No._____

In The

Supreme Court of the United States

DELOWAR MOHAMMED HOSSAIN, APPLICANT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a Fifth Amendment Due Process, or a Sixth Amendment effective assistance of counsel, claim arises when security-cleared defense counsel are not given access to classified information directly relevant to an issue being raised on appeal?

DIRECTLY RELATED PROCEEDINGS

This petition is directly related to the following:

- United States v. Hossain, Docket No. 19 Cr. 606 (SHS), U.S. District Court for the Southern District of New York. Judgment entered March 18, 2022.
- United States v. Hossain, Docket No. 19 Cr. 606 (SHS), U.S. District Court for the Southern District of New York. Opinion and Order entered April 19, 2023.
- United States v. Hossain, Docket No. 22-618-cr. U.S. Court of Appeals for the Second Circuit. Opinion entered September 17, 2024.
- United States v. Hossain, Docket No. 22-618-cr. U.S. Court of Appeals for the Second Circuit. Order entered January 13, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Delowar Mohammed Hossain respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit in United States v. Hossain, Slip Op., 22-618-cr (2d Cir. September 17, 2024), is available in an unpublished opinion at 2024 WL 4212321 (2d Cir. September 17, 2024), and at Pet.App.1; the decision denying Petitioner's motion for rehearing is available in an unpublished order, dated, January 13, 2025, at Pet.App.14; and the opinion of the United States District Court for the Southern District of New York denying the relief requested is available in an unpublished order at 2023 WL 3001464 (SDNY April 19, 2023), and at Pet.App.23.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 2024, and an order denying Petitioner's motion for rehearing and/or rehearing *en banc* was denied on January 13, 2025. This petition is untimely, however, a motion to extend the statutory time limitation by 15 days has been filed and is pending with this Court. This Court has jurisdiction to review the judgment below on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall be … deprived of life, liberty, or property, without due process of law[.]

The Effective Assistance Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right … to have Assistance of Counsel for his defense.

Title 18, United States Code, App. 3 § 4 (Discovery of classified information by defendants):

> The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, 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. The 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. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Title 18, United States Code, App. 3 § 6(b)(1) (Procedure for cases involving classified information):

> Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that

> information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such forms as the court may approve, rather than by identification of the specific information of concern to the United States.

STATEMENT

This case presents an issue that is unique to cases subject to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, but nonetheless addresses a clear and straightforward question of federal criminal law. Moreover, while not all cases are subject to CIPA, the number of those cases are increasing daily due to the Government's expanding use of classified intelligence in the early stages of many investigations; an investigative tactic that is not geographically limited. *See, e.g., F.B.I. Violated Surveillance Program Rules After George Floyd Protests and Jan. 6 Attack*, N.Y. Times, May 19, 2023 (discussing instances where surveillance programs designed to protect against international terrorist activity have been unlawfully utilized by the FBI to investigate United States citizens conducting protests, demonstrations, and general crimes unrelated to terrorism) (available at https://www.nytimes.com/2023/05/19/us/politics/fbi-violated-surveillance-program-rules.html).[1] As a result, this case presents an issue of exceptional importance that would be beneficial to all jurisdictions to resolve.

[1] Notably, notwithstanding the requirements of the Foreign Intelligence Surveillance Act ("FISA") and the FISA Amendments Act ("FAA"), both further discussed herein, in none of the cases discussed in the NY Times article was notice given to the defendants of the use of such classified information, and as such defense

At base, the question before this Court is whether appellate counsel, when advancing an appeal challenging the underlying investigative tactics that were relied upon by the prosecution, have a "need to know" whether specifically requested classified information was relied upon as part of the Government's investigation such that knowing of the existence of such information or investigative techniques, impacts whether or how appellate counsel advances the issue on appeal. *See* Executive Order 13526 § 4.1(a)(3) ("A person may have access to classified information provided that … the person has a need-to-know the information.").

In this case, between the spring of 2018 and July 26, 2019, Petitioner engaged in discussions – in person, by telephone, and by text message – with individuals he knew as "Sahil" and "Aboubakr" (confidential sources employed by the Government) during which he professed to be making plans to travel to Afghanistan to join the Taliban and engage in jihad. Hossain spoke of evading law enforcement apprehension by traveling through a third country. He directed Sahil and Aboubakr to engage in behaviors that the Muslim religion forbids, such as drinking alcohol, so that they would appear to be typical American young men planning an extended vacation rather than jihadists. He was not in contact with anyone from the Taliban to plan his trip.

Petitioner's ideas were not based on knowledge about what other would-be Taliban fighters had done. They were products of his imagination and his mistaken

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counsel in those cases were all deprived of the ability to challenge the unlawful use of classified warrantless surveillance apparently relied upon by the Government in each of their cases.

understanding of the amount of information that law enforcement could glean from his phone data.

