

**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA**  
**CRIMINAL DIVISION - FELONY BRANCH**

<b>UNITED STATES OF AMERICA</b>	:	<b>Criminal Case Nos. 2017 CF2 1300</b>
	:	<b>2017 CF2 1296</b>
<b>v.</b>	:	<b>2017 CF2 1163</b>
	:	<b>2017 CF2 1238</b>
<b>KIMBERLY CAIN,</b>	:	<b>2017 CF2 1326</b>
<b>MALLY ESPAILLAT,</b>	:	
<b>ANTHONY FELICE,</b>	:	<b>Chief Judge Robert Morin</b>
<b>JAMES HOOPEs, and</b>	:	
<b>SOAN STEFFON</b>	:	<b>Trial: 03/26/2018</b>

**GOVERNMENT MOTION IN LIMINE REGARDING ITS EXPERT WITNESS**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully requests that, due to security concerns, the Court permit the government's expert witness to testify publicly under the alias "Julie McMahon". The government makes this request because the expert witness has been involved as an undercover agent in multiple long-term undercover operations for many years; although the expert is not currently acting in an undercover capacity, some of the undercover operations in which she worked remain on-going. Disclosing her true name (which could lead to disclosure of her identify and image) would impact those investigations. In addition, given the repeated efforts to publicly disseminate identifying information about the prosecutor and law enforcement officers involved in this case (to include an MPD officer who acted in an undercover capacity), the government submits there is a reason to believe that the expert will be targeted in the same manner. The government's proposed measures, to include providing the true name of the expert to defense counsel under a protective order, making the expert available to speak with defense, and having the expert testify in a public courtroom under the alias, will fairly balance the legitimate law enforcement concerns regarding the safety and security of the expert and on-going investigations, with the defendants' right to a fair trial and the public's right to observe the proceedings.

In support of this motion, the government states the following:

1. As set forth in the sealed pleading the government filed on October 12, 2017 titled “Government’s Supplemental Pleading in Support of Its Motion for a Protective Order”, prior to the first trial (held in November and December 2017), individuals associated with the prosecution of this case have been targeted. Their identities and personal identifying information have been disseminated publicly. Also disseminated was personal information about citizens who submitted a community impact statement regarding the impact of the January 20, 2017 riot.
2. Since the filing of the sealed pleading, the publicly disseminated identifying information has been used by an individual(s) to harass and to target several of the people working on the prosecution of this case, to include the lead prosecutor and lead detective at their respective homes.
3. During the November and December 2017 trial, an MPD officer who worked in an undercover capacity testified publicly. While he was in the middle of his testimony, his name and a photograph of him were sent out on a social media account by an individual who had been inside the courtroom during his testimony. This account circulated the information about the undercover officer with a specific inquiry about when and which meetings he attended in an undercover capacity. Further, when the MPD officer stepped outside of the courthouse during his testimony, his photograph was taken and was disseminated on multiple social media accounts and in various media outlets. The public dissemination of this information impacts the officer’s ability to operate in an undercover capacity in certain future operations.

4. During the November and December 2017 trial, as the prosecutors and lead detective left the courthouse, their photograph was taken and published in media outlets. This photograph, along with a “drawing” from inside the courtroom, was recently used to create a targeted mailing to the lead prosecutor at her personal residence. The mailing included the letters “CFM” imprinted on the prosecutor’s body, which is often used to refer to the words “Come F-ck Me”.
5. In short, the government submits that there is a specific, and real, pattern of conduct by some to target individuals working on the prosecution of this case, or who are government witnesses in this case.
6. The government has identified an individual with “black bloc” expertise and wishes to present this individual as an expert witness at trial. The witness’s expertise is based, in part, on her participation as an undercover agent who infiltrated the anarchist extremist movement. This witness has also served as an undercover agent in other long-term covert operations involving public corruption and foreign counter-intelligence. Although the witness is not currently operating as an undercover agent, some of the covert operations in which she was involved remain on-going.
7. Given the above-described pattern of conduct targeting individuals working on this case, the government and the expert witness are concerned that on-going undercover investigations could be compromised if the witness’s identity is publicly-outed. The government is also concerned that the safety and security of the witness could be impacted.
8. The government respectfully requests that the expert witness be permitted to testify under the alias “Julie McMahon” at the public trial in this case. The government

recognizes the public's right to observe the trial, the right of the defendant to a fair trial, and the need and desire of defense counsel to be able to prepare for and to cross-examine the expert witness. To that end, the government proposes that it provide the true name and a CV containing the witness's background and current employment to defense counsel pursuant to a protective order that permits defense counsel to use the information to prepare for trial, but does not permit the defense to disseminate the CV, the name, or identifying information about the witness to the defendant or any third party. (A proposed protective order is attached.) The government further proposes that it will make the witness available to speak to the defense in advance of trial.

9. The government submits that these limited remedial measures fairly balance the legitimate law enforcement concerns regarding the safety and security of the expert witness and on-going investigations, with the defendants' right to a fair trial and the public's right to observe the proceedings.
10. Under appropriate circumstances, courts have permitted a witness to testify under an alias. Indeed, the government's proposed expert witness has previously testified under an alias in other criminal proceedings in the Southern District of New York, in which she was presented as a fact witness. *Alford v. United States*, 282 U.S. 687 (1931), and *Smith v. Illinois*, 390 U.S. 129 (1968), require as a constitutional minimum that a defendant be given an opportunity "to place the prosecution's witness in their proper setting and to test the weight of their testimony and their credibility before the jury." In dicta, the majority in *Smith* suggested that a demonstrated risk to the safety of a witness could, in an appropriate case, justify some curtailment of the accused's right to a full disclosure of the witness's identity. 390 U.S. 129, 133-134 (White J., joined by

Marshall J., concurring). Relying on *Smith*, courts have found that the confrontation rights of the accused are not absolute and should yield where the prosecution proves that the threat to the witness is “actual and not the result of conjecture.” *See United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969).

