

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-20364-CR-UNGARO

UNITED STATES OF AMERICA

vs.

MOHAMED HUSSEIN SAID,

a/k/a “Bill,”

a/k/a “Billph86,”

a/k/a “Mohammed Salem bin Abdisheikh,”

a/k/a “Mohamed Hussein,”

a/k/a “Abdul-Rahman Abdul Rahim,”

a/k/a “Tibyan,”

Defendant.

**GOVERNMENT’S MOTION FOR PROTECTIVE ORDER
PERTAINING TO TESTIMONY OF UNDERCOVER EMPLOYEES AT TRIAL**

I. Introduction

The United States of America hereby files this motion for a protective order authorizing the government to use certain measures to protect the identity and security of two FBI undercover employees who will be witnesses at the trial of this cause. These FBI employees will admit into evidence recordings and transcripts of conversations with Defendant Mohamed Hussein Said and his coconspirator, Gufran Mohammed. As set forth in the Declaration of Michael B. Steinbach, Assistant Director of the FBI’s Counterterrorism Division, attached as Exhibit A, public disclosure of these individuals’ true identities or physical images would jeopardize other undercover investigations and pose a risk of danger to those individuals and their families. Accordingly, to protect these individuals, their true identities, and their physical

images, the government requests certain security measures outlined below consistent with measures used in other national security prosecutions.¹

II. Facts

Defendant Mohamed Hussein Said (Said) was a citizen and resident of Kenya at all times pertinent to this case. He is charged with conspiring and attempting to provide material support and resources to three separately-designated Foreign Terrorist Organizations (FTOs): al-Shabaab, al-Qa'ida, and al-Qa'ida in Iraq/al-Nusrah Front. These are violations of 18 U.S.C. § 2339B(a)(1). Said and Gufran Mohammed (Mohammed), who has since pleaded guilty, were discovered to be supporting al-Shabaab, the al-Qa'ida affiliate in East Africa, with money and recruits. The FBI then used various investigative techniques, including the efforts of two undercover employees (UCEs), to reveal the full extent of their criminal conduct and their willingness to support a third FTO, al-Qa'ida in Iraq/al-Nusrah Front, which is the al-Qa'ida affiliate in Syria. The facts pertaining to the involvement of the two UCEs in this investigation are as follows:

A. **Undercover Employee No. 1 (UCE1)**

UCE1 was an FBI employee posing as a fundraiser, recruiter, and supplier for al-Qa'ida and al-Qa'ida in Iraq/al-Nusrah Front. Mohammed started corresponding with UCE1 on the Internet and sent wire transfers to UCE1 to support those organizations. Mohammed introduced UCE1 to Said so he could join those efforts and Said endeavored to do so. Consensual recordings between UCE1 and both Mohammed and Said confirmed that Mohammed had previously sent Said funds for al-Shabaab and that these efforts were ongoing. These

¹ Contemporaneous with this motion, the government is filing, ex parte and under seal, and pursuant to the Classified Information Procedures Act, 18 U.S.C. App. 3, § 4, a classified motion seeking deletion of the true identities of the UCEs from discovery that otherwise would be provided to the defendant. A separate, classified declaration of Michael B. Steinbach, Assistant Director for Counterterrorism Division at the FBI, accompanies that motion.

conversations further revealed that Mohammed and Said had recruited individuals to fight for al-Shabaab. Said also pledged to recruit for UCE1's terrorist groups and did so. Said intended for those recruits to fight on the front lines in Syria or conduct a 9/11-style attack in the United States. Said sent UCE1 copies of real identification documents of recruits selected for these missions. Some of those recruits were former al-Shabaab fighters or known terrorist operatives.

B. Undercover Employee No. 2 (UCE2)

UCE2 was a separate FBI employee posing as an al-Qa'ida and al-Qa'ida in Iraq/al-Nusrah Front facilitator associated with UCE1's terrorist support network. This individual met Mohammed in Saudi Arabia on one occasion. The meeting was arranged so that Mohammed could make a donation through UCE2 for the support of violent jihad. At that meeting, Mohammed provided UCE2 with 14,400 Saudi Arabian riyals (at the time worth approximately \$3,840) for the support of al-Qa'ida in Iraq/al-Nusrah Front. Mohammed also gave UCE2 one gold bar weighing 100 grams (at the time worth approximately \$5,400) for the support of the Afghan Taliban, another group that commits terrorist acts but is not an FTO. The Afghan Taliban was fighting United States and coalition troops in Afghanistan. These actions were part of the charged conduct with Said, but more than that, Mohammed stated to UCE2 that he had an associate with al-Shabaab connections in Kenya. This was a reference to Said.

III. Protective Measures Sought

Based upon the need to protect the UCEs' true identities and physical images, and the need to protect other undercover investigations and undercover investigative procedures, the government respectfully submits that there are certain measures the Court may and should adopt for the testimony of the UCEs at trial. The security measures proposed below are narrowly tailored to assure that the identity and security of the UCEs and the integrity of other undercover

investigations would not be compromised by the UCEs' appearance at trial, without impairing the defendant's Sixth Amendment rights to confront witnesses and for a fair trial. Specifically, the government requests the Court implement the following measures:

1. The UCEs may testify under the UCEs' undercover pseudonyms when testifying at trial, without disclosing publicly the UCEs' true identities;
2. The defense shall be prohibited from asking any questions seeking personal identifying information from or about the UCEs;
3. The UCEs may testify using a light disguise, such as changing the UCEs' facial hair, hairstyle, or dress style;
4. When the UCEs testify, only the Court, essential personnel, the jury, the defendant and his counsel, and the government's trial team shall be present in the courtroom. The government shall provide a contemporaneous closed circuit television ("CCTV") video or similar broadcast of the courtroom proceeding, without the visual image of the UCEs, while the UCEs are testifying, which shall be made available for public viewing in another location in the courthouse;
5. The government shall be allowed to digitally obscure the facial image of the UCEs on any recorded video footage played over the CCTV feed during court proceedings (no such measures are required for any video shown or offered by the government as an exhibit at trial and viewed by defendant, his counsel, the Court, the jury, and other essential court personnel);
6. No public disclosure of any audio recording, or similar reproduction of the voice or visual image of the UCEs while testifying, shall be permitted;

7. The UCEs shall be permitted to use a non-public entrance/exit to the courthouse and the courtroom;

8. All non-official recording devices shall be prohibited in the courtroom in which the UCEs testify, as well as in the room in which the CCTV feed is shown, during the UCEs' testimony; and

9. The Protective Order sought by this motion may only be modified through a written superseding order issued by this Court.