Prior to trial and in preparation for his direct appeal, Petitioner challenged the denial of his motion to compel the production of certain classified material, some of which may have been obtained under Section 702 of the FISA Amendments Act ("FAA"), 50 U.S.C. § 1881a. "During pretrial proceedings, the government moved *ex parte* and *in camera* for a protective order authorizing it to withhold certain classified material from discovery pursuant to § 4 of the Classified Information Procedures Act ('CIPA')." Pet.App.9, *citing*, 18 U.S.C. App. 3 § 4. The District Court granted the motion and denied Petitioner's later motions for discovery related to classified electronic surveillance, including notice of which surveillance statute was even at issue.

On appeal, the Panel likewise declined to reveal what information had been disclosed pursuant to CIPA, nor whether notice of electronic surveillance should have been provided, thereby leaving appellate counsel in a position where counsel could only hope that the court, when conducting an *in camera* review of the classified material in this case, searched the material with an understanding of ***all*** non-frivolous issues that counsel might have been able to raise had counsel been granted access to the information in question. Placing appellate counsel in this position goes against common notions of Due Process, fundamental fairness, and the right to effective assistance of counsel. It likewise runs contrary to the benefits granted by

receiving the appointment of counsel who possesses the requisite level of security clearance needed to view the classified information at the heart of Petitioner's appeal.

Justice Gorsuch recently noted, "Efforts to inject secret evidence into judicial proceedings present obvious constitution concerns." *Tiktok Inc. v. Garland*, 145 S.Ct. 57, 74 (2025) (Gorsuch, J., concurrence). These concerns are front and center in the present case. "Usually, 'the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.' Maybe there is a way to handle classified evidence that would afford a similar opportunity in cases like these." *Id., quoting, Greene v. McElroy*, 360 U.S. 474, 496 (1959). For these reasons, Petitioner seeks certiorari so that this Court may address this issue head on.

REASONS FOR GRANTING THE PETITION

The proceeding involved a question of exceptional importance: Whether it is a violation of a criminal defendant's rights to Due Process and effective assistance of counsel to deprive security-cleared defense counsel with access to classified information directly relevant to the issues being raised on appeal?

Without question, *ex parte* proceedings and *in camera* review are authorized under Section 4 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 4, *see* Exhibit A at 11 n.4, *citing*, *United States v. Muhanad Mahmoud Al-Farekh*, 956 F.3d 99, 107 (2d Cir. 2020), however, being authorized to do something does not mean that the defendant's constitutional interests are best served by doing so, nor that courts are prohibited from sharing classified information with security-cleared counsel in order to ensure that the defendant's Fifth Amendment right to Due Process

and Sixth Amendment right to effective assistance of counsel are ensured. Indeed, that is why the FISA and CIPA include sections that specifically authorize disclosure of classified information to defense counsel "under appropriate security procedures and protective orders," either because "such disclosure is necessary to make an accurate determination of the legality of the surveillance[,]" 50 U.S.C. § 1806(f), or "to the extent that due process requires discovery or disclosure." 50 U.S.C. § 1806(g); *see also* 18 U.S.C. App. 3 §§ 4, 6(b)(1).

Judge Learned Hand noted long ago, "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens." *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950). As such, *ex parte* proceedings are exceedingly disfavored. The Sixth Circuit cautioned, "Democracies die behind closed doors," *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002), and the Ninth Circuit observed, "[E]x parte proceedings are anathema in our system of justice," *Guenther v. Commissioner of Internal Revenue*, 889 F.2d 882, 884 (9th Cir. 1989).

In enacting CIPA, Congress warned that "the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without the Act." S.Rep.No. 96-823 at 9 (1980); *see also*, *e.g.*, *United States v. Poindexter*, 698 F.Supp. 316, 320 (D.D.C. 1988). As a result, in cases involving classified information, to balance the need for secrecy with the defendant's right to Due Process, Congress enacted CIPA with the express purpose of protecting sensitive national security information while at the same time not impeding a defendant's

rights. *See United States v. Stewart*, 590 F.3d 93, 130 (2d Cir. 2009); *see also American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) (noting "enormous risk of error" in use of classified evidence and explaining "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."), *quoting*, *INS v Chadha*, 462 U.S. 919, 944 (1983). To that end, courts have held that the Government's privilege under CIPA "must give way" when classified information is "relevant and helpful" to the defense. *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008).

Here, the Government acknowledged that defense counsel – at least one at trial and one on appeal – possessed the requisite security clearance necessary to review the information in question, but disputed that counsel possessed a "need to know" such information. *See* Executive Order 13526 § 4.1(a)(3). But the record is clear that Petitioner's counsel did, indeed, have such a "need to know," given the existence of classified investigative techniques that appear to have directly or indirectly led to Petitioner's arrest as well as the primary evidence relied upon the Government against him at trial. Had counsel been afforded notice, counsel could have adequately challenged those techniques pretrial, during trial, and thereafter on appeal – none of which could be effectively done absent knowledge of which techniques or programs were at issue.

