

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

THE UNITED STATES OF AMERICA, * SA-13-CR-580-OLG(14)
*
Plaintiff, *
*
v. *
*
SYED ALI, *
*
Defendant. *
* * * * * March 6, 2014

MOTION FOR DISCOVERY
BEFORE THE HONORABLE HENRY J. BEMPORAD
UNITED STATES MAGISTRATE JUDGE

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

A P P E A R A N C E S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

For the Plaintiff: UNITED STATES ATTORNEY'S OFFICE
By: AUSA Mark T. Roomberg
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216

UNITED STATES ATTORNEY'S OFFICE
By: AUSA Harry Jay Hulings
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216

For the Defendant,
Syed Ali: SIMON M. AZAR-FARR & ASSOCIATES
By: Mr. Simon M. Azar-Farr
2313 N. Flores
San Antonio, Texas 78212

GOLDSTEIN, GOLDSTEIN & HILLEY
By: Mr. Donald H. Flanary, III
310 S. St. Mary's Street
29th Floor
San Antonio, Texas 78205

1 THE COURT: Calling the case this morning of
2 SA-13-CR-580, the United States of America versus Syed
3 Ali, Defendant Number 14.

4 If I could have announcement of counsel, please.

5 MR. ROOMBERG: Good morning, your Honor.
6 Mark Roomberg and Jay Hulings for the United States.

7 THE COURT: Good morning.

8 MR. AZAR-FARR: Simon Azar-Farr, your Honor,
9 for Mr. Syed Ali.

10 MR. FLANARY: Don Flanary for Mr. Ali.

11 THE COURT: All right. Syed, is that how he
12 says his --

13 MR. AZAR-FARR: Syed Ali.

14 THE COURT: Syed Ali. Okay. All right.
15 Thank you.

16 All right. We're here on a motion that's been
17 referred to the Court. It's Defendant Syed Ali's
18 motion for discovery, Document 374. I've read the
19 motion and the response and reply, and I'd be happy to
20 hear argument on the matter.

21 I'll hear first from Mr. Azar-Farr.

22 MR. AZAR-FARR: Your Honor, I believe I
23 have, for the most part, said everything I wanted to
24 say in the motion and in my reply. Nonetheless, if I
25 may this morning, I would like to highlight, in a way,

1 and also outline for the Court's convenience, the sum
2 of what the motion is about.

3 THE COURT: All right.

4 MR. AZAR-FARR: And, hopefully, that will
5 help.

6 I was not entirely sure, when the Court set this
7 matter for a hearing, whether it meant to conduct a
8 legal questioning of the parties in a sort of an oral
9 argument, Fifth Circuit style, or whether it intended
10 to go into the evidentiary aspect of the hearing.

11 THE COURT: Well, --

12 MR. AZAR-FARR: So, I've prepared for both
13 sides.

14 THE COURT: Well, let me -- let me clarify
15 that, since both sides may be interested in that.

16 As I understand the motion, it's a request to
17 find out if there is FISA materials that were at the
18 beginning of this investigation, and, if so, to have
19 those disclosed. That strikes -- And, then, the
20 objection to that is twofold: One is that there's
21 no legal entitlement, and one -- the other is that
22 there's no legal -- no factual basis to believe that
23 existed.

24 Mr. Azar-Farr, do you have evidence, besides
25 what's in the motion, to show that there's a FISA

1 investigation? For example, a witness, an affidavit,
2 a proffer? I'll hear it. If you -- If there's stuff
3 that's in the motion, I've reviewed that, and I
4 under- -- and, so, there's no reason for an additional
5 evidentiary point on that issue, until we get there,
6 until I get to the legal issues of whether there's an
7 expanded discovery requirement in light of the
8 circumstances you've already put forward.

9 So, at this point, I think it's just argument, --

10 MR. AZAR-FARR: Thank you.

11 THE COURT: -- but if you've got a witness,
12 I'll hear it.

13 MR. AZAR-FARR: I appreciate that,
14 your Honor. In that case, let me, then, clarify.
15 I'll cover basically five areas, if I may.

16 One, what it is that we have asked for, because
17 there has been some confusion about that, apparently.
18 Two, what it is we have not asked for. Three, the
19 authority for what we have asked for, why I believe,
20 FISA is involved here, and why we're entitled to
21 receive the information.

22 What we have asked for is:

23 A complete list of all state and federal
24 officers/agents who know how Mr. Syed Ali and
25 Mr. Jaffer Ali were identified as suspects initially.

1 Two. The need to have these officers/agents
2 testify under oath before this Court.

3 Three. The need for the handler of the CI, or
4 the alleged CI, who, apparently, informed the
5 Government the very first time that -- of Mr. Jaffer
6 Ali's involvement or criminality, the need for him to
7 perform due diligence about the source of the CI's
8 knowledge, and then to provide that evidence to the
9 Defense. We have not asked for the identity of the
10 CI, just that a due diligence be performed, and that
11 the information be provided to the Defense.

12 Four. That the Government review all material
13 pertinent to the operation that resulted in the
14 identification of Mr. Syed Ali and Mr. Jaffer Ali as
15 suspects, and the disclosure of all exculpatory and
16 impeachment information and other evidence of whether
17 the operation complied with the statutory and
18 Constitutional mandates.

19 Five. The disclosure of FISA intercepts and any
20 of Mr. Syed Ali's prior statements that may not have
21 been disclosed so far and that are part of that FISA
22 intercept.

23 And, of course, the Court's -- lastly, the
24 Court's review of the FISA material, independent
25 review of the FISA material, for evidence helpful to

1 the Defense.

2 What we have not asked for, contrary to what
3 the Government has alleged, is we have not and we
4 do not ask for witness statements as defined by the
5 Jenks Act. We have not asked for Government --
6 internal Government documents, internal Government
7 reports, or internal Government memoranda. And we do
8 not ask for a list of Government witnesses that intend
9 to testify at trial; I assume that will be handled in
10 the regular course of business; the District Court
11 will manage that, as it deems necessary.

12 What's the authority for what we're asking for?
13 Three sources. One is the FISA statute, itself. It
14 requires notification before any evidence, any
15 information -- and I quote, "...any information
16 obtained or derived from FISA is to be used in a
17 judicial proceeding."