A proposed protective order setting forth the above conditions is attached as Exhibit C.

IV. Argument

Protecting an officer's safety and the integrity of other ongoing investigations are compelling interests that courts have long recognized in crafting security measures for witness testimony. Courts, for example, have allowed witnesses to testify under a pseudonym, in light disguise, and behind a screen or while otherwise concealed, concluding that those measures do not interfere with the defendant's rights to confront witnesses against him and to a fair and public trial. That precedent readily justifies the reasonable security measures proposed here.

A. The Court Should Not Require the Disclosure of the UCEs' True Identities.

The Confrontation Clause of the Sixth Amendment gives a defendant the right to confront and cross-examine the government's witnesses who testify against the defendant. See Maryland v. Craig, 497 U.S. 836, 846 (1990); Smith v. Illinois, 390 U.S. 129 (1968). The "elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." Craig, 497 U.S. at 846. "The rule is that

once cross-examination reveals sufficient information to appraise the witnesses' veracity, confrontation demands are satisfied." United States v. Falsia, 724 F.2d 1339, 1343 (9th Cir. 1983).

Still, these Confrontation Clause rights are "not absolute and may be compromised under circumstances where 'considerations of public policy and necessities of the case' so dictate." United States v. Yates, 438 F.3d 1307, 1312 (11th Cir. 2006), (citing Craig, U.S. at 848). Indeed, as the Eleventh Circuit has recognized, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on...cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." United States v. Baptista-Rodriguez, 17 F.3d 1354, 1366 (11th Cir. 1994) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). Thus, the Eleventh Circuit has concluded that a witness's use of a pseudonym is appropriate where the government's interest in protecting the witness from harm outweighs any interest the defendant may have in learning the true name of the witness. See United States v. Maso, 2007 WL 3121986, *4 (11th Cir. Oct. 26, 2007) ("The district court did not violate [the defendant's] right to confront witnesses by allowing the [cooperating witness] to testify using a pseudonym."). As noted by the former Fifth Circuit, "[a] well recognized limitation on the right to cross-examine a witness occurs when disclosure of the information sought would endanger the physical safety of the witness or his family." United States v. Conteras, 602 F.2d 1237, 1239 (5th Cir. 1979).²

² Under Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), decisions of the Fifth Circuit handed down prior to the close of business on September 30, 1981, are binding precedent on all federal courts within the Eleventh Circuit.

1. Personal Identifying Information

As the Supreme Court held in Van Ardsall, the Confrontation Clause does not necessarily require that the jury hear a witness's true name or other identifying information. Van Ardsall, 475 U.S. at 679. "[W]here there is a threat to the life of the witness, the right of the defendant to have the witness' true name, address and place of employment is not absolute." United States v. Palermo, 410 F.2d 468, 472 (7th Cir. 1969). See also Contreras, 602 F.2d at 1239-40 (5th Cir. 1979) (where there was reasonable fear that disclosure of DEA agent's home address and frequented locations would endanger him and his family, no error in precluding cross examination as to home address and other background information); United States v. Rangel, 534 F.2d 147, 148 (9th Cir. 1976) (where record showed that witness's life had been threatened and witness and family relocated, no error in permitting witness to testify without divulging true name, address, and phone number); United States v. Ellis, 468 F.2d 638 (9th Cir. 1972) (affirming district court's decision to prohibit cross-examination on undercover agent's name and address where there were "substantial reasons" for withholding information); United States v. Baker, 419 F.2d 83 (2nd Cir. 1969) (upholding decision to bar testimony regarding name and address of witness's employer when witness had received death threats).

Alias testimony has been approved in similar cases. See Brown v. Kuhlman, 142 F.3d 529, 532 n.3 (2nd Cir. 1998) (noting undercover detective who testified in closed courtroom based on his safety and investigations was permitted to testify by using his badge number as opposed to true name and, on appeal, was referred to by pseudonym "Richard Roe"); United States v. Watson, 599 F.2d 1149, 1157 (2nd Cir. 1979) (affirming prohibition against cross-examination into witness's recent activities, employment, and finances under Witness Protection Program); United States v. Abu Marzook, 412 F. Supp. 2d 913, 923 (N.D. Ill. 2006) (allowing

Israeli intelligence agents to testify using pseudonyms because, “[u]nder Israeli law, the true identities of these agents—including their names, identifying information, and physical characteristics—are classified”); United States v. Abu Ali, 395 F. Supp. 2d 338, 344 (E.D. Va. 2005) (noting use of pseudonyms in video-conferenced testimony of Saudi Arabian intelligence officers who testified during suppression hearing in terrorism case).³

The use of a pseudonym must not prevent a defendant from placing a witness in the proper context to assess his or her credibility. In Smith v. Illinois, 390 U.S. 129, 131 (1968), the Supreme Court noted that a defendant should be permitted to place the witness “in his proper setting and put the weight of his testimony and credibility to the test.” Id. at 132 See also Alford v. United States, 282 U.S. 687 (1931) (same). There, identifying the witness was necessary to show that he had a possible criminal history, an issue that goes to the credibility and reliability of the witness. If a defendant is able to place a witness in the proper context to assess his or her credibility without using the identifying information of the witness (here, neither UCE has a criminal history), then courts have prevented disclosure of that identifying information. While there is no strict definition of what placing a witness in the proper context entails, the cases make clear that so long as the relevant background information about a witness is available at trial (such as where he works, what incentives he has to testify, and his criminal history), such that a jury can evaluate his testimony and credibility, this standard is met. See, e.g., United States v. Lonetree, 35 M.J. 396, 410 (C.M.A. 1992) (preventing defendant from discovering real name of government agent witness when witness had already revealed that he worked for government).

³ See, e.g., United States v. Sheikh, Case No. 5:13-cr-00305-BO (E.D.N.C. Oct. 6, 2014) (DE 67); United States v. Osmakac, Case No. 8:12-cr-00045-MSS-AEP (M.D. Fla. Feb. 12, 2014) (DE 217); United States v. Mohamud, Case No. 3:10-cr-00475-KI (D. Or. Dec. 19, 2012) (DE 341) (orders attached as Collective Exhibit B).