As expressly provided by CIPA, the fact that discoverable information may be classified does not relieve the Government of its obligation to disclose the material to

the defendant. *See United States v. Poindexter*, 725 F.Supp. 13, 32 (D.D.C. 1989) ("[T]he protection of the rights of the defendant is paramount under the statutory scheme."). CIPA is intended as a procedural tool that does not itself modify the defendant's substantive rights or the Government's discovery obligations, *see United States v. El-Hanafi*, No. S5 10 CR 162 KMW, 2012 WL 603649, at *2 (SDNY Feb. 24, 2012), and a wealth of caselaw and the Justice Department's own policy acknowledge that in a case involving classified information the Government's discovery obligations often implicate classified information in possession of the broader United States Intelligence Community ("IC") and thus directs prosecutors to conduct a prudential search for such information that is relevant and helpful to the defense. *See* Justice Manual § 2052 (available at https://www.justice.gov/archives/jm/criminal-resource-manual-2052-contacts-intelligence-community-regarding-criminal-investigations).[2]

Based upon the public record, Petitioner cannot be assured that such occurred here. To the contrary, it appears as if the Government attempted to avoid, and may have in fact avoided, Petitioner's most basic protections. For example, the Government was provided with repeated opportunities to provide notice of its use of warrantless Section 702 surveillance under 50 U.S.C. § 1881a – ***or disclaim its use in this case*** – yet steadfastly refused to state whether Section 702 surveillance had been relied upon here. Given the mandatory notice requirements of 50 U.S.C. §

[2] The United States Intelligence Community is comprised of 18 organized agencies that each focus on a different aspect of a common mission. *See* Office of the Director of National Intelligence, "How the IC Works" (available at https://www.intelligence.gov/how-the-ic-works).

1806(c) and 18 U.S.C. § 3504(a)(1), the Government's silence speaks volumes and rings every alarm bell around. *See* 50 U.S.C. § 1806(c) ("Whenever the Government intends to enter into evidence or otherwise use … in any trial, hearing, or other proceeding … ***any information*** obtained ***or derived from*** an electronic surveillance of that aggrieved person pursuant to [FISA or the FISA Amendments Ac], the Government ***shall***, prior to trial, hearing, or other proceeding … notify the aggrieved person…") (emphasis added); *see also* 18 U.S.C. § 3504(a)(1) ("[U]pon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, ***the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act***[.]") (emphasis added).

As the dissent in *United States v. Muhtorov*, 20 F.4th 558, 674 (10th Cir. 2021) (Lucero, J., dissenting), recognized, "Our Fourth Amendment analysis must begin with an acknowledgment that CIPA procedures fundamentally alter the structures of our adversarial process and place courts in a position as uncomfortable as it is unique."

In the CIPA context,

> Congress has mandated that we step out of our traditional role as neutral arbiters overseeing adversarial presentation of issues and step into a role much closer to that of an inquisitor. As explicitly acknowledged by the government, a district court's role in cases involving CIPA is to act as "standby counsel for the defendants." Similarly, on appeal "we must place ourselves in the shoes of defense counsel, the very ones that cannot see the classified record, and act with a view to their interests."

Muhtorov, 20 F.4th at 674, *citing*, *United States v. Amawi*, 695 F.3d 457, 471 (6th Cir. 2012). Nevertheless, as the dissent in *Muhtorov* conceded, "The judiciary is neither institutionally suited nor resourced to fulfill this role." *Id*. (footnote omitted).

Given that Petitioner has at all stages had counsel with the requisite security clearance to review the material in question, and at the same time the Government never denied reliance on Section 702 or other similar surveillance programs in this case, there should be no question that counsel has a "need to know" whether the Government had complied with its notice requirements. Petitioner respectfully submits that security-cleared defense counsel in this case and in others like it, should be, or should have been, provided with, at the very least, the basic notice requirements of 50 U.S.C. § 1806(c) and 18 U.S.C. § 3504(a)(1). Doing so puts counsel in the position to ascertain whether the correct objections were made in District Court and ensures that the correct issues are raised on appeal, thereby ensuring Petitioner's (and similarly situated defendants') rights to Due Process and effective assistance of counsel.

Declining to put Petitioner, or any other similarly situated defendant, in the same position he would have been without the involvement of classified information, runs contrary to CIPA, other statutes, and the Constitution. Sadly, this happens all too often and is not confined simply to this one case. The importance of this issue to so many criminal cases – those charged not merely with national security offenses but general crimes as well – warrants this Court's review.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
April 23, 2025

Respectfully submitted,

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22-618-cr
United States v. Hossain

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of September, two thousand twenty-four.