18 THE COURT: Can you provide me the statutory
19 cite to which you refer?

20 MR. AZAR-FARR: You will find that,
21 your Honor, in Title 50, Section 1806(e). And also,
22 with respect to physical searches, you will find it at
23 Title 50, Section 1825(d).

24 Here I will note--and this will come into play
25 later on, I suspect--that it is the Court's

1 prerogative, not the Prosecution's, to decide whether
2 information is FISA-related or derived from FISA. The
3 Government does not decide whether or not it's derived
4 from FISA, whether or not it ought to disclose it.
5 The Court makes that decision. And I think the Fifth
6 Circuit has put that issue to rest. The proper
7 authority for that would be United States versus
8 Farese, F-A-R-E-S-E, as cited in my motion. And
9 I quote the relevant language of that. It says, it
10 reserves for court determination, by way of a hearing,
11 quoting, "...the question whether evidence is derived
12 from electronic surveillance, or the evidence is so
13 tenuously related to it as to be free of legal taint."

14 The second source of authority for what we're
15 asking is, of course, Rule 16, itself, in particular,
16 16(a)(1)(B). It requires that the defendant is
17 entitled to any relevant original recorded statements
18 by the defendant within the Government's custody,
19 possession or control. In order to comply with that
20 rule, the Government, of course, must attempt to
21 uncover any such statement.

22 And Rule 16, of course, applies even in FISA
23 cases, and here the authority would be under FISA
24 Title 50, Section 1806(e) and (f), as well as, I
25 think, 1825(g), because FISA, itself, expressly

1 provides the filing of a motion or request by a
2 defendant, and I quote the language of the statute
3 directly, that the defendant can file a motion or
4 request, quoting, "...pursuant to any other statute or
5 rule of the United States to discover or obtain
6 applications or orders or other materials relating to
7 electronic surveillance, or to discover, obtain or
8 suppress evidence or information obtained or derived
9 from electronic surveillance."

10 And, of course, lastly, the Constitution entitles
11 the Defendant, Mr. Ali, to this information, the
12 disclosure of all exculpatory and impeachment material
13 evidence. I won't belabor the cases of Brady and
14 Giglio, and I know that the Court is perfectly
15 familiar with those. But I will note only the
16 following. That in order to comply with Giglio and
17 Brady, the Government is required to review all of the
18 information. And if they have not seen the FISA
19 intercepts, as it has been the practice in just about
20 every case in the country, where they have actually
21 kept the prosecutors in the dark, then it cannot
22 perform its due diligence.

23 And I've cited in the motion the Kyles decision.
24 And there it's a sort of a bifurcated responsibility.
25 One is the prosecution, and I quote the Court --

1 Supreme Court's language, "It has a duty to learn of
2 any favorable evidence known to itself and known to
3 others that are acting in its behalf. And once it has
4 performed that duty, then it has a duty to disclose
5 the evidence that reaches the material level of
6 importance."

7 And, of course, these Constitutional concerns
8 apply equally, as the Clapper decision informs us,
9 with respect to FISA.

10 Now to the question that the Court raised, and
11 I'll address two other areas. Why do we believe FISA
12 is involved in this case?

13 Your Honor, the evidence that we have been given
14 so far through discovery has provided the following
15 information.

16 One. That both Syed Ali and Mr. Jaffer Ali are
17 either Pakistani nationals or citizens. I believe
18 Mr. Jaffer Ali is now a naturalized citizen, but I
19 believe he's a former national of Pakistan.

20 Two. Other Defendants in the case have various
21 nationalities other than United States citizenship,
22 not all of them, but some of them. With respect to
23 Mr. Syed Ali and Mr. Jaffer Ali, to my knowledge,
24 they're both Muslims. And though the Government
25 claims that being a Muslim is not an indication, the

1 Justice Department says that it is. In fact, when
2 these FISA matters were to be implemented early on,
3 President George W. Bush, under objections by various
4 groups, finally agreed that race is not to be used as
5 a factor in profiling for these matters, but that
6 religion and nationality continue to remain as factors
7 to be used for profiling.

8 Number three. Both Mr. Jaffer Ali and Mr. Syed
9 Ali, the evidence shows so far, were flagged as
10 terrorism or potential terrorist threats. Now, it
11 turns out that this ultimately was bogus, and there
12 was nothing to it, but, initially, they were tagged
13 and flagged as potential terrorist threats.

14 In the case of Mr. Syed Ali, the sworn statement
15 of the Government, through its agent, says that it was
16 the FBI counter-terrorism agents that first got a tip,
17 we don't know where they got the tip, but they got a
18 tip of the purchase of a large amount of acetone. The
19 affidavit admits--this is the affidavit in support of
20 the complaint--that the acetone, by itself, is a
21 perfectly legal product. So that -- There's nothing
22 illegal about acetone that would have caused them any
23 particular concern. The reason they were interested
24 in the acetone is because they suspected that it is
25 a product that can be used or employed in the making

1 of a bomb.

2 Based on that information -- And this is -- You
3 will find that, your Honor, if you're looking for it,
4 on Page 23 of the affidavit filed by the agent, --

5 THE COURT: Uh-huh.

6 MR. AZAR-FARR: -- Paragraphs 36, 37 and 38.

7 THE COURT: All right. Go ahead.

8 MR. AZAR-FARR: You will note that the sworn
9 statement says that the investigation began when the
10 FBI counter-terrorism agents received information
11 regarding Middle Eastern males. I suppose it's a
12 euphemism for Muslim men. But that's what the
13 affidavit says. That's where the investigation began.

14 Now, this is -- In terms of a timeline, the Court
15 will note that this begins in, we're told, early
16 January 2013. I don't have an exact date because the
17 affidavit does not disclose an exact date.

18 At that point, an investigation is initiated.
19 And that investigation apparently has nothing to do
20 with Mr. Jaffer Ali. It's an independent
21 investigation, as best as I can determine from the
22 evidence.

23 So, then, at that point -- And there is no
24 Title 3 matter, at this point, in play, so nothing is
25 yet obtained. But Mr. Syed Ali is then subjected to

1 surveillance. Under what authority, I do not know,
2 but I would have to assume that, in part, that could
3 have been FISA.

4 He is subjected to surveillance and he's
5 followed. And when he goes to purchase the acetone,
6 he's -- Actually, at that moment, when he takes
7 possession of the acetone--this, I think, is at
8 Paragraph 37 of that affidavit--he's under
9 surveillance when he purchases it.