The instant case is easily distinguishable from Smith and other cases in which courts have held that it was improper for a witness to testify using a pseudonym. In neither Smith nor Alford did the prosecution present affirmative justifications for withholding the witness identify information. In Alford, the court sustained the government's objection to questions about the witness's residence on the grounds that they were immaterial. Alford, 282 U.S. at 688. In this case, in contrast, the government has established a compelling need to limit inquiries that might reveal the UCEs' identities because such inquiries would jeopardize their safety and the safety of others associated with them, as well as the integrity of ongoing and future investigations. Moreover, Said will have what the Smith and Alford defendants lacked: the opportunity to show bias; because the defendant knows that the UCEs work for the FBI, he still would be free to explore any potential effect their employment by the government may have on their testimony. He would also be able to cross-examine the UCEs on the information the government will elicit on the stand regarding their background and training. The defense questioning that may be permitted in this case thus would fulfill the interests protected by both Smith and Alford, that is, the defendant's opportunity to test the witness' credibility and to place them in their proper setting. See Smith, 390 U.S. at 132.

2. Light Disguise

As part of the FBI's concern for the safety of the UCEs and their families, the government further requests that the UCEs have the latitude to testify in a light disguise if need be, which may include the wearing of a wig, glasses and the addition of facial hair. None of these "additions" to the UCEs' appearances would interfere with facial gestures, or otherwise preclude physical assessments of demeanor and credibility by the Court, the jury, or the defendant. In short, the proposed light disguise is narrowly tailored to balance the defendant's

rights under the Confrontation Clause with the government's interest in protecting the identity of the witness.

In Morales v. Artuz, 281 F.3d 55, 61-62 (2nd Cir. 2002), the Second Circuit rejected a defendant's argument that his Confrontation Clause rights were denied when a government witness testified while wearing sunglasses that the trial judge noted were "dark" and "you can't see through them." Id. at 57. Significantly, the only rationale provided by the district court for allowing the witness to wear the sunglasses was that the witness appeared "nervous and shy." Id. After analyzing the extensive Supreme Court jurisprudence on the Confrontation Clause, the Second Circuit concluded that there was no violation because the jurors had an unimpaired opportunity to assess the delivery of the witness's testimony, to assess her credibility, to observe her demeanor and body movements, and, ultimately, to observe all of the other traditional bases for evaluating testimony. Id. at 60.

As recently as the 2007 trial in the case of United States v. Jose Padilla, United States District Court for the Southern District of Florida, Case No. 04-60001-CR-COOKE, based on these same considerations, a judge in this District allowed a Central Intelligence Agency operative to wear a light disguise while testifying before a jury. See also United States v. Pungitore, 910 F.2d 1084, 1128 (3rd Cir. 1990) (noting that witness had testified in disguise); Kauffman v. Secretary of Air Force, 269 F. Supp. 639, 646 (D.D.C. 1967) (declining to review defendant's claimed error that "key prosecution witness wore a disguise while testifying"). Based on this clear precedent, the limited nature of the disguise sought in the instant case, and the compelling justification for the light disguise, the government respectfully requests that the Court approve these procedures.

3. UCE Program

The declaration from Assistant Director Steinbach lays out the compelling reasons to adopt the proposed security measures in terms of personal identifying information and personal appearance. The FBI's undercover program, which relies on a small group of personnel who are trained and certified, plays a vital role in the detection, prevention, and prosecution of national security cases. Members of this program are highly valuable, and the FBI has a substantial interest in their personal safety. As such, and as further detailed in the Steinbach Declaration, disclosing the UCEs' identities would pose a risk to the safety of the UCEs and undermine the security of other undercover investigations and the integrity of the government's undercover procedures. In light of these interests, and as further explained in the Assistant Director's declaration, the true names of the UCEs are classified. As noted above, the government is filing a separate motion to address issues concerning UCEs' true identities under the Classified Information Procedures Act.

Balanced against these interests, the use of a pseudonym or a light disguise by the UCEs would not prejudice the defendant's confrontation rights. It is the UCEs' interactions with the defendant, not their personal identities, that make their testimony relevant at trial. Because the defendant has only known the UCEs through pseudonyms, withholding the UCEs' true identities would not detract from the substance of the questioning on cross-examination and would not impair the defendant's Sixth Amendment right to confront the witnesses against him. And as to both UCEs, Said never met them in person, so their personal appearance should be of no significance. The UCEs will be present in the courtroom, so the jury will be able to observe and assess their appearance and demeanor while testifying. For the same reasons, permitting the

UCEs to testify in light disguise, such as with changes to facial hair or dress style, should be permitted and will simply serve to minimize the risk of compromising the UCEs' true identities.

Along those same lines, and as a logical corollary to the above-requested procedures, the defendant should be restricted from eliciting questions that would publicly reveal any personal information about the UCEs that would disclose their identities. Personal information about the UCEs is not relevant to the charges; rather, it is the UCEs' contacts and communications with the defendant and his co-conspirator that matter. Public disclosure of personal information about the UCEs, such as name and address, would compromise their safety and that of their families, as well as substantially impact other investigations. Cross-examination into completely irrelevant personal information should be prohibited.

B. The Court Should Permit the UCEs to Testify Outside the View of the Public.

The Sixth Amendment guarantees the right to a public trial. That right guarantees the defendant a fair trial, promotes the integrity of the fact-finding process, preserves public confidence in the criminal justice system, and affords the community an outlet to address crime. Waller v. Georgia, 467 U.S. 39, 46 (1984). But the right to a public trial is not absolute—a trial judge may implement reasonable procedures to protect other compelling interests without infringing the Sixth Amendment. Id. at 45. One of those procedures involves closing the courtroom to the public in appropriate circumstances. Waller provided a four-factor test for determining whether courtroom closure is appropriate:

The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 48.

Although the government is not seeking to close the proceedings entirely for the UCEs' testimony, these factors indicate the government's proposal meets constitutional standards. "The state interest in maintaining the continued effectiveness of an undercover officer is an extremely substantial interest, and...this interest would be seriously prejudiced by requiring the officer to testify in an open courtroom." Ayala v. Speckard, 131 F.3d 62, 72 (2nd Cir. 1997). "It is clear that the State has an 'overriding interest' in protecting the identity of its undercover officer." Rodriguez v. Miller, 537 F.3d 102, 110 (2nd Cir. 2008). In Brown v. Artuz, 283 F.3d 492, 501-02 (2nd Cir. 2002), the Second Circuit held that protecting an undercover officer's safety satisfied the first prong of the Waller test and was an overriding interest likely to be prejudiced if the courtroom were open to the public during the officer's testimony. Taken together, Ayala, Rodriguez, and Brown indicate that protecting other investigations and ensuring an officer's safety are compelling government interests. The FBI and the UCEs have serious concerns about the disclosure of the UCEs' identities, both by name and appearance.

