IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CRIMINAL CASE NO. 1:05CR225
	)	The Honorable T.S. Ellis, III
STEVEN J. ROSEN and	)	
KEITH WEISSMAN,	)	
Defendants	)	

SUPPLEMENT TO DEFENDANTS' MOTION TO STRIKE THE GOVERNMENT'S CIPA § 6(c) REQUESTS AND TO STRIKE THE GOVERNMENT'S REQUEST TO CLOSE THE TRIAL

Defendants Steven J. Rosen and Keith Weissman, through counsel, respectfully submit this supplement as ordered by the Court at the hearing on March 15, 2007.[1]

INTRODUCTION

On February 20, 2007, the government served Defendants with an Amended Motion for Hearing Pursuant to CIPA Section 6. As the Court later recognized, that motion set forth a series of unprecedented proposals; those proposals, if adopted, would close significant portions of the trial from public view and require that witnesses testify under the constraints of the "silent witness rule." On March 9, 2007, Defendants filed their Motion to Strike the Government's CIPA § 6(c) Requests and to Strike the Government's Request to Close the Trial ("Motion to Strike"). While it is true that the government was not seeking to physically "close" the trial by barring the public and press from

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[1] At the March 15 hearing, the Court indicated that defendants could submit a fifteen page supplement to the original motion; defendants indicated that they might seek to file an overall substitute motion instead. Upon reflection, defendants agree that the Court's suggestion is the better approach.

entering the courtroom, the government was indeed "closing" the courtroom as a matter of law, because, once inside, the public and press would not, in any meaningful sense, actually hear the central evidence in the case.

The government's § 6(c) proposal, as the Court is aware, is premised on the claim that the CIPA and the Constitution allow the Court to differentiate between the evidence seen by the jury and that seen by the public. The government has asked the Court to allow it to redact for the public the very portions of the documents and recordings that the government will use to attempt to prove that the Defendants transmitted national defense information ("NDI") in this case. Through an invention called the "silent witness rule," the government would have the testimony relating to almost all the alleged transmissions of NDI be conducted through a cumbersome and confusing system of code language and euphemisms.

The Motion to Strike set forth three independent (though interrelated) grounds on which this proposal must be rejected. First, the government's proposal violates the Defendants' public trial rights under the Sixth Amendment. As set forth in the Motion to Strike, attempts by the government to close trial proceedings can only be sustained if they meet the rigorous standard set forth in *Press-Enterprise Company v. Superior Court*, 464 U.S. 501, 510 (1984), and *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Section I, below, demonstrates, first, that the government's § 6(c) proposal affects such a quantity of evidence as to constitute a complete closure under the Sixth Amendment, and, second, that *Press-Enterprise* is the appropriate standard, regardless of the quantity of evidence affected.

Second, the government's proposal is unworkable, prejudicial and fundamentally unfair. As set forth in the Motion to Strike, the government's proposal will not only make meaningful cross-examination of critical government witnesses impossible, but will send a continuous message to the jury that the information at issue is NDI deserving of protection – the very issue that the jury must

itself decide. Similarly, it will also have the Court improperly instruct the jury that the evidence is classified, thereby instructing them on another issue that the jury must itself decide. As set forth in Section II, below, the prejudice caused by the government's proposal is so great that no cautionary or curative instruction could remove the taint.

Third, the government's proposal is not permitted by CIPA § 6(c), and is not supported by the statute's text, structure, purpose, or legislative history. This argument is set forth in the Motion to Strike and is not addressed further in this supplement. Section III, below, however, demonstrates that the only two cases relied upon by the government for the "silent witness rule" actually do not lend its claim any support, and that the rule, as applied here, violates the Confrontation Clause.

The original motion and this supplement demonstrate that the government has legislated a new CIPA procedure that is not supported by the statute or its legislative history and which, if implemented, violates the Defendants' constitutional rights to a fair trial, an open trial and a trial in which they may fully confront the evidence and witnesses presented against them.

I. THE GOVERNMENT'S PROPOSAL CALLS FOR A FORM OF TRIAL CLOSURE GOVERNED BY *PRESS-ENTERPRISE*

The government's CIPA § 6(c) motion's distinction between evidence heard by the jury and evidence released into the public domain is governed by the same standard that would apply to an actual trial closure: the *Press-Enterprise* standard. That is so for two reasons. The first reason was set forth at length in the Motion to Strike – the proposal would bar the public from seeing the very portions of the exhibits, hearing the very portions of the tapes, and comprehending the very portions of the testimony that the government will use to prove its case. The jury must decide whether the Defendants acted with the *mens rea* required by the statute, and whether the information at issue was, in fact, NDI. The portions of the evidence that the government would redact and subject to the "silent witness rule" is precisely the evidence that the jury will consider in making its judgment.