10 Then they follow Mr. Ali as he leaves the place
11 where he has purchased the acetone. And, seemingly,
12 on a pretextual stop, two officers, San Antonio police
13 officers, I believe, they pull him over on the
14 freeway. Now, that's not in the affidavit, but the
15 evidence will show that through Mr. Ali. They pull
16 him over. No one knows why he's pulled over. He's
17 not issued any citation for any driving violations of
18 any kind. But he is questioned: What's that stuff in
19 the back of your truck? They verify that he's got the
20 acetone, but then they say, okay, fine, go.

21 Well, the surveillance apparently continues until
22 later on, when FBI agents go to the home of Mr. Syed
23 Ali, early in the morning, and conduct an
24 interrogation or a questioning of him at the house.
25 This particular questioning, the affidavit tells us,

1 is done in furtherance of the mass destruction
2 investigation. This is -- Again, we're not talking
3 any kind of a criminal activity at this point, at
4 least certainly not as revealed by the affidavit.

5 And then, of course, later on, at some point, and
6 no one really knows at what point, Mr. Syed Ali is
7 brought into the criminal side of the case.

8 As for Mr. Jaffer Ali, we're told, at least based
9 on the evidence we have so far, that he may have come
10 to their attention based on some supposed transfer of
11 \$90,000 of money; not just a transfer of \$90,000, but
12 a transfer of \$90,000 to Pakistan; and not just to
13 Pakistan, but to extremists in Pakistan; and not just
14 extremists in Pakistan, but Muslim extremists in
15 Pakistan.

16 Now, ultimately, it turns out that, apparently,
17 there was no \$90,000 transfer, but we're told that
18 some CI has said that to a Government agent.

19 Now, ordinarily, one can take it at face value
20 that a CI has informed an agent of something. But
21 here, particularly given the history where CIs have
22 been construed -- actually, FISA intercepts have been
23 construed as CIs. In other words -- Now, am I making
24 sense here, your Honor? That is their -- The
25 Government receives information through FISA, but then

1 categorizes or classifies that as having received it
2 from a CI. The FISA people become their confidential
3 informant. And I think that's our concern here, that
4 that is probably what has happened.

5 Lastly, through all the discovery we have so far,
6 I cannot determine, because there is no clear
7 information, as to exactly how Mr. Jaffer Ali and
8 Mr. Syed Ali were identified as suspects in the
9 criminal investigation.

10 In part here, there has also been another issue,
11 and that is, the Government's, I think, attempt in
12 trying to play with words, semantics, to some extent,
13 that is, when the investigation began, versus when
14 they began to assemble evidence against individuals.

15 Lastly, why should we receive this relief? The
16 reason is, the Government has not complied with FISA,
17 all across the country. It has not complied with its
18 discovery obligations. This is not an attack. I've
19 gone out of my way in my original motion to say I mean
20 to cast no aspersion on Mr. Roomberg or Mr. Hulings.
21 The Government of the United States, the Justice
22 Department, has not complied with its FISA
23 obligations. That's been evident, I think, throughout
24 the news media, as well as the information I've
25 submitted to the Court.

1 The Clapper decision, itself, is a good example
2 of that. I mean, imagine for a moment that the
3 Solicitor General of the United States is deliberately
4 and willfully kept in the dark, is fed incorrect
5 information. He goes and he misrepresents,
6 unwillingly, at least that's the evidence we have so
7 far, based on his own admissions, as well as the news
8 people -- newspaper pieces, and he makes
9 representations to the United States Supreme Court
10 that, in fact, they have disclosed, when, then, three
11 months later he's told that, no, there is no such
12 policy, we do not disclose that information. And
13 part of the reason they do not is because the Justice
14 Department has been reading the "derived from"
15 language in such a narrow fashion as to entirely throw
16 out the notification provisions of FISA out of
17 existence.

18 THE COURT: Mr. Azar-Farr, if I may ask a
19 couple questions.

20 MR. AZAR-FARR: Sure, your Honor.

21 THE COURT: First, as to the timeline that
22 you referred to, that I've tried to look at relatively
23 carefully, I thought the earliest event that's
24 included in the probable cause statement, if I recall
25 correctly, and I'm looking at it now, is Paragraph 33,

1 where I see a particular confidential human source,
2 CHS -- CHS-1, buys 96 packets of synthetic marijuana
3 from Mowla, and did that after talking to Jaffer Ali.
4 That's, I thought, the earliest event.

5 Now, that's a purchase. That's way before your
6 client -- That's a year before your client's involved.
7 Why wouldn't that be -- I mean, if we're looking for
8 evidence of, where did this start from, why didn't it
9 start -- Now, maybe you'll say that that came from
10 something else and I'll be hearing you on that, but,
11 certainly, as far as your client goes, it looks like
12 they were looking into buying synthetic marijuana a
13 year before your client was involved. And --

14 Now, it may have been that two different sources
15 lead them together, but it looks like they have a
16 human person buying things, not -- not a FISA
17 surveillance that led to that.

18 MR. AZAR-FARR: Well, one is, we have two
19 different individuals, of course. And they come into
20 the picture at different points in time. Mr. Jaffer
21 Ali, apparently, comes into the picture earlier, as
22 you had mentioned, and Mr. Syed Ali comes into the
23 picture sometime around January of 2013, as best as
24 I can determine from the evidence I have so far.

25 But the problem with this CHS-1 person, or

1 alleged person, is the difficulty we've had in the way
2 the Government has been engaging in this parallel
3 construction. In other words, that is why we have
4 asked to determine that the officer -- the handler of
5 CH-1 determine the source of that information. In
6 other words, if the Government has used CH -- or used
7 the term "CH", not just in this case, as a way of
8 getting around FISA, so it receives a FISA intercept
9 and it calls it CHS, then --

10 THE COURT: But you see my concern there.
11 A FISA intercept didn't buy packets of drugs from
12 Jaffer Ali. That ain't happening. A person bought
13 them.

14 MR. AZAR-FARR: Well, no, no.

15 THE COURT: And, so, it seems to me we're
16 talking about a person, and that -- what we really
17 need to know is what this -- That's a human being.