As to the second and third Waller factors, the proposed measures are no broader than necessary to protect the government's core interests in light of other alternatives. Rather than seeking the more drastic measure of closing the courtroom completely during the testimony of the UCEs, the government requests moderate protection against the disclosure their true identities and images, while still permitting the public to hear their testimony. When the UCEs testify, the government asks that the Court, essential personnel, the jury, the defendant and his counsel, and the government's trial team be present in the courtroom and that a CCTV video or similar broadcast, without the visual image of the UCEs, be made available to the public. During the UCEs' testimony, the government anticipates offering and publishing exhibits. The public may view these exhibits except to the extent they contain a visual image of a UCE. See United

States v. Trofimoff, No. 8:00-CR-197-T-24EAJ, 2001 WL 1644230 at *3 (M.D. Fla. June 12, 2011) (blurring image of undercover officer was “a narrow remedy carefully tailored to protect the effectiveness of the undercover agent while allowing the media access to the full substance of the video tape”).

These same protective measures were authorized in a terrorism trial in the District of Oregon. That case involved a defendant who attempted to detonate a car bomb at a Christmas tree lighting event in Portland. Two FBI UCEs testified at trial with the same protective measures. See United States v. Mohamud, Case No. 3:10-cr-00475-KI (D. Or. Dec. 19, 2012) (DE 341). Likewise, similar protective measures were used for FBI UCEs in recent terrorism trials in the Middle District of Florida and the Eastern District of North Carolina. See United States v. Sheikh, Case No. 5:13-cr-00305-BO (E.D.N.C. Oct. 6, 2014) (DE 67); United States v. Osmakac, Case No. 8:12-cr-00045-MSS-AEP (M.D. Fla. Feb. 12, 2014) (DE 217). These courts found that no reasonable alternatives existed to those limited measures designed to protect the UCEs’ visual appearance and images and that the equities inherent in a public trial were preserved.

As to the last Waller factor, the government requests that the Court make the following findings based on the law above and the information presented in the Steinbach Declaration: (1) the reasonable measures proposed by the government are necessary to protect from disclosure the true identities of the UCEs at trial; (2) disclosure of the UCEs’ true identities would jeopardize ongoing and future undercover investigations and the government’s undercover investigative procedures; and (3) the UCEs and their families face a real and substantial risk of danger if the UCEs’ true identities are disclosed.

V. Conclusion

The government requests that the Court grant the government's motion for a protective order and adopt the government's proposed protective measures to assure the security and safety of the UCEs and their families, other undercover investigations, and the government's undercover investigative procedures. The government has been informed that defense counsel opposes the relief requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 6, 2015, I electronically filed the foregoing Government's Motion for Supplemental Rule 16 Protective Order Limiting Disclosure of Discovery Information with the Clerk of the Court using CM/ECF.

/s/ Brian K. Frazier

Brian K. Frazier

EXHIBIT A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 13-20364-CR-UNGARO/Torres

UNITED STATES OF AMERICA)	
)	
)	
v.)	<u>FILED IN CAMERA, EX PARTE</u>
)	<u>AND UNDER SEAL WITH THE</u>
)	<u>CLASSIFIED INFORMATION</u>
)	<u>SECURITY OFFICER</u>
MOHAMED HUSSEIN SAID,)	<u>OR DESIGNEE</u>
)	
Defendant.)	

**IN CAMERA, EX PARTE DECLARATION OF MICHAEL B. STEINBACH,
ASSISTANT DIRECTOR, COUNTERTERRORISM DIVISION,
FEDERAL BUREAU OF INVESTIGATION**

I, Michael B. Steinbach, hereby declare and say:

1. I am the Assistant Director of the Counterterrorism Division, Federal Bureau of Investigation (“FBI”), United States Department of Justice. I am responsible for, among other things, directing the conduct of FBI counterterrorism investigations. As the Assistant Director, I have official supervision and control over the files and records of the Counterterrorism Division, FBI, Washington, D.C.

2. As the Assistant Director of the FBI’s Counterterrorism Division, I have been delegated original classification authority by the Director of the FBI. See Executive Order 12958, as amended by Executive Order 13292, as amended by Executive Order 13526, Section 1.3(c). As a result, I am responsible for the protection of classified information within the Counterterrorism Division, including the sources and methods used by the FBI in the collection of information in

national security investigations. To that end, I have been authorized by the Director of the FBI to execute declarations and other affidavits in order to protect such classified information.

3. The matters stated herein are based upon my personal knowledge, my review and consideration of documents and information available to me in my official capacity, and information furnished by Special Agents, or other employees of the FBI. My conclusions have been reached in accordance therewith.

4. This declaration is submitted in support of the Government's Motion for a Protective Order Pertaining to the Testimony of the Undercover Employee at Trial (Government's Motion for Protective Order) and the Government's Classified *In Camera, Ex Parte* Memorandum of Law and Motion for an Order Pursuant to Section 4 of the Classified Information Procedures Act and Rule 16(d)(1) of the Federal Rules of Criminal Procedure (Government's Classified CIPA Motion). Specifically, the Government's Motion for Protective Order seeks a Protective Order requests the court to put measures in place while the undercover employees (UCEs) testify, in order to prevent the disclosure of their true identity and limit the disclosure of their physical appearance. I understand that the Government seeks narrowly tailored security measures in order to (1) prevent the compromise of several national security investigations in which the UCE has been, or is currently involved; (2) ensure that the UCE may be used in future investigations, which could prevent future terrorist attacks; and (3) protect the safety of the UCE and his family from potential threats or terrorist attacks by individuals sympathetic to the defendant or terrorist organizations. In addition, the Government's Classified CIPA Motion seeks an Order to exclude from discovery certain information that would identify the Undercover Employees ("UCEs") used in this case (e.g., name, contact information, and/or physical characteristics). The disclosure

of the identities of the UCEs may reasonably be expected to cause serious damage to the national security of the United States.