Beyond the quality of the affected evidence, the quantity of the material that would be affected by the government's proposal is vast. There are nine transmissions of NDI alleged in the indictment. Of these, seven would be subject to the bifurcated procedure. Within these, virtually every recording and document that allegedly discusses the alleged NDI would be substantially redacted for public view. Indeed, even publicly available documents (e.g., newspaper clippings) would be treated like actually classified documents under the government's proposal. With this quantity of evidence being restricted, the government's proposal in this case is equivalent to sealing the trial in almost its entirety, and the fact that the courtroom doors remain physically open is illusory. *See United States v. Pelton*, 696 F. Supp. 156, 157 (D. Md. 1986) ("Although the doors to the courtroom will remain open, the court agrees...that the playing of the tapes to only the court, counsel, defendant, and the jury is a form of 'closure'."); *see also* Mot. to Strike at Section III.B. *Press-Enterprise* clearly applies because under the government's proposal the trial will be functionally closed.

The second reason, referred to in the original brief, but expanded here, is that *Press-Enterprise* applies to any closure, even to a closure that amounts to something less than a trial held entirely in secret. Even should the government – whether on its own or at the direction of the Court – reduce the quantity of evidence at issue, *Press-Enterprise* would still apply. No matter what the quantity, the government would still have to demonstrate an "overriding interest based on findings that closure is essential to preserve higher values," *Press-Enterprise*, 464 U.S. at 510; *Waller*, 467 U.S. at 48; and it would still have to demonstrate that there is no alternative to closure. *Press-Enterprise*, 464 U.S. at 511; *Waller*, 467 U.S. at 48.

Quantity would be relevant only to the third *Press-Enterprise* prong, namely, whether -- assuming the first two prongs are met -- the proposed closure is narrowly tailored and "no broader than necessary" to protect that interest. *Bell*, 236 F.3d at 166 (citing *Waller*, 467 U.S. at 48).

Obviously, the smaller the quantity of evidence subject to closure, the more likely the government is to satisfy the "no broader than necessary" prong.

That the *Press-Enterprise* analysis applies to any trial closure – and that the government must consequently demonstrate an overriding interest and an absence of alternatives regardless of quantity – is clear from the extensive caselaw applying the *Press-Enterprise* analysis regardless of the quantity of evidence subject to closure. *See, e.g.*, *Bell v. Jarvis*, 236 F.3d 149, 165-66 (4th Cir. 2000) (applying *Press-Enterprise* in upholding exclusion of members of the general public from the courtroom where closure was limited to testimony of one minor witness); *In re The South Carolina Press Ass'n*, 946 F.2d 1037, 1040-41 (4th Cir. 1991) (applying *Press-Enterprise* in upholding the exclusion of press and public from voir dire to protect the defendant's right to a fair trial and noting that confidential juror questionnaires must be treated as a form of trial closure); *United States v. Jacobson*, 785 F. Supp. 563, 568-69 (E.D. Va. 1992) (applying *Press-Enterprise* in denying government requests to close the courtroom during testimony of certain witnesses and instead allowing the witnesses to use pseudonyms while prohibiting sketch artists from entering the courtroom during their testimony); *United States v. Abuhamra,* 389 F.3d 309, 329 (2d Cir. 2004) (applying *Press-Enterprise* in remanding application for bail due to improper closure of government submission in a bail hearing); *Judd v. Haley*, 250 F.3d 1308, 1316-19 (11th Cir. 2001) (applying *Press-Enterprise* in granting writ of habeas corpus where state court unconstitutionally closed the courtroom during testimony of a minor sexual assault victim); *United States v. Lucas*, 932 F.2d 1210, 1216-17 (8th Cir. 1991) (applying *Press-Enterprise* analysis in upholding undercover detective testimony from behind a screen so that members of the public could not see her where the courtroom remained open for public and press to hear the testimony); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1262-63 (W.D. Wash. 2002) (applying *Press-Enterprise* in granting media partial access to sealed protective orders sealing various CIPA pleadings); *Pelton*, 696 F. Supp. at 157-60

(applying *Press-Enterprise* in allowing classified audio evidence to be played for the jury but not for the public and press where the closure was limited to only five minutes of evidence and where the public evidence allowed for informed public discussion of all relevant issues).