18 MR. AZAR-FARR: Right.

19 THE COURT: It's not a -- It can't -- I
20 don't think I can be -- They either bought them or
21 they didn't, so...

22 MR. AZAR-FARR: I understand the Court's
23 concern.

24 THE COURT: Yeah.

25 MR. AZAR-FARR: But as I mentioned in my

1 motion, the Court needs to step back in time.

2 THE COURT: All right.

3 MR. AZAR-FARR: In other words, at some
4 point, the Court needs to go back and say, well,
5 why -- As I said, it's -- Unless the Government is in
6 the habit of just sending confidential informants to
7 stores around -- all the stores around San Antonio,
8 and see which one sells, which one doesn't sell, then
9 that confidential -- Somehow they came to wanting to
10 make that buy. And that's the -- That's what we're
11 trying to get to. How did that occur?

12 THE COURT: Uh-huh.

13 MR. AZAR-FARR: How did they decide to send
14 this guy in to make the purchase?

15 Now, Mr. Ali, Syed Ali, our client, presents an
16 entirely different situation, because this is not a
17 purchase situation where he comes to their attention.
18 As I've listed all the variable factors, starting from
19 January 1, or January -- early January of 2013, it's
20 not because any confidential human sources engaged in
21 purchase of drugs with him.

22 THE COURT: Uh-huh.

23 MR. AZAR-FARR: So, in that sense, we've got
24 two different ways that two different individuals have
25 now come into the picture.

1 Now, I have -- Of course, Mr. Jaffer Ali is not
2 my client. Everybody knows that. But it was
3 important to see how he came into the picture because
4 that would have also shed information on how Syed Ali
5 may have come into the picture.

6 THE COURT: May I inquire -- And I don't --
7 just don't recall. Is there any familial business, or
8 other relationship, prior to this investigation,
9 between Mr. Jaffer Ali and Mr. Syed Ali?

10 MR. AZAR-FARR: I don't believe so,
11 your Honor.

12 THE COURT: All right.

13 MR. AZAR-FARR: I think just -- it just
14 happens that the name Ali --

15 THE COURT: Just checking the -- And --

16 MR. AZAR-FARR: The name Ali is just a
17 common name, I believe.

18 THE COURT: Of course. No, I mean, people
19 can be named Garcia, same --

20 MR. AZAR-FARR: Yes.

21 THE COURT: -- or Smith.

22 MR. AZAR-FARR: Yes.

23 THE COURT: Okay.

24 MR. AZAR-FARR: No. To my knowledge -- I
25 stand to be corrected. But to my knowledge --

1 THE COURT: I didn't see anything, I
2 was just asking.

3 MR. AZAR-FARR: I don't believe so.

4 THE COURT: All right. And this is my last
5 question, Mr. Azar-Farr, and then I'll hear from the
6 Government.

7 As I read 1806(e), you have a right to get to
8 that information, any information that's obtained or
9 derived, as you mentioned, from FISA, if that evidence
10 is to be or has been--so in this case, is to be--used
11 or disclosed at any trial, hearing or other
12 proceeding.

13 Isn't the solution there, if there's a question
14 here, as opposed to massive discovery to figure out
15 what that stuff is, a motion in limine that would
16 exclude from trial any evidence that's obtained or
17 derived from any FISA court? Wouldn't that solve
18 the problem?

19 MR. AZAR-FARR: No, your Honor, it won't.
20 The reason it will not solve it is because that
21 information itself -- In other words, if -- Let me go
22 to the very beginning. If this investigation began
23 with FISA, then everything derived from that
24 investigation is tied to that FISA. And the Defendant
25 is entitled to know that so that he can exercise his

1 Constitutional rights, whether it's by way of
2 suppression or otherwise.

3 That's the -- That's the key problem here. Where
4 did this investigation begin? Because if it began
5 with FISA, everything else is derived from it. It
6 simply has turned into a criminal investigation. I'm
7 not talking about the authorization to be able to do
8 it. Of course they can do it. I'm just saying that
9 we need to know that.

10 With respect to the concern you just raised,
11 there's the other side of it, and that is, I think the
12 Government takes the position in their response that
13 they only have the notification obligation if they
14 intend to use the information in trial. And that is
15 not so. That's not how this FISA statute operates.

16 The notification requirements and the second
17 stage, that is the in camera inspection, are entirely
18 separate provisions. One doesn't just read 1806(d)
19 alone -- (c), I'm sorry, by itself. 1806(c) must be
20 read in conjunction with 1806(e) and (f). So,
21 essentially, what happens is, if FISA is involved, the
22 Government must disclose that. There is no threshold
23 requirement for that part.

24 Now, I know the -- the Government has insisted,
25 and I addressed that earlier to this Court. But if

1 FISA is involved in the case, somehow FISA intercepts
2 are involved, the statute contemplates disclosure.
3 It just provides a mechanism, under 1806(e) and (f),
4 of -- on how that disclosure is to be done. In other
5 words, the Government says, yes, FISA is involved, but
6 the information is national security sensitive, or
7 otherwise, gets an affidavit from the Attorney General
8 stating so to the Court, and then invites the Court to
9 review that information in camera. And then the Court
10 decides which part of that information is to be
11 disclosed or not.

12 Now, it doesn't work that the Government makes
13 the decision that, we don't intend to offer any
14 information, and, therefore, FISA is -- is out of the
15 play. That's -- The Defendant is entitled to know it,
16 your Honor. That's Fifth Circuit law.

17 THE COURT: Well, --

18 MR. AZAR-FARR: And that's also the
19 statutory language.

20 THE COURT: Well, I'm looking at the
21 language. I'm confused, Mr. Azar-Farr.

22 MR. AZAR-FARR: Okay.

23 THE COURT: 1806(c), I'm reading it.

24 Whenever the Government intends to enter into
25 evidence or otherwise use or disclose in any hearing,

1 trial or other proceeding "X stuff" it shall give
2 notice. That sounds -- Intend to enter into evidence
3 or otherwise used. Now, "otherwise used" is broad.
4 And it has to be obtained evidence or derived
5 evidence; that's also broad. But the Government's
6 intention is squarely in the plain language of the
7 statute.

8 MR. AZAR-FARR: The difficulty is that
9 you're reading --

10 THE COURT: I'm confused.

11 MR. AZAR-FARR: Well, the Court is reading
12 1806(c) in its sort of singularity. It cannot be --
13 If -- If that were the case, your Honor, the
14 notification provisions, even in cases where FISA is
15 involved -- Remember, the practice is that sometimes
16 prosecutors are kept in the dark. Sometimes case
17 agents are kept in the dark, as well.