Present:

DENNIS JACOBS,
EUNICE C. LEE,
SARAH A. L. MERRIAM,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 22-618-cr

DELOWAR MOHAMMED HOSSAIN,

Defendant-Appellant.

For Defendant-Appellant: DONNA R. NEWMAN, Law Offices of Donna R. Newman, P.A.; MICHAEL K. BACHRACH, Law Office of Michael K. Bachrach, New York, NY.

For Appellee: KAYLAN E. LASKY (Stephen J. Ritchin, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a March 17, 2022 judgment of the United States District Court for the Southern District of New York (Stein, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Defendant-Appellant Delowar Mohammed Hossain appeals from a judgment of the United States District Court for the Southern District of New York convicting him, following a jury trial, of one count of attempting to provide material support and resources for terrorism in violation of 18 U.S.C. § 2339A, and one count of attempting to contribute funds, good, or services to the Taliban in violation of 50 U.S.C. § 1705(a).

We assume the parties' familiarity with the facts, the record of prior proceedings, and the issues on appeal, which we reference only as necessary to explain our decision to affirm.

I. Expert Testimony

Hossain challenges the district court's decision to allow Dr. Tricia Bacon to testify as an expert witness for the government regarding the Taliban's "playbook" to recruit foreign fighters, the history and ideology of the Taliban, and the meaning of certain Arabic words and phrases offered in the government's direct case against Hossain at trial. Hossain argues that the district court abused its discretion in admitting Bacon's testimony because it was irrelevant or, alternatively, was more prejudicial than probative and should have been excluded under Federal Rule of Evidence 403.

The admission of expert testimony is governed by Federal Rule of Evidence 702, which permits expert witness evidence if it "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Federal Rule of Evidence 403 further instructs that the district court, *inter alia*, "may exclude relevant evidence if its probative value is substantially outweighed

by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." Fed. R. Evid. 403.

"We review the district court's decision to admit or exclude expert testimony for an abuse of discretion." *United States v. Cruz*, 363 F.3d 187, 192 (2d Cir. 2004) (quoting *Fashion Boutique of Short Hills v. Fendi USA*, 314 F.3d 48, 59–60 (2d Cir. 2002)). "When we are confronted with a Rule 403 issue, so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Al-Moayad*, 545 F.3d 139, 159–60 (2d Cir. 2008) (internal quotation marks omitted). Otherwise, "[a] district court's determination with respect to the admission of expert testimony is not an abuse of discretion unless it is manifestly erroneous." *Cruz*, 363 F.3d at 192 (internal quotation marks omitted).

Hossain argues that the expert testimony was cumulative and irrelevant because the parties stipulated, and the district court took judicial notice, that the Taliban is a specially designated global terrorist organization, and Hossain did not actually have any engagement with any Taliban members. Hossain also

contends that, in large part, Bacon's testimony was not a matter of specialized knowledge, making her expert instruction unnecessary.

Here, the district court "conscientiously balanced the proffered evidence's probative value with the risk for prejudice." *Al-Moayad*, 545 F.3d at 159. After oral argument on the pretrial motions *in limine*, the district court permitted Bacon to testify as the government's expert witness. The district court explained that "her testimony is going to help the trier of fact—that is, the jury—understand the evidence." App'x at 49. The district court specifically determined that the testimony "has probative value that's not outweighed by wasting time or confusing the jury or distracting the jury." *Id.* As to the issue of prejudice, the district court emphasized that Bacon did not know the facts of Hossain's case; explained that the government should not belabor her testimony or solicit opinion testimony; and noted that to the extent the defense had issues with her qualifications, counsel should address it during cross-examination. In light of the court's considered explanation for its decision, we cannot say it was arbitrary, irrational, or manifestly erroneous. *See, e.g.*, *United States v. Farhane*, 634 F.3d 127, 159 (2d Cir. 2011) (approving "the use of expert testimony to provide juries with

background on criminal organizations," such as "terrorist organizations, including al Qaeda").

Accordingly, we affirm the admission of testimony by the government's expert witness.

II. Summation

Hossain next challenges the government's reliance on the same expert testimony in its summation, arguing that the government improperly used the testimony to argue that Hossain took a substantial step towards the commission of the crimes—a necessary component of the attempt offenses—notwithstanding the absence of other evidence to directly support its theory of the case. *See Farhane*, 634 F.3d at 145 ("A conviction for attempt requires proof that a defendant (a) had the intent to commit the object crime and (b) engaged in conduct amounting to a substantial step towards its commission.").

A defendant who seeks to overturn a conviction based on a prosecutor's comment in summation bears the "heavy burden" of showing that "the comment, when viewed against the entire argument to the jury, and in the context of the entire trial, was so severe and significant as to have substantially prejudiced him, depriving him of a fair trial." *Id.* at 167 (internal quotation marks omitted).