These varied and discreet forms of closure were not anywhere near as pervasive or involving the quantity of evidence the government seeks here. Nonetheless in each instance the court applied the *Press-Enterprise* test, and in the few instances where the court upheld the limited closure at issue, it did so only after finding that the government had demonstrated an overriding interest based on findings that closure was essential to preserve higher values, that no reasonable alternative to disclosure existed and that the closure was narrowly tailored. Thus, in this case, even if the amount of evidence affected by the government's request were to be far less than it is, the *Press-Enterprise* analysis would still govern.

While the *Press-Enterprise* standard provides the proper analysis no matter what the quantity, in this case the quantity of evidence that will be removed from public view is so great, and is of such central importance to the case, that it makes it impossible for the government to meet its burden of justifying the closure. In this case, the government has proposed that virtually all the NDI at issue in its case be closed from the public; it is inconceivable that such a closure is necessary to protect the government's interests when CIPA was designed to allow for a public trial and provides other avenues (such as admissions) for preserving an open trial.

In sum, no matter the quantity of evidence subject to closure, *Press-Enterprise* provides the proper analysis, and consequently the government must always demonstrate an overriding interest[2] and must always demonstrate that the closure is no broader than necessary, reasonable alternatives must always be considered, and the Court must always make findings necessary to support the closure. *Press-Enterprise*, 464 U.S. at 510; *Waller*, 467 U.S. at 48. The government cannot meet this burden, and thus its § 6(c) motion must be struck.

II. A CAUTIONARY INSTRUCTION TO THE JURY IS INSUFFICIENT TO REMEDY THE PREJUDICE FROM THE GOVERNMENT'S PROPOSED PROCEDURES

As set forth in the Motion to Strike, the procedures suggested by the government are so prejudicial so as to deny the Defendants a fair trial.[3] That is true not only because the precise procedures proposed by the government (use of redacted exhibits for the public, the "silent witness

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[2] Other circuits have relaxed this "overriding" requirement when the closure is only partial, *Bell*, 236 F.3d at 168 n.11, but neither the Supreme Court nor the Fourth Circuit have ever adopted this relaxed standard. *Id.*

[3] Defendants do not need to demonstrate specific prejudice when raising a public trial violation. Certain constitutional errors conducted in the course of the criminal trial are structural defects and will always invalidate a conviction. *See, e.g.*, *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (deprivation of the right to self-representation); *Murray v. Giarratano,* 492 U.S. 1, 7 (1989) (deprivation of the right to counsel at trial); *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial by a biased judge). Such structural errors require automatic reversal partly because "they infect the entire trial process", *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and also because they are violations of fundamental rights, *Neder v. United States,* 527 U.S. 1, 9 (1999), and therefore, these violations defy the harmless error analysis. The violation of the defendant's fundamental right to a public trial is one such structural error, one that permeates the entire trial. *Waller*, 467 U.S. at 49-50 & n.9; *Bell*, 236 F.3d at 165 ("The violation of the constitutional right to a public trial is [also] a structural error, not subject to the harmless error analysis." (citations omitted)). Therefore, once a defendant has demonstrated a violation of his Sixth Amendment right to a public trial, he is not required to show prejudice, but rather, the mere showing of a violation of this right entitles him to relief. *Waller*, 467 U.S. at 49-50 & n.9. Nevertheless, as discussed in this section, there is great prejudice in the government's proposal in any event, and its pervasive nature and subliminal reinforcement of the government's theory of the case would not be corrected by instructions.

rule," an instruction to the jury at the beginning of the case that it is receiving classified information) are so prejudicial, but also because other prejudicial procedures must necessarily follow when the government tries to conduct a trial in this bifurcated way: visible security (including magnetometers) at the courtroom door; security sweeps of the courtroom itself, a court security officer monitoring electronic surveillance while proceedings are underway. Taken together, these procedures -- none of which would be necessary if the government had followed the text of § 6(c) -- will create a "continuing influence" of guilt on the jury that cannot be purged. *Estelle v. Williams*, 425 U.S. 501, 504 (1976).

The Court has raised the issue of whether a cautionary instruction to the jury that it disregard the procedures in its deliberations can successfully obviate the prejudice of these procedures. A cautionary instruction in this situation, however, is ineffective as a matter of law. Moreover, on the particular facts of this case, the government's proposal is so prejudicial that any cautionary instruction as a factual matter will never be successful in actually having the jury ignore that which it will observe throughout the trial.