18 THE COURT: Uh-huh.

19 MR. AZAR-FARR: So, the notification
20 provisions that the -- that the Congress has demanded
21 will just be subverted. No one will know. And, so,
22 they'll say FISA is not involved. If you engage in
23 parallel construction, then how's the -- how's
24 Mr. Roomberg supposed to know that FISA is involved,
25 unless he digs deep? And so --

1 THE COURT: All right.

2 MR. AZAR-FARR: And, moreover, I would also
3 point out to the Court the language of 1806(e).

4 Now, there the Court will say -- or the Court
5 will see that the defendant can move to suppress the
6 evidence, and (f), in particular, that provides for
7 court in camera inspection. That whenever -- I mean,
8 if I may, I'll just read it. I think it -- it will
9 make sense.

10 THE COURT: Yeah. I've got it in front of
11 me. I'm reading it.

12 MR. AZAR-FARR: Whenever a court or other
13 authority is notified or -- or -- whenever any motion
14 or request is made by an aggrieved person, under any
15 of the statutes of the United States, for discovery of
16 that information, as we have done, then, of course,
17 the Government can make a call. They can either
18 disclose it or inform the Court that its disclosure
19 might compromise national security, in which case,
20 then, --

21 THE COURT: Yeah.

22 MR. AZAR-FARR: -- they will simply file
23 that information with the Court and the Court will
24 review it.

25 THE COURT: All right. Well, Mr. Azar-Farr,

1 thank you for your presentation.

2 Let me hear, Mr. Roomberg, from you, --

3 MR. ROOMBERG: Yes, sir.

4 THE COURT: -- as to the points that
5 Mr. Azar-Farr has made. And then, of course, you can
6 answer the same questions I was asking him. I'll
7 probably be asking you similar questions.

8 MR. ROOMBERG: Yes, sir. In fact, one of --
9 I'll first address the Court's last question to
10 Mr. Azar-Farr, in terms of, would a motion in limine
11 be sufficient. In this one thing, I would agree with
12 Mr. Azar-Farr. If there was FISA information or
13 FISA-derived information, as the Court correctly
14 pointed out, 1806(c) says we have to give affirmative
15 notice. So, if there was FISA information or
16 FISA-derived information, we would give notice. We
17 know our responsibility. If there is ever in this
18 case, we certainly will follow that.

19 But that's not what we're dealing with there.
20 What we're dealing with is raw speculation. And I'll
21 use Mr. Azar-Farr's own words. He assumes there's
22 FISA because they're Pakistani. Well, we're not --
23 It's not the Government doing profiling here; it's
24 Mr. Azar-Farr who's doing profiling.

25 As the Court correctly pointed out, Mr. Jaffer

1 Ali first came to the Government's attention when he
2 sold -- well, he set up a deal with a live human
3 being, CHS-1, who will be a witness at trial. And --

4 THE COURT: I was going to ask you about
5 that. But go ahead.

6 MR. ROOMBERG: He will be a witness at
7 trial, and made the comment that \$90,000 -- he gave
8 \$90,000 to a Pakistani Islamic extremist group.

9 Then we have the follow-up, because, as the Court
10 can see from the response, as well as from the
11 affidavit, numerous agencies were looking into the
12 distribution of synthetic cannabinoids throughout
13 San Antonio. Actually, Mr. Syed Ali's store was
14 targeted even before -- was -- purchases were done
15 in July of 2012 by different agencies. And, then,
16 Mr. Jaffer Ali's stores were then targeted.

17 Unfortunately, synthetic cannabinoids, given that
18 misnomer of synthetic marijuana, has been prevalent
19 not just in San Antonio, but, unfortunately, around
20 the country, and Mr. Ali was one of those purveyors of
21 poison. That's why his store was targeted.

22 In regard to the acetone, well, that came to
23 light in a different way. Another source said that
24 Mr. Ali was purchasing sixty gallons of acetone.

25 THE COURT: Can I ask you about that?

1 MR. ROOMBERG: Yes, sir.

2 THE COURT: That was a part that I was --
3 wondered about. And there may be more discovery on
4 this, that I've not seen. All I have is the
5 complaint.

6 It says, in Paragraph 36, Mr. Azar-Farr pointed
7 out, FBI San Antonio received -- received information
8 of "X," and that was the purchasing of acetone.

9 MR. ROOMBERG: Yes, sir.

10 THE COURT: You're saying now that actually
11 what they got was information from a -- some sort of
12 source, a confidential source. That's what you just
13 said at this -- a moment ago.

14 Has there been discovery on that? Have they
15 already disclosed that that's -- that's how this came
16 about?

17 MR. ROOMBERG: We gave that out --

18 THE COURT: And is that going to be
19 another person who's going to be a witness? I'm --
20 You know, --

21 MR. ROOMBERG: No.

22 THE COURT: -- I mean -- Okay.

23 MR. ROOMBERG: I don't believe so.

24 THE COURT: I'm just wondering whether --
25 Okay.

1 MR. ROOMBERG: Because in this instance,
2 after that tip was given to the FBI, and, of course,
3 given that amount of acetone, the FBI was concerned
4 that someone was building a bomb.

5 THE COURT: Yeah.

6 MR. ROOMBERG: And they went and they
7 interviewed the Defendant. That 302 of the interview
8 has been turned over. And he admitted and showed them
9 the acetone. He made a -- a claim that all 60 gallons
10 were to wash down a sidewalk, and we don't believe
11 that --

12 THE COURT: Well, I guess my question is,
13 the 302 indicates that it was a tip, as opposed to
14 the very -- the broad language in the complaint would
15 tend to support it could come from any sort of
16 information.

17 MR. ROOMBERG: Yeah.

18 THE COURT: But what you're telling me now
19 in court is that it was a tip.

20 MR. ROOMBERG: I can tell you it came from
21 a live concerned citizen.

22 THE COURT: That's all I was -- That's all I
23 was wondering. All right. Go ahead.

24 MR. ROOMBERG: Who will not be a witness.

25 THE COURT: That's all right.

1 I mean, you see why I was asking the question?

2 MR. ROOMBERG: Yes, sir. No, I do
3 understand.

4 THE COURT: Okay.

5 MR. ROOMBERG: And it's interesting. The
6 only -- Mr. Azar-Farr cites, at times, correct law in
7 his brief. He cites that FISA expressly avows the use
8 of its information to launch criminal investigations.
9 He cites 1806, failure to comply with these
10 requirements or with other procedural requirements
11 renders the information inadmissible as evidence in
12 any trial, hearing, or other proceeding.

