

**(A) Limited Unsealing of Rule 15 Deposition Transcripts and
Unsealing of Government's Opposition to Defendant's Motion to
Suppress**

Background

By its April 19, 2005 Memorandum Order, this Court granted the government's Motion for Rule 15 Depositions and thereby authorized the parties in this case to take depositions in Saudi Arabia of several Saudi government officials, including Foreign Witnesses A and B, who are alleged to possess relevant information about the detention and interrogation of Defendant Ahmed Omar Abu Ali ("Mr. Abu Ali," "Defendant") as his primary interrogator and superior interrogator, respectively. Federal Rule of Criminal Procedure 15(a)(1) allows a party to move for the deposition of a prospective witness to preserve his or her testimony for trial, and permits the Court to grant the motion when "exceptional circumstances" arise, and when doing so is in the "interest of justice." FED. R. CRIM. P. 15(a)(1).

After weighing the factors articulated in *United States v. Hajbeh*, 284 F.Supp.2d 380, 382 (E.D.Va. 2003), this Court granted the Rule 15 motion because it found that: (1) Foreign Witnesses A and B are unavailable to testify at trial since they both reside in Saudi Arabia and the Saudi government will not allow them to travel to the United States to participate in judicial proceedings; (2) their testimony is material to the outcome of

this proceeding; and (3) their testimony is necessary to serve the ends of justice. Mem. Order, Apr. 19, 2005, at 3-5.

Pursuant to the Order of the Court, the transcript of the deposition testimony was filed by the government under seal. The government, through the instant motion, now seeks to have the existence and transcripts of the Rule 15 deposition testimony unsealed.

Ruling

The Court grants the government's Motion to Unseal Testimony by Saudi Government Officials and Government's Opposition to Defendant's Motion to Suppress, and orders that the transcripts of the Rule 15 deposition testimony are unsealed with the following restrictions. During the suppression hearing, both the government and defense counsel may refer only to testimony in the transcripts. Neither party may refer to those portions of the transcript which refer to evidentiary objections. Furthermore, neither the government nor defense counsel may refer to arguments made by either party during the course of the depositions. Finally, neither party may release these transcripts, in whole or in part, to the public until so instructed by the Court.

The government's Opposition to Defendant's Motion to Suppress is unsealed and may be referred to during the suppression hearing.

**(B) Presentation of Video Recordings of Rule 15 Depositions at
Suppression Hearing and at Trial**

The Court grants, in part, the government's Motion for Protective Order and orders that the Rule 15 deposition testimony be displayed in the manner prescribed below. In the Court's April 19, 2005 Memorandum Order authorizing Rule 15 depositions to be taken, the Court specifically reserved the question of whether and how that deposition testimony would be presented in future hearings and at trial. Mem. Order, Apr. 19, 2005, at 2 n.1.

Suppression Hearing

The Court rules that during the suppression hearing, the parties will be permitted to play, in open court, those portions of the videotaped depositions to which evidentiary objections were not made. However, the Court will only permit the public to hear audio of the videotaped depositions and will, otherwise, conceal the faces of the deponents. During these depositions, at the government's request, the Court permitted the Foreign Witnesses to testify under pseudonyms and ordered the courtroom sealed during the deposition testimony because the government advanced an "overriding interest that is likely to be prejudiced," and the closure was no broader than necessary to protect that interest. *See Waller v. Georgia*, 467 U.S. 39, 48 (1984) (describing and affirming the standard for closing a

hearing in *Press-Enterprise Co. v. Super. Ct. Cal.*, 464 U.S. 501 (1984)). The Court also considered alternatives to closing the proceeding. *Id.* (holding courts must “consider reasonable alternatives to closing the proceeding, and... make findings adequate to support the closure”).

The Court granted the government’s motion to seal the courtroom because the government articulated overriding public interests: protecting the witnesses from possible violent acts, allowing the factfinder access to highly relevant testimony necessary for a fair adjudication of this case, and Saudi cooperation in future terrorism cases. The prosecution informed the Court that the Saudi Government expressly conditioned its willingness to make the witnesses available for deposition on the United States Government’s assurance that the true names of the witnesses will not be made public. Both witnesses work for the Saudi domestic security service, the *Mabahith*, and their true names are classified. Other *Mabahith* members whose true names have been publicized have suffered violent retribution. Other courts have permitted the sealing of courtrooms and testimony under pseudonyms when danger to the witnesses or national security interests are at issue. *See United States v. Moussaoui*, 382 F.3d 453, 458 (4th Cir. 2004) (allowing remote video depositions of witnesses not identified to the public for national security reasons); *see also Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997) (holding three state court trial judges

"adequately determined that courtroom closure was warranted" during the testimony of undercover officers whose testimony might make it impossible for them to continue their work); *Smith v. Illinois*, 390 U.S. 129, 133-34 (1968) (White and Marshall, JJ., concurring) (suggesting that a court may bar inquiries on cross-examination tending to endanger the personal safety of a witness).