5. Specifically, I understand that the Government seeks to (1) allow the UCEs to testify under a pseudonym, (2) prohibit the defense from asking the UCEs questions that reveal personally identifiable information or could lead to the UCEs identity, (3) allow the UCEs to wear a light disguise, (4) have the UCEs testify in a courtroom with only essential personnel while the public and press observe from a second courtroom via Closed Circuit Television (CCTV) that does not show the UCEs, (5) allow that any videos or photographs that are shown to the public or press via CCTV that depict the UCEs have the faces of the UCEs obscured or pixilated, (6) prohibit the disclosure of any audio recording, or similar reproduction of the voice or visual image of the UCEs, (7) allow the UCEs to use non-public entrances and exits to the courthouse and courtroom, and (8) prohibit all non-official recording and photographic devices from the courtroom in which the UCEs testify as well as the courtroom in which the CCTV feed is shown during the UCEs testimony.

I. THE FBI'S UNDERCOVER PROGRAM

6. The use of the undercover technique is an important tool in the detection, prevention, and prosecution of numerous investigations that are central to the FBI's national security and law enforcement missions. The services rendered by FBI UCEs provide important information that the United States government needs to serve these missions, often at great danger to the personal safety of the UCEs and to their families.

7. The successful use of the undercover technique in FBI investigations is dependent upon a small group of personnel who are trained and certified as UCEs. The FBI expends substantial financial resources and effort to select, train and protect its UCEs. The certification process is rigorous and multi-tiered, thus emphasizing the need to select only those individuals who can perform safely and effectively in an undercover capacity. UCEs are highly valuable and non-fungible assets and therefore the FBI goes to great lengths to protect their true identities due to significant, legitimate fears of retaliation against each UCE or that UCE's family.

8. Thus, the FBI has an extremely substantial interest in the integrity of its undercover program and perhaps more importantly in the personal safety of the UCEs and their families. The program could be seriously prejudiced by requiring the UCEs to testify in any manner that could reveal their true identities.

II. CONSEQUENCES OF FAILING TO PUT PROTECTIVE MEASURES IN PLACE

9. For the reasons described below, failure to put in place the requested protective measures could reasonably compromise several national security investigations involving the UCEs, could prevent the UCEs from future participation in undercover roles, and perhaps most importantly could put the UCEs and their families in jeopardy of physical harm. If the identities of the UCEs are revealed and concomitantly their positions as an FBI UCE, then any investigation involving them could be compromised. A terrorist organization could use a UCE's true identity to obtain pictures of the UCE either from the internet or by using the identity to locate and photograph the UCE. Using the internet, the terrorist organization could widely

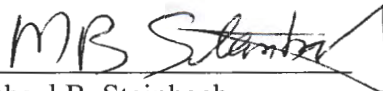
circulate the picture of the UCE to its operatives. The FBI has concerns that in such a scenario the UCE and his family could be threatened, harmed, or killed in an effort to thwart the investigation, retaliate against the UCE, or dissuade other FBI personnel from participating in the undercover program. In addition, if the true identity and physical characteristics or appearance are revealed then the UCE will not be able to participate in any future investigation, as he will no longer be able to act in an "undercover" role. Since the UCEs involved with this investigation have very unique abilities and skills, the consequences of their inability to participate in future investigations cannot be underestimated. The FBI would be left without an important resource to fulfill its mission. Finally, and perhaps mostly importantly, if the UCEs true identities are disclosed then their physical safety and that of their families will be put in significant jeopardy.

10. These conclusions are not idle speculation. An FBI UCE has already been threatened as a result of his undercover activities in a counterterrorism investigation. The concern regarding the UCE's vulnerability of being targeted for harm and exposure has been heightened considerably by the increasing availability of personal information on the Internet. Indeed, several web sites exist which encourage the posting and dissemination of the identities and personal information about law enforcement undercover agents/officers. With the simple click of a mouse, personally-identifying information about or a photograph of a UCE – like the valuable law enforcement officers in this case– can be transmitted instantly to adversaries. The Justice Department and other law enforcement agencies have argued that the dissemination of such information on the internet not only compromises pending or future investigations, but also places undercover agents in potentially grave danger. That is certainly the case here; the vulnerability of the UCE and his family to personal attack is substantially greater if the UCE's true identity and physical characteristics are disclosed.

11. Accordingly, and consistent with my responsibilities, I am submitting this declaration to support the government's request that this Court order certain security measures to protect against the disclosure of the true identity and physical characteristics of the UCEs.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 29, 2015.

A handwritten signature in black ink, appearing to read "MB Steinbach", written over a horizontal line.

Michael B. Steinbach
Assistant Director
Counterterrorism Division
Federal Bureau of Investigation

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:13-cr-00305-BO

UNITED STATES OF AMERICA,)
)
 Plaintiff,) ORDER
) ALLOWING CERTAIN WITNESSES
 v.) TESTIFY UNDER PSEUDONYM and
) TO NOT BE VIEWED BY COURT
) SPECTATORS
 BASIT JAVED SHEIKH)
 a/k/a "Abdul Basit")
)
 Defendant.)

This matter is before the Court by an unopposed motion of the United States to allow certain witnesses to testify under pseudonym and to not be viewed by court spectators.

Upon review of the Government's written statement, good cause having been shown, and no objection having been received from the Defendant, the Government's motion is GRANTED.

It is HEREBY ORDERED that the Confidential Human Source known as "Nusaybah" may testify under the pseudonym "Nusaybah."

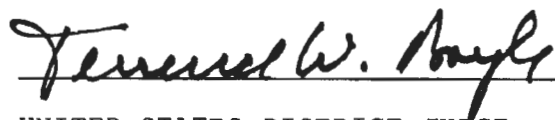
It is FURTHER ORDERED, that the Online Covert Employee known as "Zaydan" may testify under the pseudonym "Zaydan."

Thus, the Government witness list will name these individuals as "The person known as Nusaybah" and "The person known as Zaydan." These individuals will swear or affirm to tell the truth

and will do so under this same description. During testimony, the individuals will be referred to simply as "Nusaybah" and "Zaydan".

It is FURTHER ORDERED that during the testimony of the person known as "Nusaybah" and the person known as "Zaydan," all public spectators in the gallery who are not a part of either trial team will be directed to a separate room which will have been pre-designated for this purpose and in which these spectators will be able to listen to the live audio of the testimony of these two witnesses.