Though there is a general assumption that jurors can and will follow jury instructions, *see, e.g., United States v. Alerre*, 430 F.3d 681, 692 (4th Cir. 2005) ("Ordinarily . . . we presume that a properly instructed jury has acted in a manner consistent with the instructions."), it is well recognized that in some circumstances, improper prejudice to a defendant is so great that, as a matter of law, a cautionary instruction is no a cure. *See, e.g., Bruton v. United States,* 391 U.S. 123, 135-36 (1968) (limiting instruction insufficient to cure prejudice from codefendant admission in joint trial); *see also Gray v. Maryland*, 523 U.S. 185, 193-95 (1998) (applying *Bruton* to redaction of non-testifying codefendant's confession in manner that notifies jury that there has been a deletion in part). As the Court explained in *Bruton*,

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Bruton, 391 U.S. at 135-36 (internal citations omitted). Despite what the Supreme Court conceded was a clear instruction to the jury to disregard the evidence, given the nature of the evidence, "[t]he effect is the same as if there had been no instruction at all." *Bruton*, 391 at 137.

The Supreme Court reached a similar conclusion in *Jackson v. Denno*, 378 U.S. 368 (1964). In that case, the trial jury was responsible under state law for determining any factual dispute over whether a confession was voluntary. 378 U.S. at 374-78. If the jury found the confession involuntary, it was instructed to reject the confession. *Id.* at 374-75. The jury however, simultaneously was given not only the evidence relating to voluntariness, it was also given the evidence corroborating the confession, to consider in the event that it found the confession to be voluntary. *Id.* at 381. Finding this procedure improper, the Court focused on the substantial probability that the jury would not be able to obey the instruction to perform the independent, initial suppression function. The Court determined that the jury, despite the limiting instructions, would not be able to focus solely on voluntariness when considering the admissibility of the confession, but would also consider evidence related to the truthfulness of the confession and defendant's guilt in assessing whether the confession was voluntary. *Id.* at 383. The Court determined that

> the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness. Indeed the jury is told to determine the truthfulness of the confession in assessing its probative value. As a consequence, it cannot be assumed . . . that the jury reliably found the facts against the accused.

Id. at 386-87. Once again, despite the use of an extensive cautionary instruction, *see id.* at 375 n.5, the risk that the jury would not (or could not) follow was too great.

The failure of cautionary instructions to purge the taint of impermissible evidentiary considerations applies equally to courtroom procedures that impinge on the presumption of innocence. For that reason, a cautionary instruction is ineffective when the defendant is forced to don prison garb and/or shackles in the presence of the jury at trial; that practice is unconstitutional. *See Deck v. Missouri*, 544 U.S. 622, 629 (2005) (routine practice to compel defendant to wear shackles visible to jury at sentencing phase violates due process); *Estelle*, 425 U.S. at 503 ("To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process."). In *Estelle*, the Court considered the effect on the jury of forcing a defendant to appear at trial wearing a prison uniform:

> This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play.

425 U.S. at 504-05 (citations omitted) (holding that compelling a defendant to wear jail cloths at trial over defendant's objection constitutes a violation of the Fourteenth Amendment). Thus, the prejudice inherent in prison garb and shackles at trial is so great that the Court did not even consider the efficacy of a cautionary instruction; an instruction simply would not work.

Like the confession in *Bruton,* like the suppression hearing in *Jackson*, and especially like the prison garb and shackles in *Estelle* and *Deck*, the proposal here is so inherently prejudicial that a cautionary instruction would be ineffective as a matter of law. The procedure proposed by the government will compromise the presumption of innocence by communicating strongly to the jury that the information at issue is closely held and that it is potentially damaging to national security. Like the prison garb in *Estelle*, the quantity of evidence affected by the government's proposal and its attendant procedures is so great that the government's proposal will become a continuing influence throughout the trial. And as in *Bruton* and *Jackson*, the message sent by these proposals is "powerfully incriminating" – indeed, it relates to the very elements of the offense that will be

contested at trial. Consequently, the risk that the jury cannot or will not follow a cautionary instruction is so great – and the consequences of failure are so vital to the Defendants – that the human limitations of the jury cannot be ignored.