However, where no contemporaneous objection to the summation is raised, as in this case, we review for plain error. *See United States v. Williams*, 690 F.3d 70, 77 (2d Cir. 2012). "And under plain error review, [Hossain] must demonstrate not only that there was an error that is clear or obvious, but also that the error affected [his] substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and . . . the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (emphasis and internal quotation marks omitted).

According to Hossain, the government improperly used Bacon's testimony to argue that Hossain's actions fit a pattern of conduct that is typical of foreign fighters seeking to join the Taliban, from which his intent and substantial steps could be extrapolated to support the government's burden of proof. He argues that even if expert testimony is admissible under Rule 702, the government is not permitted to corroborate the testimony of a fact witness by pointing to parallels between the fact witness's testimony regarding the defendant's conduct and the expert's description of the usual practices of others involved in the same conduct. The government argues that it was permitted to introduce expert testimony in summation to rebut Hossain's defense that he lacked the requisite criminal intent.

"It is important to distinguish the legitimate use of an expert to explicate an organization's structure from the illegitimate and impermissible substitution of expert opinion for factual evidence." *United States v. Zhong*, 26 F.4th 536, 556 (2d Cir. 2022) (alterations and internal quotation marks omitted).

Here, Bacon's testimony was not used to corroborate anyone's testimony, nor was it designed to mirror any witness's version of events. The government did refer frequently to Bacon's testimony in its closing, but Bacon's testimony did not itself refer to any witnesses or to Hossain, Bacon was never presented with information on Hossain's case or actions, and she was not asked to render an opinion as to whether Hossain engaged in any specific illegal conduct.

The threshold for reversal on appellate review is high, and it is even higher here, given that defense counsel failed to object during the government's summation or rebuttal. On this record, we see no clear or obvious error affecting Hossain's substantial rights or the fairness, integrity or public reputation of judicial proceedings. We therefore conclude that the district court did not commit plain error in permitting the government to reference Bacon's expert testimony in summation.

III. Classified Information[1]

Last, Hossain challenges the district court's denial of his motion to compel the production of certain classified information, some of which may have been obtained under the Foreign Intelligence Surveillance Act ("FISA"), specifically FISA Amendments Act Section 702. *See* 50 U.S.C. § 1881a, *et seq.*; *see generally United States v. Hasbajrami*, 945 F.3d 641, 649–58 (2d Cir. 2019) (detailing the Section 702 surveillance apparatus).

During pretrial proceedings, the government moved *ex parte* and *in camera* for a protective order authorizing it to withhold certain classified material from discovery pursuant to § 4 of the Classified Information Procedures Act ("CIPA"), *see* 18 U.S.C. app. 3 § 4.[2] The district court granted that motion after finding, *inter alia*, that the government submission described classified information that required protection, the classified information was not discoverable under *Brady*

[1] The government sent an Assistant United States Attorney to oral argument before this Court who did not work on the classified elements of this case and who could not make representations as to this issue. Whatever the reason for this decision, we note at the outset that it impairs the judiciary's ability to do its job efficiently. Given the classified information issue was a significant question on appeal, it was not ideal for the government to send a representative not familiar with the issue.

[2] Section 4 of CIPA sets out procedures for a district court to deny or restrict discovery of classified information for good cause. *See, e.g.*, *United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008).

v. Maryland, 373 U.S. 83 (1963), or its progeny, and the classified information was not helpful to the defense. Later, Hossain moved to compel discovery related to classified electronic surveillance. The district court denied that motion.

Several months later, Hossain renewed his motion to compel and sought an *ex parte* conference with the court pursuant to CIPA § 2[3] to explain his defense theory. After separate *ex parte* § 2 hearings with the government and with defense counsel, the district court denied Hossain's renewed motion to compel.

Hossain argues that the district court erred in denying his motions because the government failed to represent that the information to be used against Hossain *was not obtained* through FISA-surveillance, but simply represented that *it would not use* FISA-obtained or FISA-derived information directly against Hossain. He notes that this can raise several issues, notably that: (1) if the government relied on FISA Section 702 surveillance, it was required to give notice to the defense so that the defense could move to suppress the fruits of such surveillance; and (2) if the government's universe of FISA-obtained or FISA-derived evidence contained

[3] Section 2 provides that "any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution" of the case. 18 U.S.C. app. 3 § 2.

Brady evidence, it was obligated to turn it over to Hossain if it might be relevant or helpful to his defense.[4]

The government points to the steps the district court took in response to Hossain's concerns, namely, holding a subsequent classification review which led the district court to unseal a classified order explaining its decision and to file a redacted version of the order on the docket. The government argues that the redacted order demonstrates that the district court diligently addressed the classified information at issue. *See* Sept. 24, 2021 Order at 2, attached as Ex. A to Letter Resp., *United States v. Hossain*, No. 19-CR-606 (SHS) (S.D.N.Y. April 18, 2023), ECF No. 208-1 ("The Court therefore finds that the government is not improperly withholding any materials from the defense that are exculpatory, material, or even helpful to the defense.").