11. The Confrontation Clause arose in response to the legal abuses that occurred in criminal trials in England prior to the seventeenth century. Its primary purpose was to prevent the trial of individuals based solely on accusations made anonymously or by the use of *ex parte* depositions or affidavits. *See White v. Illinois*, 502 U.S. 346, 362 (1992). The purpose of the Confrontation Clause was to provide specific trial procedures to promote the reliability and the integrity of evidence presented in criminal trial. *Id.* at 356-57. This is accomplished by providing certain rights to the accused, including the right to cross-examine and physically confront one’s accusers. The Clause also affords to the accused various layers of protection: that trials be set in a court of law; that the accused and the prosecution witnesses be present before the trier of fact; that the trier of fact be able to observe the demeanor and assess the credibility of the witnesses as they testify; and that witnesses give their statements under oath, subject to the penalty of perjury. *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990).
12. The Confrontation Clause was meant to protect against the use of anonymous accusers, individuals who signed declarations, did not attend trial, did not swear to the truth of their statements, and did not face the trier of fact or the defendant. *California v. Green*, 399 U.S. 149, 156 (1970). Here, nondisclosure of the true name of the expert witness to the public does not harm the rights guaranteed by the Confrontation Clause. To avoid Confrontation Clause problems, defense counsel will be provided the true

identity of the expert witness in advance of trial along with a CV outlining her background, and will be provided with an opportunity to speak with the witness in advance of trial. The true identity of the expert witness will merely remain under seal from the public to protect the integrity of on-going investigations, and the safety and security of the witness. This limited restriction will not impinge on the defendants' rights under the Confrontation Clause. The defendants will still have the opportunity to confront physically the witness. They will have the opportunity to prepare for and to conduct cross-examination, and the trier of fact will have the opportunity to assess the demeanor and credibility of the witness. In addition, the witness will give testimony under oath, subject to the penalty of perjury.

13. Under appropriate circumstances, including safety concerns of a witness or concerns for on-going investigations, courts have permitted government witnesses to testify using pseudonyms. *See, e.g., United States v. Fuentes*, 988 F. Supp. 861 (E.D. Pa. 1977) (Confrontation Clause does not require an undercover narcotics agent's revelation of his true identity in open court, stating "not permitting use of his true name during trial has [in our view] no constitutional significance"); *United States v. Celis*, 608 F.3d 818, 833-34 (D.C. Cir. 2010) (in a drug trafficking conspiracy case involving the FARC, a protective order allowing government witnesses to testify under a pseudonym and limiting disclosure of their true identities did not impermissibly intrude upon a defendant's confrontation rights under the Sixth Amendment); *United States v. Machado-Erazo*, 951 F.Supp.2d 148, 154 (D.D.C. 2013) (where there was a genuine and continuing threat to the safety of a foreign police officer, he was permitted to testify under a pseudonym, without disclosing his true identity to the defense); *see also United*

*States v. Ramos-Cruz*, 667 F.3d 487, 500 (4th Cir. 2012) (it was within the court’s discretion to allow two government witnesses to testify under pseudonyms and without revealing their names where a threat was actual and not a result of conjecture); *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (Israeli intelligence officers permitted to testify using pseudonyms where there exists legitimate safety concerns for witnesses); *United States v. Ellis*, 468 F.2d 638 (9th Cir. 1972) (Ninth Circuit affirmed district court’s refusal to allow a defendant to elicit the witness’s correct name, residence, and occupation because of potential harm to the witness). These courts have generally required limited disclosure of the witness’s identity to the necessary members of the defense teams to allow for cross-examination sufficient to comply with the Confrontation Clause, but hold that there is no absolute right of an accused to have the jury hear the witness’s true name.

WHEREFORE, for the foregoing reasons, the government respectfully requests that the Court enter the attached protective order, and permit the expert to testify publicly under the alias “Julia McMahon”.

Respectfully submitted,

JESSIE K. LIU  
United States Attorney

/s/ Jennifer A. Kerkhoff  
JENNIFER A. KERKHOFF  
RIZWAN A. QURESHI  
Assistant United States Attorneys

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was served by electronic mail on the defendants' attorneys on this 2nd day of March, 2018.

/s/ Rizwan A. Qureshi  
RIZWAN A. QURESHI  
Assistant United States Attorney



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**ORDER**

Upon consideration of the Government’s Motion in Limine Regarding Its Expert Witness, it is this \_\_\_ day of \_\_\_\_\_, 2018,

**ORDERED**, that the Government's Motion is hereby **GRANTED**, and the Government’s expert witness will be permitted to testify at trial under the alias “Julie McMahon”; and it is further

**ORDERED**, that the Government shall immediately provide to defense counsel the true name and *curriculum vitae* of the expert witness, and shall make the expert witness available to speak with defense counsel prior to trial; and it is further

**ORDERED**, that defense counsel shall not disclose the true name of the expert witness (or any personal identifying information about the expert witness, to include the witness’s current specific job title) to the defendant or to any third party; and it is further

**ORDERED**, that defense counsel shall not disseminate to the defendant or any third party the expert witness’s *curriculum vitae*.

\_\_\_\_\_  
Chief Judge Robert Morin

Cc: Counsel of Record