That is especially true because the government's proposal asks the jury to disregard not simply what the government has done, but what the Court does. In an ordinary case, if the government introduces some piece of evidence that it should not have, then the Court can instruct the jury to disregard the government's misstep. But here, a cautionary instruction would require the Court to instruct the jury to disregard not what the government does, but what the Court itself does. Under the government's proposal, the *Court* would instruct the jury at the outset that the *evidence* in the case is classified and can never be disclosed. But the Court would then have to undercut this very instruction and tell the jury that in deciding the case it is the jury, not the Court, decides whether the information is classified and NDI.[4] For the Court to tell the jurors that the information is classified, but in the same breath to tell the jurors that the jury, not the Court, decides whether the information is classified and NDI, is simply untenable. As a matter of law, such an instruction would be unavailing.

Moreover, even if the practice suggested by the government does not fall within the category of conduct so prejudicial that, as a matter of law, a cautionary instruction could never cure the harm,

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[4] The jury would have to make that dual determination because whether the information is NDI and whether it is classified are both elements that the government has to prove. Although 18 U.S.C. § 793 explicitly speaks only in terms of NDI and does not explicitly speak in terms of classified information, this Court has determined that the statute avoids a constitutional vagueness challenge aimed at the "entitled to receive it" element only if the statute is understood to incorporate the classification system. As the Court has held, that means that the government would have to prove that the information was classified and that the recipient was not cleared to receive it. *See United States v. Rosen*, 445 F. Supp. 2d 602, 622-23 (E.D. Va. 2006).

it is still clear that on the facts of the instant case an instruction, as a practical matter, would simply not work. That is, even if a cautionary instruction would not categorically be precluded, the specific circumstances in a given case may render an instruction legally insufficient to cure the taint. *See, e.g.*, *United States v. Ince*, 21 F.3d 576, 584 (4th Cir. 1994) (cautionary instruction could not cure prejudice from improper admission of witness's prior statement that defendant confessed); *Goldsmith v. Witkowski*, 981 F.2d 697, 703 (4th Cir. 1993) (jury instruction could not cure prejudice from introduction of inadmissible hearsay testimony by police officer that went to critical issue in case); *United States v. Brevard*, 739 F.2d 180, 182-83 (4th Cir. 1984) (curative instruction to disregard impermissible reference to polygraph could not cure prejudice where defendant's credibility was critical issue).

Here, it is clear that even if the government's proposal does not fall within the category of automatic prejudice such that an instruction will always fail, it clearly constitutes an instance where the prejudicial procedure as proposed in this particular case is of a nature and pervasiveness that the jury will be unable to ignore it. As discussed at greater length in the Motion to Strike, the government's proposal affects each of the nine transmissions of NDI alleged in the indictment. The "silent witness rule" will affect virtually every witness who testifies. By forcing defense counsel to use cumbersome references to documents redacted for the public and confusing, inconsistent lists of code names for key people, places, and things, it will render cross-examinations entirely unworkable. It will affect a substantial majority of the important recordings, and it will affect a substantial majority of the classified information. Not only does the proposed procedure go to the very core issues for the jury to decide – the nature of the information – but it forces a conclusion on the jury repeatedly and pervasively throughout the trial proceedings: the conclusion that the information is not public and its disclosure is harmful. The jury will, at every moment, be viewing the Defendants as if they were wearing prison clothes or shackles in front of the jury, and the

repeated use of the prejudicial procedures, coupled with the prejudicial jury instruction, will be a continuing influence on the jury throughout the trial, with the passage of time merely lending more weight to the improper inferences. The procedure will be so pervasive throughout the trial, affecting nearly every witness, and nearly every alleged disclosure of NDI, that to trust the cautionary instruction would require ignoring the human limitations of the jurors.

III. THE SILENT WITNESS RULE IS NOT SUPPORTED BY CIPA § 6(C) OR FOURTH CIRCUIT CASELAW, AND, AS APPLIED IN THIS CASE, VIOLATES THE CONFRONTATION CLAUSE

As discussed in the Motion to Strike, the proposed bifurcation of the evidence and the use of the "silent witness rule" is not supported by CIPA's text or legislative history. The purpose of the statute was specifically to permit the trial judge to rule on questions of admissibility involving classified information so that the information could be used in open court. *See* S. Rep. No. 823, 96th Cong., 2d Sess. 1980, *available at* 1980 WL 12985 at *1. To accomplish this, § 6(c) clearly and unequivocally permits only two specific types of "substitutions": (a) a statement admitting relevant facts that the classified information would tend to prove; and (b) a summary of the specific classified information. Section 8(a) allows for redactions. CIPA makes no allowance for the "silent witness rule" or any other form of "substitution."