So ordered, this 3 day of October, 2014.



UNITED STATES DISTRICT JUDGE
TERRENCE W. BOYLE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES AMERICA,

v.

Case No.: 8:12-cr-45-T-35-AEP

SAMI OSMAKAC
_____ /

ORDER

THIS CAUSE comes before the Court for consideration of the Government's Motion for Protective Order Pertaining to the Testimony of Undercover Agent at Trial ("Motion for Protective Order") (Dkt. 140), Defendant's Objections to Motion for Protective Order (Dkt. 146), Government's Reply to Defendant's Objections to the Government's Motion for Protective Order (Dkt. 152), Memorandum of Law in Support of the Tampa Tribune's Motion to Intervene (Dkt. 160), Government's Reply to Tribune's Opposition to the Government's Motion for Protective Order. (163) Upon consideration of the foregoing, the arguments set forth at the hearing held before the Undersigned on September 30, 2013, all other relevant filings, case law, and being otherwise fully advised, the Court **GRANTS in part and DENIES in part** the Government's Motion for Protective Order (Dkt. 140), as described herein.

The Government seeks certain protections for the undercover employee's ("UCE's") identity during his/her testimony in this case. The security measures sought are as follows:

1. The UCE may use the UCE's undercover pseudonym when testifying at trial, without disclosing publicly the true identity of the UCE.

2. The defense shall be prohibited from asking any questions seeking personal identifying information, such as name and address, from the UCE.
3. The UCE may testify using a light disguise, such as changing the UCE's facial hair, hairstyle, or dress style.
4. The UCE shall be permitted to use a non-public entrance/exit to the courthouse and the courtroom.
5. When the UCE testifies, only the Court, essential personnel, the jury, the defendant and his counsel, and the Government's trial team shall be present in the courtroom. The Government shall provide a contemporaneous CCTV video or similar broadcast of the UCE's testimony, without the visual image of the UCE, while the UCE is testifying, which shall be made available for public viewing in another location in the courthouse.
6. The Government shall be allowed to digitally obscure the facial image of the UCE on any recorded video footage played over the CCTV feed during court proceedings (no such measures are required for any video shown or offered by the Government as an exhibit at trial and viewed by the Court, essential personnel, the jury, the defendant and his counsel, and the government's trial team).
7. All non-official recording devices shall be prohibited from being in the room in which the CCTV feed is shown during the UCE's testimony.
8. No public disclosure of any audio and/or video recording of the UCE while testifying shall be permitted.

(Dkt. 140 at 6-7) The Government argues that the "proposed security measures are

narrowly tailored to assure that the identity and security of the UCE and the integrity of other undercover investigations will not be compromised by the UCE's appearance, without impairing Defendant's confrontation rights under the Sixth Amendment, and without closing the proceedings to the public." (Id. at 6)

Defendant does not object to the security measures numbered 1, 3, 4, 6, 7, and 8. With respect to security measure number 2, Defendant does not object to being prohibited from asking questions seeking the UCE's name, address, or social security number. However, Defendant does seek to cross-examine the UCE about his prior work activity, prior undercover activity, education, and training. Defendant asserts that this information is necessary for the jury to evaluate the credibility of the witness.

Further, Defendant does object to security measure number 5 involving the closing of the courtroom to the public because Defendant contends that the closure of the courtroom would unduly prejudice Defendant in the eyes of the jury and bolster the perceived importance of the witness in the minds of the jury. However, as an alternative, Defendant requests that Defendant's family be allowed to remain in the courtroom during the testimony of the UCE.

Additionally, the Tampa Media Group, Inc., owner of the Tampa Tribune (hereinafter, the "Tribune") objects to the proposed closure of the courtroom during the UCE's testimony. The Tribune contends that the Government's interest to protect the identity and security of the UCE could be protected with other less restrictive measures and that the closure of the courtroom is broader than necessary to accommodate the Government's interest.

The Tribune also requests access to judicial records, including videos introduced

in evidence, which may be released with obscured imaging and/or voice distortion in order to protect the identity of the UCE. The Government does not object to the Tribune's request to have access to the videos of the meetings between Defendant and the UCE in which the UCE's face is obscured, or to having the pixelated videos generally available to the public once the videos are admitted at trial.

The Court has explored the options presented by the parties in their pleadings and during the hearing, and other available options to find reasonable measures to protect the identity of the UCE while balancing the Defendant's right to a fair trial and the public's right to know. After careful consideration of the competing interests and the available means for protecting those interests, principally to ensure the Defendant receives a fair trial, the Court **ORDERS** as follows:

1. The Government's Motion for Protective Order Pertaining to the Testimony of Undercover Agent at Trial (Dkt. 140) is **GRANTED in part and DENIED in part**.
2. The proceedings will be held in **Courtroom 10B** rather than Courtroom 17A.
3. The following security measures shall be implemented:
 - a. The UCE may use the UCE's undercover pseudonym when testifying at trial, without disclosing publicly the true identity of the UCE.
 - b. By agreement of the parties, the defense shall be prohibited from asking any questions seeking the UCE's name, address, or social security number. The Court **defers** ruling on the issue of the extent to which Defendant can cross-examine the UCE about his prior work activity, prior undercover activity, education, and training until the Court

hears from the parties at the Status Conference scheduled for February 21, 2014. In this regard, the parties shall be prepared to articulate *precisely* what will be asked and *precisely* what the Government seeks to preclude the Defendant from asking, for example, whether the Defendant seeks to elicit the number of prior undercover operations or the details of prior undercover investigations.