[4] Hossain also contends that the district court abused its discretion in prohibiting his security-cleared defense counsel from accessing classified information under CIPA. But "we have held that § 4 of CIPA and Federal Rule of Criminal Procedure 16(d)(1) authorize *ex parte* proceedings and that a district court acts well within its discretion in reviewing CIPA submissions *ex parte* and *in camera*." *United States v. Muhanad Mahmoud Al-Farekh*, 956 F.3d 99, 107 (2d Cir. 2020) (internal quotation marks omitted). Moreover, "a district court's *ex parte*, *in camera* adjudication of CIPA motions falls squarely within the authority granted by Congress." *Id.* The status of defense counsel's security clearance is irrelevant because "[n]othing in the text of § 4 limits the District Court's authority to review classified information *ex parte* only where defense counsel lacks a security clearance." *Id.*

Hossain requests that this Court vacate and remand to the district court for further proceedings, or at a minimum, review the government's *ex parte* filings to determine: (1) whether notice should have been given to the defense pursuant to FISA notice requirements, 50 U.S.C. § 1806(c), § 1881e(a), or otherwise; and (2) whether, even if notice was not strictly required, Hossain's constitutional rights were violated, or whether there was any violation of the FISA Amendments Act, or any other statute. At oral argument, we specifically asked Hossain's counsel for the dates during which he fears the government may have acquired *Brady* material that it subsequently failed to produce. Counsel explained that the defense was looking for any evidence between March and September of 2018 that could demonstrate a lack of intent[5] or support an entrapment defense.

The parties dispute whether the appropriate standard of review is abuse of discretion or a modified, more searching version of that standard, in light of the *ex parte* nature of the proceedings below. But after reviewing the classified material in this case, the panel is satisfied that, under either standard, the district court was correct in its conclusion that there was no evidence in the government's possession

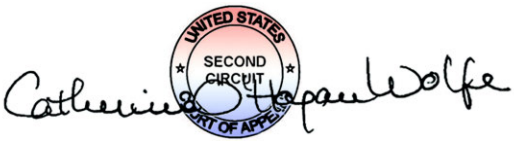
[5] Specifically, Hossain requests review for any statements that he never intended to go through with the alleged scheme, that he did not intend to leave Thailand to go to Afghanistan, or that the tent he acquired was for a hiking purpose.

that was exculpatory, material, relevant to a motion to suppress, or otherwise helpful to the defense.

* * *

We have considered Hossain's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of January, two thousand twenty-five.

Before: DENNIS JACOBS,
EUNICE C. LEE,
SARAH A. L. MERRIAM,

Circuit Judges.

United States of America,

Appellee,

v.

Delowar Mohammed Hossain,

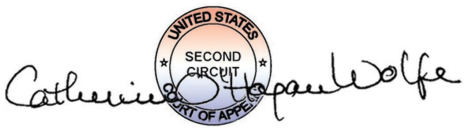
Defendant - Appellant.

ORDER
Docket No. 22-618

Appellant Delowar Mohammed Hossain, having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
DELOWAR MOHAMMED HOSSAIN

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:(S1) 19-Cr-00606-1 (SHS)

USM Number: 87049-054

Andrew Dalack and Amy Gallicchio
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. One and Two in the Superseding Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2339A	Attempted Provision of Material Support and Resources for Terrorism	7/26/2019	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) open counts & underlying indict ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/17/2022
Date of Imposition of Judgment

Signature of Judge

Sidney H. Stein, U.S. District Judge
Name and Title of Judge

March 18, 2022
Date

DEFENDANT: DELOWAR MOHAMMED HOSSAIN
CASE NUMBER: 1:(S1) 19-Cr-00606-1 (SHS)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
50 U.S.C. § 1705(a), 31C.F.R. §§ 594.201, 594.204, 594.205, and 594.310	Attempting to Make or Receive a Contribution of Funds, Goods, and Services to the Taliban	7/26/2019	2

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: DELOWAR MOHAMMED HOSSAIN
CASE NUMBER: 1:(S1) 19-Cr-00606-1 (SHS)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

96 months on Count One and 96 months on Count Two to run concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:

1. That defendant be housed in the tri state area to facilitate visits with his family who live in Manhattan, New York.
2. That defendant be transferred from Essex to the designated facility as soon as possible.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DELOWAR MOHAMMED HOSSAIN
CASE NUMBER: 1:(S1) 19-Cr-00606-1 (SHS)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

three years on each count to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DELOWAR MOHAMMED HOSSAIN
CASE NUMBER: 1:(S1) 19-Cr-00606-1 (SHS)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DELOWAR MOHAMMED HOSSAIN
CASE NUMBER: 1:(S1) 19-Cr-00606-1 (SHS)

SPECIAL CONDITIONS OF SUPERVISION

You shall submit your person, and any property, residence, vehicle, papers, computer, other electronic communication, data storage devices, cloud storage or media, and effects to a search by any United States Probation Officer, and if needed, with the assistance of any law enforcement. The search is to be conducted when there is reasonable suspicion concerning violation of a condition of supervision or unlawful conduct by the person being supervised. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search shall be conducted at a reasonable time and in a reasonable manner.