13 What he mis-cites is, the 1980 Farese case is
14 dealing with T-3 wiretaps, which is under a different
15 statute than FISA intercepts, and when it must be
16 disclosed, because of national security concerns. As
17 the Court correctly points out, when we use that, or
18 derived information from it, then we are required to
19 disclose. But it's not, as Mr. Azar-Farr points out,
20 that it somehow, no matter what, if there was ever
21 FISA in -- somewhere in Pakistan, and it somehow led
22 to something, that led to something, that led to
23 something, we're still dealing with, is FISA-derived
24 information against these Defendants used? That's not
25 what we have here.

1 What we have is a criminal investigation that
2 started by -- from live tips and from different --
3 various law enforcement agencies all seeing an issue
4 with the sale of synthetic cannabinoids and synthetic
5 cathinons, the bath salts, as well, happening at this
6 Defendant's store, at Mr. Jaffer Ali's store, both at
7 Best Foods and at Hang Ten, and throughout the city.
8 Eventually, we found out that they were all tied
9 together. That came because, after independent
10 probable cause was given to an Article III judge, we
11 got wiretap authority, and that's where this
12 information comes from.

13 Mr. Azar-Farr wants to go on this fishing
14 expedition because there may be FISA. Under his
15 theory, there may be FISA for every case in the
16 country, and that every court would have to go through
17 every potential gyration to determine whether or not
18 somewhere down the road, forget about how far the
19 taint is, that maybe FISA led to something that led to
20 something that led to something, with 43 degrees
21 of separation.

22 So, that's not what we're dealing with.

23 What we're dealing with here, is there FISA or
24 FISA-derived? We are not introducing any FISA or
25 FISA-derived information in this case. It has all

1 come from criminal investigation. And Mr. Azar-Farr's
2 claim that, well, maybe Mr. Roomberg and Mr. Hulings
3 don't even know about it, well, if that's the case,
4 and the folks on the trial team don't know about it,
5 we're not responsible to go seek it out, like
6 Mr. Azar-Farr asks.

7 THE COURT: Can I ask you a question about
8 that --

9 MR. ROOMBERG: Yes, sir.

10 THE COURT: -- particular point?

11 Let's assume that somewhere in there there's
12 a recording, there is FISA, or anything else, that's
13 a recording of Mr. Syed Ali. It's my reading of Rule
14 16 that it's not just, if you know it, but if, through
15 due diligence, you could know it, you've got to give
16 that recording. Now, if it's an oral statement, it's
17 only if you use it. But under 16(b)(1), I understand
18 that to say that the attorney for the Government
19 knows, or, through due diligence, could know that the
20 statement exists, you've got to give the statement up.

21 So, have you --

22 MR. ROOMBERG: I think that the only --

23 THE COURT: My question is, have you done
24 that due diligence? Or maybe I'm reading it wrong.

25 So...

1 MR. ROOMBERG: We know of no statements that
2 would be discoverable in this case, other than on the
3 T-3s or the 302s.

4 THE COURT: Well, then, that's -- that's
5 fine.

6 MR. ROOMBERG: But just so I make our point
7 clear. If it were related to the subject matter of
8 this case, as opposed to, do I know --

9 THE COURT: It has to be related.

10 MR. ROOMBERG: -- do I know if he's been
11 in Pakistan and was picked up on a -- a FISA.

12 THE COURT: It has to be relevant. And
13 I'm --

14 MR. ROOMBERG: It has to be relevant.

15 THE COURT: Yes.

16 MR. ROOMBERG: Or --

17 THE COURT: And I didn't mean to say
18 otherwise.

19 MR. ROOMBERG: Or if it was Brady
20 information. And, yes, we are responsible to seek
21 Brady information wherever we reasonably believe it
22 might be, based on our knowledge and the -- and the
23 knowledge of the trial team. But the trial team
24 doesn't include, as Mr. Azar-Farr would like to make
25 this argument, the entire United States Government.

1 The NSA is not part of our trial team. And unless
2 they are, what Mr. Azar-Farr asked for, basically in
3 this, and I'm sure in every other case, is that
4 this search be done, and he's not entitled to that.
5 The rules don't allow for that. 1806 does not allow
6 for that.

7 I think the Court has an excellent grasp. I'm
8 happy to take questions.

9 THE COURT: One more. I --

10 MR. ROOMBERG: But there's no basis for
11 Mr. Azar-Farr's motions, or for his baseless
12 accusations against the attorneys in this case.

13 THE COURT: I just had one additional
14 question.

15 MR. ROOMBERG: Yes, sir.

16 THE COURT: I mean, Mr. Azar-Farr's argument
17 was, look, some of these sources, you've said they're
18 live human sources.

19 MR. ROOMBERG: Yes, sir.

20 THE COURT: Some of these sources or
21 background of those sources were actually surveillance
22 of some sort. If -- If that was true -- As a
23 hypothetical matter, let's put it that way.

24 MR. ROOMBERG: Yes, sir.

25 THE COURT: If that was true, and you knew

1 that there was surveillance that had led to something
2 along those lines, would you be required, under 16(b)
3 and the -- to look for relevant statements? Would you
4 be required, under Brady, to look for exculpatory
5 statements in that background information, as a
6 hypothetical matter?

7 MR. ROOMBERG: And are we talking about
8 physical surveillance, or are we talking about --

9 THE COURT: Whatever -- I mean, in other
10 words, if he's -- in a case where he was correct, not
11 this case, but in some case, let's say, where he --

12 MR. ROOMBERG: Yes, sir.

13 THE COURT: I'm not -- I don't know. We
14 have to -- I have to decide that. But if he was -- if
15 in a case where the -- like it says in Paragraph 37,
16 received information, that information, you know, is
17 not in your trial team's hands but it's what led to a
18 source, and that information came from surveillance,
19 wouldn't you, as a team, have to go and read that
20 surveillance, look for relevant recorded statements
21 and -- and material exculpatory statements?