- c. The UCE may testify using a light disguise, such as changing the UCE's facial hair, hairstyle, or dress style. The disguise, however, shall fairly represent the UCE's approximate age and shall not obscure the UCE's face to the extent that a person would not be able to assess the UCE's demeanor.
- d. The UCE shall be permitted to use a non-public entrance/exit to the courthouse and the courtroom. The UCE will enter and exit the courtroom outside the presence of the public.
- e. The courtroom shall remain open during the testimony of the UCE. However, the UCE will testify behind a screen and only the Court and its essential security cleared personnel, the jury, the Defendant and his trial team counsel, and the Government's trial team shall be able to view the UCE. **NO ONE OTHER THAN THE QUESTIONING AND DEFENDING LAWYER AND COURT SECURITY OFFICERS WILL BE ALLOWED TO STAND DURING THE UCE'S TESTIMONY.** Attached to this Order are two photographs approximately depicting the courtroom arrangement that will be used during the UCE's

testimony. Though not pictured in the photograph, the Court will arrange for the prosecution to have a counsel table in the space typically occupied by the witness stand in courtroom 10B, such that it will be perpendicular to the defense table and across from and facing the jury. The podium for the questioning lawyer will be placed between counsels' tables along with the presentation cart. (Contrary to the picture, the podium would be moved farther to the right and closer to the defense table so as not to obscure the prosecution's view of the witness.) Also, the defense team will have their chairs turned facing the gallery, so that they will have a better vantage point from which to view the witness. As positioned, the screen blocks all gallery observers from viewing the witness, who, as noted, will enter and exit the courtroom when it is closed to all but Court security cleared personnel and both trial teams and the Defendant.

- f. Any unaltered video recorded footage admitted as evidence and presented during the trial that includes the unobscured face of the UCE shall only be viewed by the Court and its security cleared personnel, the jury, the Defendant and the Defendant's trial team, and the Government's trial team. Such video recorded footage shall not be visible to the public. The Government has advised that it can adequately synchronize a pixelated version of the video feed during the testimony. As such, a pixelated version will be played simultaneously on the display screen in the courtroom so that it can, to

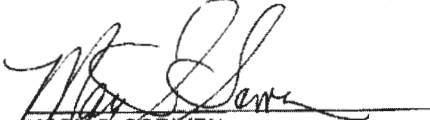
some extent, be viewed by the public. Unfortunately, the witness screen as positioned will likely obscure the view of the display screen at certain positions (especially those on the north side of the courtroom sitting closest to the screen). If additional jury display carts are available, the Court will attempt to accommodate those viewers. In any event, the public, including the media, will be allowed to hear any audio recorded with the video footage. Further, the Government has agreed to provide access to the Tribune of the pixelated version of any video recorded footage of the UCE admitted into evidence during the trial. It would appear that the Government does not oppose the republication by the media of the pixelated version of the video, which obscures the UCE's face. **If that is not the case, the Government and/or the Defendant shall be prepared to address this issue at the status conference.**

- g. No recording devices shall be allowed in the courtroom, except for the devices used by the official security cleared court reporter.
- h. Because there will be no recording made of the UCE during testimony, no public disclosure of such non-existent audio and/or video recording shall be permitted. The Government advises that it will make the transcript of the UCE's testimony available for the media and the public. That accommodation will require daily copy of that portion of the trial to be ordered and paid for by the Government. To that end, the Government shall contact the official security cleared court

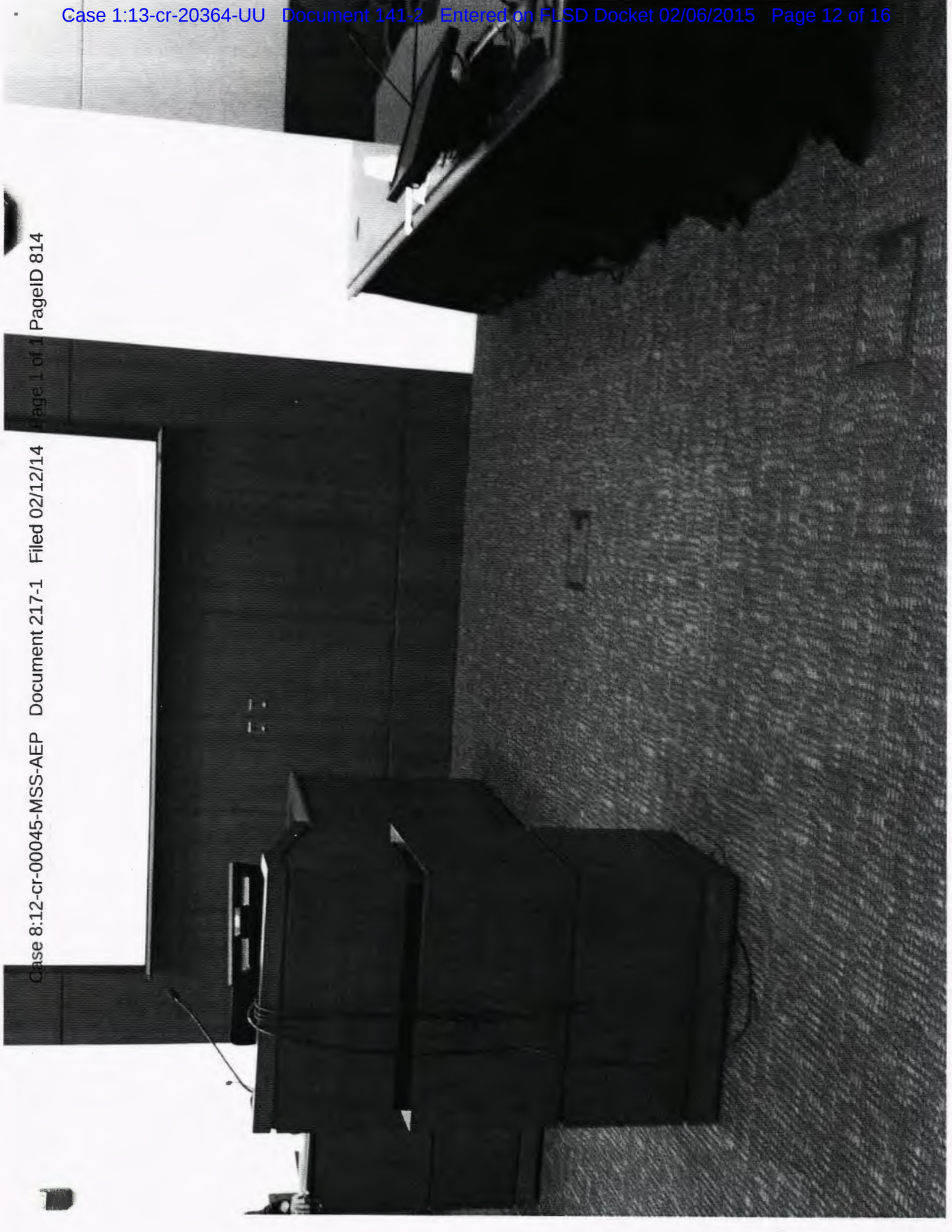
reporter, Claudia Spangler-Fry, to make appropriate logistical and financial arrangements.