The defendant is to report to the nearest Probation Office within 72 hours of release from custody.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: DELOWAR MOHAMMED HOSSAIN
CASE NUMBER: 1:(S1) 19-Cr-00606-1 (SHS)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 200.00	$ 0	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: DELOWAR MOHAMMED HOSSAIN
CASE NUMBER: 1:(S1) 19-Cr-00606-1 (SHS)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

DELOWAR MOHAMMED HOSSAIN,

Defendant.

19-cr-606 (SHS)

OPINION & ORDER

SIDNEY H. STEIN, U.S. District Judge.

On October 8, 2021 a jury found defendant Delowar Mohammed Hossain guilty of one count of attempted provision of material support and resources for terrorism and one count of attempting to make or receive a contribution of funds, goods, and services to the Taliban. (ECF No. 190.) Hossain was sentenced to 96 months on each count, to run concurrently, and thereafter filed a timely notice of appeal. (ECF No. 191.) Hossain's appellate counsel has now filed a motion seeking access to the classified version of this Court's Order dated September 15, 2021. (ECF No. 200.)

I. Background

During pre-trial proceedings, the Government moved *ex parte* and *in camera* for a protective order authorizing it to withhold certain classified material from discovery pursuant to Section 4 of the Classified Information Procedures Act ("CIPA") and Federal Rule of Criminal Procedure 16(d)(1). (ECF No. 25.) On June 19, 2020 the Court entered an Order granting that motion after finding that the Government submission described classified information (1) that required protection against unauthorized disclosure; (2) that could reasonably be expected to cause serious damage to national security; (3) over which the head of the department that has control of the classified information invoked the state secrets privilege; and (4) that is not discoverable under *Brady v. Maryland* or its progeny and is not helpful to the defense. (ECF No. 26.)

The defendant then moved to compel discovery related to classified electronic surveillance, which the Government opposed. (ECF Nos. 44 & 45.) The Court subsequently entered an Order denying that motion. (ECF No. 67.) On May 10, 2021 Hossain renewed his motion to compel disclosure of his written or recorded communications with third parties abroad, and sought an *ex parte* conference with the Court to explain his theory of defense, pursuant to Section 2 of CIPA. (ECF No. 108.) Section 2 provides that any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the

prosecution of the case. After a pretrial conference and separate *ex parte* Section 2 hearings with the Government and with defense counsel, on September 15, 2021 the Court issued an Order denying Hossain's renewed motion to compel the Government to disclose additional information. (ECF No. 138.) The Order stated that "[t]he reasons underlying that determination shall be filed in a classified version of this Order." *Id.* That classified version of the September 15, 2021 Order (hereinafter the "Classified Order") was filed under seal with the Classified Information Security Officer on September 24, 2021. (ECF No. 146.)

As set forth above, Hossain's appellate counsel now requests access to the classified version of the September 15 Order for the purpose of ascertaining whether any appealable issues exist relating to the Court's protective order. Defense counsel notes that he has the security clearance required to have access to the Classified Order. In an April 3, 2023 letter to the Court, defense counsel requested that the Court direct that the appropriate authorities conduct a classification review of the Classified Order. (ECF No. 202.) The Government did not oppose that request and the Court directed the Government and the Classified Information Security Officer to conduct an immediate classification review of the Classified Order. (ECF Nos. 203 & 205.) That review has been completed and a redacted, unclassified version of the Classified Order was published on ECF on April 18, 2023. (ECF No. 208.)

II. The Court Does Not Have Jurisdiction to Revisit a Prior Substantive Determination

During the pendency of the appeal from the judgment of conviction, this Court does not have jurisdiction to reverse a prior substantive determination. The notice of appeal, filed on March 23, 2022, "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *see also Berman v. United States*, 302 U.S. 211, 214 (1937). The district court may only "act in aid of the appeal" and cannot "modify a judgment substantively." *United States v. Nichols*, 56 F.3d 403, 411 (2d Cir. 195). *See, e.g., United States v. Viola*, 555 Fed. Appx. 57 (2d Cir. 2014) (finding that a district court's clarification of a restitution order while the case was under appeal did not substantively modify the judgment).