Despite the Court's granting of the government's motion to seal the courtroom and allow Foreign Witnesses A and B to testify under pseudonyms, the Court recognizes that sealed proceedings in a criminal case, particularly involving the credibility of key prosecution witnesses, are highly disfavored. See *Smith*, 390 U.S. at 131 (citing *Pointer v. State of Texas*, 380 U.S. 400, 404 (1965) ("Yet when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross examination must necessarily be to ask the witness who he is and where he lives.... To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself"). Consequently, the Court has fashioned a procedure intended to preserve the defendant's rights to confrontation under the Sixth Amendment and the public and the press's qualified First Amendment rights to attend criminal trials. See *Waller*, 467 U.S. at 44-45 (citing *Globe Newspaper Co. v. Super. Ct. Norfolk County*, 457 U.S. 596 (1982)

(discussing the First Amendment rights of the public and press to attend criminal trials)).

Trial

The Court rules that, during trial, the depositions will be presented in the same manner as during the suppression hearing, with one exception. During trial, the jury, the defendant, and counsel will see the full edited video testimony with the faces unobstructed.

Evidentiary Objections to Transcripts

The Court directs both parties to meet on or before September 30, 2005 to jointly review the transcript, and seek to resolve, in advance of trial, any evidentiary objections to the transcript registered by either side and to determine which portions, if any, of the testimony are not necessary for consideration by the judge or jury (e.g. dialogue with the judge and counsel concerning scheduling witnesses, etc.). If necessary, the parties shall then prepare a list of any unresolved objections not including translation issues concerning the transcripts and submit that list to the Court no later than 5 p.m. on Thursday, October 6, 2005. The Court will hold a hearing on any unresolved evidentiary objections at the end of the civil docket at 12:00 noon on Friday, October 14, 2005. After those objections have been resolved, the Court will require that the

video and audio recordings to be played at trial be edited accordingly.

Translation-Related Objections to Transcript

The Court will address, in a separate Order, the manner in which the parties' objections to the transcripts that are based on translation-related issues are to be resolved.

(C) Defense Access to Video Recordings of Rule 15 Depositions

The Court grants the government's Motion for Protective Order and prohibits defense counsel, the government, and any other persons from making or receiving copies of the aforementioned video recordings for the reasons the Court has shielded the identity and names of the Saudi Arabian government officials discussed above. However, the government shall give defense counsel liberal access and opportunity to privately view the video recordings of the Rule 15 depositions at the United States Attorney's Office in Alexandria, VA. The Court notes that this ruling is in no way a reflection upon the integrity or ethics of defense counsel who continue to conduct themselves in accordance with their duties as officers of the court. However, the Court issues this protective order in order to minimize the likelihood that individuals other than defense counsel and the government will inadvertently gain access to the video recordings.

For the preceding reasons, it is hereby

ORDERED that the government's Motion to Unseal Testimony by Saudi Government Officials and Government's Opposition to Defendant's Motion to Suppress is GRANTED IN PART. The transcripts of the Rule 15 deposition testimony are unsealed with the following restrictions. During the suppression hearing, both the government and defense counsel may refer only to testimony in the transcripts. Neither party may refer to those portions of the transcript to which evidentiary objections were made. Furthermore, neither the government nor defense counsel may refer to arguments made by either party during the course of the depositions. Finally, neither party may release these transcripts, in whole or in part, to the public until so instructed by the Court. Also, the government's Opposition to Defendant's Motion to Suppress is unsealed and may be referred to during the suppression hearing. It is further

ORDERED that the government's Motion for Protective Order is GRANTED IN PART. During the suppression hearing, the parties will be permitted to play, in open court, testimony of witnesses excluding those portions of the videotaped depositions to which evidentiary objections were made. However, the Court will only permit the public to hear audio of the videotaped depositions and will, otherwise, conceal the faces of the deponents. During trial, the depositions will be presented in the same manner as during the suppression hearing, with one exception. During

trial, the jury, the defendant, and counsel will see the full edited video testimony with the witnesses' faces unobstructed. It is further

ORDERED that defense counsel, the government, and any other persons are prohibited from making or receiving copies of the aforementioned video recordings for the reasons the Court has shielded the identity and names of the Saudi Arabian government officials discussed above. However, the government shall give defense counsel liberal access and opportunity to privately view the video recordings of the Rule 15 depositions at the United States Attorney's Office in Alexandria, VA. It is further

ORDERED that both parties meet on or before September 30, 2005 to jointly review the transcript, and seek to resolve, in advance of trial, any evidentiary objections to the transcript registered by either side. If necessary, the parties shall then prepare a list of any unresolved issues concerning the transcripts and submit that list to the Court no later than 5 p.m. on Thursday, October 6, 2005. The Court will hold a hearing on any unresolved evidentiary objections at 12:00 noon on Friday, October 14, 2005. After those objections have been resolved, the Court will require that the video and audio recordings to be played at trial be edited accordingly.

The Clerk is directed to forward a copy of this Order to
counsel of record.

ENTERED this ___16th___ day of September, 2005.

_____/s/_____
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
9/16/05