22 MR. ROOMBERG: We would, in that case, make
23 a Prudential Search Request.

24 THE COURT: I'm sorry? A what?

25 MR. ROOMBERG: We would make a Prudential

1 Search Request for Brady information, --

2 THE COURT: Who --

3 MR. ROOMBERG: -- to the National Security
4 Division, --

5 THE COURT: I see. All right.

6 MR. ROOMBERG: -- if we believed that to be
7 the case. And we're well-aware of how to do that and
8 when to do that.

9 I can tell the Court we have given Brady
10 information. We have given extensive discovery in
11 this case. We've made three discovery productions so
12 far. We can measure it on a number of DVDs that have
13 had to be turned over on. And we're not done because
14 we're still gathering emails, we're still waiting for
15 lab reports. So, I'm guessing there's going to be
16 even more production in this case.

17 We've turned over Brady. When Brady becomes
18 aware (sic), we put that in the discovery. We've
19 given Mr. Syed Ali all of the discovery that has gone
20 to everybody else. He's gotten any Brady information
21 that goes to him or anybody else. We've gone above --
22 We've given early Jenks.

23 We've gone above and beyond what Rule 16
24 requires. We understand what our obligations are
25 under 1806. If there comes a time where we seek to

1 introduce evidence that is FISA or FISA-derived, we
2 will certainly notify the Court. And, at that point,
3 that might be the time where he could ask for a
4 suppression. But he doesn't get to go on a fishing
5 expedition and do depositions of every agent for what
6 started this case. You know, he's not even
7 necessarily entitled to know what started the case,
8 unless we're planning, in this case, if it -- if it
9 was FISA-derived, then, yes, he would be able to, if
10 we were going to introduce that evidence.

11 But, again, this case has been an extensive
12 criminal investigation centering around the wiretaps
13 that went on for almost three months, and from buys
14 that happened even before we went up on the wiretaps.
15 They were some of the bases for the wiretaps. So...

16 I'm happy to take any other questions.

17 THE COURT: Two -- Two other quick ones.

18 MR. ROOMBERG: Yes, sir.

19 THE COURT: One is, you say that -- that
20 CHS-1 is going to be a witness.

21 MR. ROOMBERG: Yes, sir.

22 THE COURT: It sounds like it's more than a
23 tipster. When are you going to disclose the identity?
24 I mean, that sounds like a participant in the crime.
25 I don't know if a Roviario motion's been filed, but

1 would -- would that moot some of the stuff before me
2 if that person's disclosed? Because then we know who
3 this person is, and it's not FISA, it's a human, --

4 MR. ROOMBERG: Right.

5 THE COURT: -- and that solves the issue.

6 And you're going to -- If they're going to be a
7 witness, that sounds like they're more than a tipster,
8 and, obviously, they're engaged. So, I don't know if
9 there's been a request, or if there's an issue as to
10 the security, or otherwise, then I'll hear that.

11 MR. ROOMBERG: I -- I would have security
12 issues at this point, Judge.

13 THE COURT: Uh-huh.

14 MR. ROOMBERG: And that would certainly be
15 revealed at trial.

16 THE COURT: Uh-huh.

17 MR. ROOMBERG: But...

18 THE COURT: Okay. Well, that was --

19 MR. ROOMBERG: He -- He will be a witness.

20 THE COURT: All right. That was -- That was
21 one question. And then --

22 MR. ROOMBERG: Well, and -- and --

23 THE COURT: Oh, go ahead. I'm sorry.

24 MR. ROOMBERG: Except -- except -- if --

25 He may or may not be a witness if Mr. Jaffer Ali and

1 Mr. Mowla plead, he might not be.

2 THE COURT: It depends on who goes to trial.

3 MR. ROOMBERG: Right.

4 THE COURT: He's a witness at a trial for
5 Mr. Jaffer Ali.

6 MR. ROOMBERG: Yes. Right. And for
7 Mr. Mowla.

8 THE COURT: Okay. Oh, yes. Mow- --
9 M-O-W-L-A, Mr. Mowla?

10 MR. ROOMBERG: Right.

11 THE COURT: All right. Very well.

12 And, then, my last question was, you're not
13 arguing, in any way, that FISA protections or
14 limitations, whatever they may be, would trump Brady
15 or would trump Rule 16?

16 MR. ROOMBERG: Never.

17 THE COURT: The only thing would be the
18 issue --

19 MR. ROOMBERG: My understanding --

20 THE COURT: Yeah.

21 MR. ROOMBERG: My position, and certainly
22 it's my understanding of what the Department's
23 position is, Brady information always has to be
24 revealed. And doing a Prudential Search Request is
25 not an unusual request to make. So...

1 THE COURT: The only limitation would be the
2 one, and, as I understand it, in 1806(f), which would
3 be, before giving it up, you'd give it to us in
4 camera, saying, look, we've got an issue here, --

5 MR. ROOMBERG: Right.

6 THE COURT: -- how do we disclose it.

7 But that's a procedural question, as opposed
8 to whether you're required.

9 MR. ROOMBERG: Right. We would --

10 THE COURT: There's no argument -- Yeah.

11 MR. ROOMBERG: We would file 1806 and
12 disclose to the Court first. It may be, if it was
13 Brady information, and depending on what it was, we
14 would disclose it without even going to the Court, --

15 THE COURT: Uh-huh.

16 MR. ROOMBERG: -- after getting the proper
17 permissions.

18 But there is no Brady information, to my
19 knowledge, that has not been turned over or that is
20 about to be turned over, which would be not in
21 particular to Mr. Ali. As the Court knows, one of the
22 codefendants has pled guilty.

23 THE COURT: Uh-huh.

24 MR. ROOMBERG: But, no. 1806, while not
25 trumping Rule 16 or Brady, gives procedures if there

1 are sources and -- and methods that need to be
2 protected.

3 THE COURT: All right.

4 MR. ROOMBERG: Thank you.

5 THE COURT: Thank you, Mr. Roomberg.

6 Mr. Azar-Farr, you've heard my questions of
7 Mr. Roomberg. You may have additional comments
8 you'd like to make. I'm happy to hear them.

9 MR. AZAR-FARR: Very few, your Honor.

10 Parsing through Mr. Roomberg's comments, and
11 notwithstanding general accusations of criminality,
12 I would like to narrow the legal question again a
13 little bit more.

