.

During oral argument on the issue of whether and

⁵ Indeed the cross examination of UCE 4599 led to the admission by him that he was no longer undercover and aspired to be in a non-undercover capacity while employed by the FBI. The Court should take note that on direct the government artfully skipped over 4599's current position at the FBI in an effort to keep the truth from the Court, the defense, and the public. If whether 4599 was undercover or not were curtailed as a permissible topic then the truth would not have come to light. The same anticipated effect can be extended to cross examination on the agents identity and background as a means of testing government disclosures in this case, which have been less than forthright.

how to protect the FBI agents' identities, heard on Friday, November 13, 2015, the Court justified closing the courtroom to the public based on representations made by the United States Attorneys' Office that they were "engaged in ongoing undercover operations" and if their identity was made known, it would "destroy their effectiveness as an undercover agent." Transcript of Proceedings Nov. 13, 2015 at 1091, 13-25.

Despite the Government's representation that the agents were presently working in an undercover capacity; on Monday, November 23, 2015, during cross-examination of the primary undercover agent, "David Jordan," the witness stated he was not currently involved in an undercover operation.

Q: You're not undercover now?

A: No.

Transcript of Proceedings, Nov. 23, 2015 at 1720, 1-2.

"David Jordan's" statement directly contradicts the representation made to the Court by Assistant U.S. Attorney Hasib on November 13, 2015. Those misstatements were relied upon by the Court in its

decision to maintain the anonymity of the UCEs. Defendant submits that the true identity of "Dave Jordan," as well as the identity of "Jimmy Chen," and all discovery related to their undercover status must be immediately disclosed.

III.

THE TRUE IDENTITY OF UCE 4773 MUST BE REVEALED

There has been a long-standing controversy in this case surrounding UCE 4773, "Michael Anthony King." The prosecution went through great lengths to not disclose to any attorney on this case the nature of the financial misconduct investigation which led to 4773's removal from this operation midway through. Despite a multi-year investigation which was not completed and despite the fact that this investigation was footnoted but apparently ignored in wiretap applications, 4773 is no longer with the FBI for reasons which are also undisclosed. The Government shifted the language surrounding 4773's misconduct to a "program review" and this Court eventually saw it the Government's way: that

the misconduct need not be released to defense counsel. Agent 4773 planned and coordinated with "Dave Jordan" in attempts to induce Chow into criminal conduct and 4773 had a significant role in socializing with Chow in concert with "Dave Jordan." Potentially more troublesome is that 4773 may have been attempting to solicit investors for Chow's book outside of the purview of the FBI operation itself.

In light of the erroneous application of CIPA and the fact that "Dave Jordan" is not presently involved in any undercover operation, there is no further justification to withhold the agents' identities.

If this Court does not issue an order mandating the Government to reveal the true identities of the agents, Defendant alternatively requests this Court to compel the Government to produce materials probative of the agents' character for truthfulness, and any crimes or incidents of moral turpitude, with both agents' identifying information redacted.

At this time, in order to effectively cross-examine the undercover agents, Defendant needs material

relating to any civil suits filed against the witness, any court martial proceedings against him, any evidence of credit card default, police reports filed against him, any evidence that the witness has lied to gain entry into the military or FBI, and any material showing whether the witness cheated on any examination once admitted into the FBI. Furthermore, Defendant needs any and all information regarding all psychiatric records, including any records of hospitalizations due to drug use.

The defense urges this Court to affirm that CIPA procedures were not adhered to, and mandate the District Court to require revelation and disclosure.

Moreover, defendant urges this Court proceed with haste, as trial is a month away from completion, there is evidence on ongoing misconduct in this case, and defendant will be greatly prejudiced and deprived of his due process rights if this Court does not hear this matter.

CONCLUSION

The day has come when the accused has to file appellate motions to ascertain the identity of his accuser while he stares down a *de facto* life sentence. The day has come when a person can aspire to be a well-paid undercover agent for the FBI whose purpose is to find incriminating evidence for prosecution, and that same agent can then invoke his undercover status to shield his identity from the very person he accuses. It is ludicrous to carve out this segment of the population and make their identities off-limits to criminal defendants when it is their entire purpose to create criminal defendants.

This is reminiscent of the era of the Declaration of Independence. America has drifted far from the ideals that have founded this country. Blood is on the hands of bureaucrats and administrators who cling to bite-sized pieces of the law to justify the end game; in this case, denial of a substantial right. The criminal system must adhere to a notion, deeply rooted in the common law, that "justice must satisfy the

appearance of justice.” (Citations omitted) Levine v. United States, 362 U.S. 610, 616 (1960).

Shielding the undercover agents’ identities defeats any presumption of justice, openness, and transparency. Defendant asserts that the Sixth Amendment protections must be extended to discovery in this case where the Government is using CIPA to shield the witnesses and restrict his ability to adequately cross-examine said witnesses.

Mr. Chow asserts that the Government’s actions vitiate his Sixth Amendment guarantees, and therefore urges this Court to mandate the United States District Court to order the revelation of the agents’ true identities and disclose all relevant discovery.

Dated: December 28, 2015

Respectfully submitted,

J. TONY SERRA
CURTIS L. BRIGGS
TYLER SMITH
Attorneys for Defendant
KWOK CHEUNG CHOW

By J. TONY SERRA

/S/J. TONY SERRA

DECLARATION

I, J. TONY SERRA, declare:

1. I am an attorney licensed to practice in the State of California, and counsel of record for defendant KWOK CHEUNG CHOW herein.

2. The statements in the accompanying **PETITION FOR WRIT OF MANDAMUS AND MOTION FOR REVELATION AND DISCLOSURE OF THE UNDERCOVER AGENTS' TRUE IDENTITIES** are true and correct to the best of my knowledge, based on my information and belief

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of December, 2015, at San Francisco, California.

/s/ J. TONY SERRA
J. TONY SERRA

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(5)(B), I certify that the Brief of Defendant is proportionately spaced, has a typeface of 14 points or more, and contains 5,696 words.

Dated: December 28, 2015

/s/J. TONY SERRA
J. TONY SERRA