In support of its proposal, the government cites the Fourth Circuit's decision in *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990), but fails to note the criticism that *Fernandez* leveled at the "rule." *See* Govt's Amended CIPA Section 6(c) Motion at 12 n.5 & 15. In *Fernandez,* the district court rejected the government's proposed adoption of the "silent witness rule," (referred to in *Fernandez* not as the "silent witness rule," but rather as the "key card proposal"). One of the central issues in the case revolved around the actual locations of certain CIA sites. The government proposed that the sites be referred to in a coded fashion while the witness and the jury would "apparently consult a key card to discover their actual locations." *Fernandez,*

913 F.2d at 162. The Court of Appeals upheld the district court's rejection of the proposal, finding that the government's proposal was made too late. But in upholding the district court's rejection of the government's proposal, the Court of Appeals did not limit itself solely to the proposal's timing; it also went out of its way to note the problems with the proposal:

> [T]he key card proposal, though ingenious, is an artificial means of presenting evidence. . . . Moreover, it was within the district court's discretion to believe that, in addition to its artificiality, the complicated key card system might confuse or distract the jury. . . . Jurors would have to make continuous reference to a key card and a map while at the same time focusing on the content of the testimony.
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> It seems clear, therefore, that the key card proposal was far from an interchangeable substitute for the real thing.

Id.[5] The use of the silent witness rule in this case implicates all the concerns raised in *Fernandez*, and, consequently, should be rejected.

Moreover, not only is the "silent witness rule" artificial, complicated, confusing, distracting and far from a substitute for the real thing, it is also, at least as proposed in this case, inconsistent with the Confrontation Clause. It is important to recall that the government's proposal is designed to affect the government's own evidence in its case-in-chief, not just the evidence Defendants intend to offer in their case. This also raises the possibility of violating Defendants' Confrontation Clause rights, which secure an adequate opportunity to cross-examine adverse witnesses. *United States v. Owens*, 484 U.S. 554, 557-58 (1988) (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

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[5] The government also cites *United States v. Zettl*, 835 F.2d 1059 (4th Cir. 1987), in support of the "silent witness rule." Contrary to the government's proposal in this case, the district court in *Zettl* did not allow the case to proceed using the silent witness rule as to the documents that were used to prove the government's case. Similarly, the government should not be permitted to proceed under this rule in order to prove that the very information subject to the silent witness rule was NDI. *Zettl* does not support such a result.

The Clause is satisfied when the defense is given a full and fair opportunity to probe and expose testimonial infirmities such as forgetfulness, confusion, or evasion, "thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Fensterer*, 474 U.S. at 22. The opportunity for an effective cross-examination is critical because it is the principal means to test the credibility and veracity of testimony. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

The government's proposal whereby the cross-examination of key government witnesses will be subject to the silent witness rule procedures does not give the Defendants the opportunity for a full and fair cross examination. The substitution of key words and phrases with general statements that have little relation to the underlying NDI will so hamper the Defendants' ability to "probe and expose" testimonial infirmities that it will render cross examination meaningless. The Defendants' ability to question the witnesses will be so stifled that they will not have the opportunity to delve into and question the witnesses' testimony in order test perceptions, memory, bias, or confusion. The silent witness rule will so hamper the Defendants' ability to cross-examine government witnesses that it is the same as permitting no cross examination at all.

Respectfully submitted,

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Dated: March 21, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL CASE NO. 1:05CR225
	)	The Honorable T.S. Ellis, III
STEVEN J. ROSEN and	)	
KEITH WEISSMAN,	)	
Defendants	)	

ORDER

Upon consideration of Defendants' Motion for Leave to File Supplement to Defendants' Motion to Strike the Government's CIPA §6(c) Requests and to Strike the Government's Request to Close the Trial, it is hereby ORDERED that:

1. Defendants' Motion is GRANTED;

2. Defendants are granted leave to file Supplement instead of superseding pleading indicated in Court's March 15, 2007 order; and

3. Defendants shall file a redacted, unclassified version of their initial Motion to Strike the Government's CIPA §6(c) Requests and to Strike the Government's Request to Close the Trial with the Court Security Officer by 5:00 p.m. on March 23, 2007 for filing in the public record.

Alexandria, Virginia
March 21, 2007

T.S. Ellis, III
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2007, *Defendants' Motion for Leave to File Supplement to Defendants' Motion to Strike the Government's CIPA §6(c) Requests and to Strike the Government's Request to Close the Trial* and *Defendants' Supplement to Motion to Strike the Government's CIPA §6(c) Requests and to Strike the Government's Request to Close the Trial* was hand delivered to the following:

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