14 Everything Mr. Roomberg has said essentially says
15 that the Government decides what is FISA information
16 and what is FISA-derived information. That decision
17 is not the Government's to make. That decision
18 belongs to the Court. Otherwise, the notification
19 provision of FISA is utterly meaningless, particularly
20 when it is now shown across the country that the
21 Government has taken such a narrow view of "derived
22 from," that it has entirely read that provision out
23 of existence.

24 So I repeat again, if I may, that the
25 notification provisions are triggered separate and

1 apart from the in camera inspection provisions and
2 the Government's intent to introduce evidence at
3 trial. 1806(c) and (e) and (f) must be read in
4 conjunction with each other in order to give meaning
5 to the purpose of the statute. When Congress put 1806
6 in there, it did not contemplate nondisclosure, it
7 contemplated disclosure. And the Government cannot
8 abide by that if the Government, itself, often times
9 is left in the dark. That's the evidence we have.

10 Now, the fact that we have received ten or
11 twenty or thirty, or, in the future, maybe fifty
12 CDs of information, hardly matters to me. I'm not
13 judging it based on quality -- or quantity of the
14 information they send our way. There is no evidence
15 so far as to how this investigation actually began
16 against Mr. Syed Ali, the criminal investigation.

17 Now, the Government keeps saying, we have this
18 information, we have that information, but they don't
19 place it in context. They do not define it. Nor does
20 the Government commit to this Court that it has done
21 due diligence. What it does say is, I can tell the
22 Court "A" and I can tell the Court "B." But that's
23 not enough. The Government is required to dig deep,
24 and it cannot dig deep if it's kept in the dark.

25 THE COURT: All right. Thank you,

1 Mr. Azar-Farr.

2 Well, I appreciate the parties' arguments. It
3 was helpful to the Court in understanding the
4 circumstances of the case. And I'm prepared to rule.
5 I'll give you an oral ruling, but then I'm going to
6 follow up with a very short written ruling so you'll
7 have it on paper.

8 And the -- As I see it now, the Defense has not
9 provided sufficient reason to believe that there is
10 a FISA investigation involved in any way in this case.
11 And, so, at that -- on that basis, I will deny the
12 motion for discovery, without prejudice. And this
13 is why.

14 If it turns out that there is FISA-based
15 information, then there is a serious concern, based on
16 the proceedings here, and the information presented in
17 the motions, as to how to determine whether evidence
18 is used or otherwise disclosed in trial -- sorry --
19 entered into evidence or otherwise use that evidence;
20 in other words, evidence can be used because you
21 started your investigation that way, or it was
22 evidence derived from FISA evidence.

23 Right now we don't know there's any FISA evidence
24 at all. If it turns out that there is FISA evidence,
25 and in any way the Defense can show that or the

1 Government is obligated to disclose that, then there's
2 going to need to be a rather searching review, first
3 by the Government, and then perhaps with court
4 supervision, as to whether the evidence they're using
5 at trial is derived from that evidence, if the
6 evidence from FISA is otherwise being used in any
7 trial hearing or otherwise, and whether the
8 proceedings in 1806(c), (d), (e) and (f) are being
9 followed.

10 But I think the Court -- the Government
11 understands its obligation. The obligation is
12 spelled out, actually, in the Clapper case, at 18 --
13 I'm sorry -- 133 Supreme Court 1154, sets out what
14 those obligations are. The Government has to follow
15 those obligations. The Government has conceded that
16 Rule 16 trumps any FISA protection. So, if there is a
17 statement that is a relevant statement, that is a
18 recorded statement, in their possession or through due
19 diligence known to exist, they have to disclose it.

20 And, of course, they have to disclose any Brady
21 information. That means anything that is material
22 and exculpatory, as broadly defined in Kyles versus
23 Whitley, and the subsequent cases. And I think it's
24 quite properly defined in the U.S. Attorney Manual, as
25 I read it.

1 So, with those disclosure requirements, it may
2 very well be that we find that we have statements that
3 were reported through some intelligence process, FISA
4 or otherwise. If that is true, then this motion may
5 have to come back before the Court. But, at this
6 time, there's just not enough evidence to see -- to
7 show that there is actually FISA involvement in this
8 case. It is equally possible that this is all
9 human -- at best equally possible for the Defense that
10 it's all human sources. And "equally possible" is not
11 enough.

12 And, so, given that we're at a point of
13 speculation on that matter, I'm denying without
14 prejudice. But it is without prejudice. If
15 additional evidence, through the discovery, or
16 otherwise, shows that we have surveillance that led to
17 this, we're going to be looking back at this and going
18 back to 1806 and trying to figure out what that
19 information was.

20 Of course, that would be a motion probably filed
21 back with the District Court. That would have to be
22 referred to me again. But I'm happy to consider those
23 matters in more detail.

24 Anything further from you, Mr. Azar-Farr, since
25 it's your motion, first?

1 And then I'll ask from the Government.

2 MR. AZAR-FARR: Does the Court intend to
3 follow its oral decision with a written decision?

4 THE COURT: It'll just be a written decision
5 saying, for the reasons on the record, that it was
6 denied without prejudice. You can print up the
7 record; that way you can have the ruling.

8 MR. AZAR-FARR: Okay. Well, I was --
9 In terms of the prospects of an appeal of the
10 decision, --

11 THE COURT: Of course.

12 MR. AZAR-FARR: -- with due respect to the
13 Court.

14 THE COURT: Of course.

15 MR. AZAR-FARR: And, so, I just wanted to
16 know what the marking time might be.

17 THE COURT: Of course.

18 MR. AZAR-FARR: Thank you.

19 THE COURT: Absolutely. And it's recorded.
20 Everything I said is recorded, so it should be easy
21 enough to get.

22 Mr. Roomberg, anything further at this time?

23 MR. ROOMBERG: No, sir.

24 THE COURT: All right. Very well.

25 We will be in recess.

1 COURTROOM SECURITY OFFICER: All rise.

2 (Recess.)

3 *****

4

5 I, Court approved transcriber, certify that the
6 foregoing is a correct transcript from the official
7 electronic sound recording of the proceedings in the
8 above-entitled matter.

8 /s/ Darla Messina March 15, 2014
9 Signature of Approved Transcriber Date

9

10

10 Darla Messina
11 Typed or Printed Name

12

13

14

15

16

17

18

19

20

21

22

23

24

25