Any request by defense counsel for the classified information underlying the Classified Order would be asking the Court to review its substantive decision to withhold classified information under Section 4 of CIPA. The Court reached that decision after holding hearings pursuant to Section 2 of CIPA, which allowed the defense to argue its theory of the case and explain why it needed access to classified materials.

In his April 3, 2023 letter to the Court, appellate counsel contended that he was not requesting reconsideration of the underlying decision denying trial counsel access to classified information, but was instead only requesting access to the Classified Order explaining why trial counsel was denied such information. (ECF No. 202.) As a result of last week's classification review of the Classified Order, he has now been given access to the Classified Order. However, because the appropriately redacted portions of the Classified Order necessarily addressed the underlying classified information that compelled the Court to reach its decision to withhold certain details under CIPA, defense counsel's distinction is unavailing.

The Court's decision to withhold certain classified information from trial counsel, and to file *ex parte* an Order containing that information, was a substantive determination. It was not a clerical error or minor ambiguity in need of clarification. This Court therefore does not have jurisdiction to reconsider this aspect of the case during the pendency of Hossain's appeal.

III. Defendant's Motion is Without Merit

The purpose of CIPA, which governs the discovery of classified information in federal criminal cases, *see United States v. Abu Jihaad*, 630 F.3d 102, 140-141 (2d Cir. 2010), is to "harmonize a defendant's right to obtain and present exculpatory materials upon his trial and the government's right to protect classified material in the national interest." *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). Pursuant to Section 4 of CIPA, the Court, "upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure." The Federal Rules of Criminal Procedure similarly permit the court to, "for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." Fed. R. Crim. P. 16(d)(1). *See also United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008) (explaining that Section 4 of CIPA "clarifies district courts' power under Federal Rule of Criminal Procedure 16(d)(1) to issue protective orders denying or restricting discovery for good cause.").

Defense counsel urges that *ex parte* proceedings are "exceedingly disfavored" as they "impair the integrity of the adversary process and the criminal justice system." (ECF No. 200, at 2.) However, this presumption against *ex parte* proceedings may give way in cases involving information vital to the national security. Section 4 of CIPA authorizes the court to restrict discovery relating to specified items of classified information, and allows the court to do so after an *ex parte* showing from the Government. The Second Circuit has made clear that Section 4 of CIPA and Federal Rule of Criminal Procedure 16(d)(1) authorize *ex parte* proceedings and that, "notwithstanding the rarity of *ex parte* proceedings in criminal matters, there can be no

question that a district court's *ex parte, in camera* adjudication of CIPA motions falls squarely within the authority granted by Congress." *United States v. Al-Farekh*, 956 F.3d 99, 107 (2d Cir. 2020).

Defense counsel also suggests that "the classified nature of the classified version of this Court's [Order] does not foreclose access to security-cleared appellate counsel." (ECF No. 200, at 2.) He claims that there is "no dispute that [he] possesses the requisite security clearance necessary to view the classified information in question." *Id.* at 3. But merely possessing the requisite security clearance does not warrant automatic access to classified information. In *Al-Farekh*, the Second Circuit declined to hold that defense counsel who has the appropriate security clearance must be given access to classified information, 956 F.3d at 107, finding instead that:

> As a practical matter, because it may well be that the information in a [CIPA] § 4 motion is not discoverable at all, [this] theory would permit a defendant represented by counsel with a security clearance to gain access to classified information that would otherwise be unavailable to the defendant. That possibility could result in the improper disclosure of information that, by its very nature, may put the national security of the United States at risk.

Id. at 108-09.

In this case it is apparently security-cleared appellate counsel, rather than trial counsel, who requests access to the classified information contained in the Classified Order. That fact, however, does not change the analysis. Under Section 4, the district court is required to "decide in the first instance whether the Government's classified information is discoverable and the extent and form of any disclosure to the defendant." *Id.* at 107. Here, the Court found after separate Section 2 *ex parte* hearings that "the Government is not improperly withholding any materials from the defense that are exculpatory, material, or even helpful to the defense." (ECF No. 208; *see also* ECF No. 138.) Because the Court determined that the information was not discoverable at all, Hossain is not entitled to the classified information, regardless of whether his counsel possesses the requisite security clearance.

Finally, Section 4 of CIPA provides that "[i]f the court enters an order granting relief following [the Government's] ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal." The Second Circuit has employed this provision to review district court rulings respecting the discoverable nature of classified materials. *See, e.g., United States v. Abu-Jihaad*, 630 F.3d 102, 142 (2d Cir. 2010). Thus, defendant's appeal rights have been fully protected.

IV. Conclusion

For the reasons set forth above, defense counsel's motion requesting access to the classified version of this Court's September 15, 2021 Order is denied.

Dated: New York, New York
April 19, 2023

SO ORDERED:

Sidney H. Stein, U.S.D.J