- i. Finally, because of the accommodations that will be required for this witness, the Government shall call the UCE as its first witness or call the UCE on the first day of the second week of trial. This is necessary to allow the Court's IT personnel to adjust the courtroom to facilitate the Government's requested accommodations. **The Government shall advise the Court at the status conference which of these two alternatives it selects.**

DONE and ORDERED in Tampa, Florida, this 12th day of February 2014.


MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
All Counsel of Record
All *Pro Se* parties





UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA

Case No. 3:10-CR-00475-KI

v.

MOHAMED OSMAN MOHAMUD,

Defendant.

**[REDACTED] PROTECTIVE ORDER
PERTAINING TO THE TESTIMONY
OF UNDERCOVER EMPLOYEES
AT TRIAL**

Upon motion of the United States, the Court being advised as to the nature of this case and having considered the position of the parties including any objections, it is hereby

ORDERED that, the following procedures will be utilized to protect the true identities of the undercover Federal Bureau of Investigation employees (UCEs) at trial:

1. The UCEs may testify under the UCEs' undercover pseudonyms when testifying at trial, without disclosing publicly the true identities of the UCEs;
2. The defense is prohibited from asking any questions seeking personal identifying information from the UCEs;

3. The UCEs may testify using a light disguise, such as changing the UCEs' facial hair, hairstyle, or dress style;

4. When the UCEs testify, only the Court, essential personnel, the jury, defendant and his counsel, and the government's trial team shall be present in the courtroom. The government shall provide a contemporaneous CCTV video or similar broadcast of the courtroom proceeding, without the visual images of the UCEs, while the UCEs are testifying, which shall be made available for public viewing in an adjacent courtroom;

5. The government be allowed to digitally obscure the facial images of the UCEs on any recorded video footage played over the CCTV feed during court proceedings (no such measures are required for any video shown or offered by the government as an exhibit at trial and viewed by defendant, his counsel, the Court, the jury, and other essential court personnel);

6. No public disclosure of any audio recording, or similar reproduction of the voices or visual images of the UCEs while testifying, shall be permitted;

7. The UCEs be permitted to use a non-public entrance/exit to the courthouse and the courtroom;

8. All non-official recording devices are prohibited from being in the courtroom in which the UCEs testify as well as the courtroom in which the CCTV feed is shown during the UCEs' testimony;

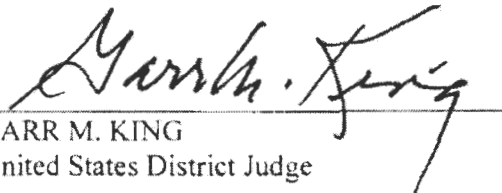
9. All unpixelated video or photographs showing the true facial images of the UCEs provided to defendant pursuant to the Protective Order for use as trial evidence shall be returned to the government at the conclusion of this case. Defendant shall retain no copies of any

///

discovery material provided by the government that shows the true facial images or identities of the UCEs; and

10. This Protective Order may only be modified through a written superseding order issued by this Court.

Dated this 19th day of DECEMBER ~~October~~ 2012.


GARR M. KING
United States District Judge

Presented by:

S. AMANDA MARSHALL, OSB #95347
United States Attorney
District of Oregon

s/ Pamala R. Holsinger
ETHAN D. KNIGHT, OSB #99298
PAMALA R. HOLSINGER OSB #89263
Assistant United States Attorneys
(503) 727-1000

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-20364-CR-UNGARO

UNITED STATES OF AMERICA

vs.

MOHAMED HUSSEIN SAID,

a/k/a "Bill,"

a/k/a "Billph86,"

a/k/a "Mohammed Salem bin Abdisheikh,"

a/k/a "Mohamed Hussein,"

a/k/a "Abdul-Rahman Abdul Rahim,"

a/k/a "Tibyan,"

Defendant.

**PROTECTIVE ORDER PERTAINING TO
TESTIMONY OF UNDERCOVER EMPLOYEES AT TRIAL**

This cause came to be heard upon the Motion of the United States of America for a Protective Order authorizing the government to use certain measures to protect the identity and security of two Federal Bureau of Investigation undercover employees ("UCEs") who will be witnesses at the trial of this cause. After consideration of the Motion and the record as a whole, this Court finds that the Motion is well-taken, and that it should be, and hereby is, **GRANTED**. It is therefore

ORDERED, ADJUDGED, and DECREED that the UCEs may testify under the UCEs' undercover pseudonyms at trial, without disclosing the UCEs' true identities. It is further

ORDERED, ADJUDGED, and DECREED that the defense shall be prohibited from asking any questions seeking personal identifying information from or about the UCEs. It is further

ORDERED, ADJUDGED, and DECREED that the UCEs may testify using a light disguise, such as changing the UCEs' facial hair, hairstyle, or dress style. It is further

ORDERED, ADJUDGED, and DECREED that when the UCEs testify, only the Court, essential personnel, the jury, the defendant and his counsel, and the government's trial team shall be present in the courtroom. The government shall provide a contemporaneous closed circuit television ("CCTV") video or similar broadcast of the courtroom proceeding, without the visual image of the UCEs, while the UCEs are testifying, which shall be made available for public viewing in another location in the courthouse. It is further

ORDERED, ADJUDGED, and DECREED that the government shall be allowed to digitally obscure the facial image of the UCEs on any recorded video footage played over the CCTV feed during court proceedings (no such measures are required for any video shown or offered by the government as an exhibit at trial and viewed by defendant, his counsel, the Court, the jury, and other essential court personnel). It is further

ORDERED, ADJUDGED, and DECREED that no public disclosure of any audio recording, or similar reproduction of the voice or visual image of the UCEs while testifying, shall be permitted. It is further

ORDERED, ADJUDGED, and DECREED that the UCEs shall be permitted to use a non-public entrance/exit to the courthouse and the courtroom. It is further

ORDERED, ADJUDGED, and DECREED that all non-official recording devices shall be prohibited in the room in which the UCEs testify as well as in the courtroom in which the CCTV feed is shown, during the UCEs' testimony. It is further

ORDERED, ADJUDGED, and DECREED that this Protective Order may only be modified through a written superseding order issued by this Court.

DONE and ORDERED in Chambers in Miami, Florida this _____ day of February,
2015.

THE HONORABLE URSULA UNGARO
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: All Counsel of Record