

THOMAS E. MOSS
 UNITED STATES ATTORNEY
 TRACI J. WHELAN
 WENDY J. OLSON
 ASSISTANTS UNITED STATES ATTORNEY
 DISTRICT OF IDAHO
 WASHINGTON GROUP PLAZA IV, SUITE 600
 800 PARK BOULEVARD
 BOISE, IDAHO 83712-9902
 TELEPHONE: (208) 334-1211
 FAX: (208) 334-1038

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)	
)	CR No. 07-023-N-EJL
Plaintiff,)	
)	UNITED STATES' JOINT MOTION
vs.)	FOR PROTECTIVE ORDER
)	(UNDER SEAL)
JOSEPH EDWARD DUNCAN, III,)	
)	
Defendant.)	
)	

The United States of America, by and through the undersigned counsel, joins in the Motion for Protective Order filed by S.G.'s Guardian Ad Litem on November 5, 2007. In that motion the Guardian Ad Litem (GAL), John Sahlin, moves this Court pursuant to 18 U.S.C. § 3509 to order the following.

1. An adult attendant will be allowed to accompany S.G. throughout the judicial process for purposes of providing emotional support.
2. Prohibiting public disclosure of S.G.'s name or any information concerning her in the course of the proceedings when she or any other witness may divulge her name or any other information concerning her.

3. Closing the courtroom during S.G.'s testimony to all persons, including members of the press, who do not have a direct interest in the case.
4. Providing S.G. may testify by live two-way closed circuit television.

On July 9, 2007, the United States and the Defendant provided a stipulation to the Court and jointly moved the Court to order the closing of the courtroom during S.G.'s testimony and to prohibit the public disclosure of S.G.'s name. (*See* docket entry 63). In that motion and stipulation the parties articulated the legal framework which the Court must consider in granting the motion. That legal framework is reiterated below.

A. THE COURTROOM SHOULD BE CLOSED DURING THE TESTIMONY OF THE MINOR VICTIM PURSUANT TO 18 U.S.C. § 3509(j).

Title 18, United States Code, Section 3509 (e) provides that:

When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate.

Although there is a presumption in favor of open trials, *see, Waller v. Georgia*, 467 U.S. 39, 44 - 45 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573(1980), trial judges are given discretion to close portions of court proceedings when presented with "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *See, Waller*, 467 U.S. at 45 (quoting, *Press-Enter. Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984) ("Press-Enterprise I").

In order to close the courtroom, it must be shown that the party seeking closure advances an overriding interest that is likely to be prejudiced, that closure is no broader than necessary to protect that interest, that the trial court considered reasonable alternatives to closing the

proceeding, and that the court make findings adequate to support the closure. See, Waller, 467 U.S. at 48; Brown v. Kuhlmann, 142 F.3d 529 (2d Cir. 1998).

In the present case, the testifying victim is entitled to closure of the courtroom pursuant to 18 U.S.C. § 3509. The Court has already designated this a case of special public importance pursuant to 18 U.S.C. § 3509(j) and accepted affidavits which were filed in support of that designation. Those affidavits are incorporated by reference herein for the limited purpose of providing the Court with the reasoning for closing the courtroom during S.G.'s testimony. Therefore, closure of the courtroom during the victim's testimony to all persons but witnesses, court personnel, the parties, and attorneys presents an overriding interest essential to preserving the personal dignity of the victim and safe-guarding her physical and psychological well-being.

1. The Victim Advances An Overriding Interest That Is Likely To Be Prejudiced By Testifying In Front Of An Open Courtroom.

The practice of closing the courtroom to members of the public during the testimony of a victim of a sex crime is not uncommon. See, Bell v. Jarvis, 236 F.3d 149, 167 (4th Cir. 2000); United States ex. rel. Latimore v. Sielaff, 561 F.2d 691, 694 (7th Cir. 1977); Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966); United States v. Kobli, 172 F.2d 919, 923 (3rd Cir. 1949). The party requesting closure must advance an overriding interest that is likely to be prejudiced in an open courtroom. Waller, 467 U.S. at 48; Press-Enterprise I, 464 U.S. at 511 - 512. Courts have refined this requirement, calling only for a "substantial probability" that the interest will be prejudiced. See, Press-Enter. Co. v. Superior Court, 478 U.S. 1, 14 (1986) ("Press-Enterprise II"); see also, Ayala v. Speckard, 131 F.3d 62, 69 (2d Cir.1997). Furthermore, if the party is seeking a relatively narrow closure, their burden of proving an overriding interest is not a "heavy" one. Bowden v. Keane, 237 F.3d 125, 129 (2d Cir. 2001) (citing, Brown, 142 F.3d at 538. The

justification for such closures “lies in the protection of the personal dignity of the complaining witness”. Bell, 236 F.3d at 167; Latimore, 561 F.2d at 694 (The “[p]rimary justification for this practice lies in protection of the personal dignity of the complaining witness.”).

In Jarvis, an overriding interest justifying temporary courtroom closure was found during the testimony of a rape victim in order to protect the victim while she testified as to details of her prior sexual abuse. 236 F.3d at 167. The Fourth Circuit in Jarvis reiterated the point made earlier in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982), that protecting the physical and psychological well-being of a minor victim of sex crimes, including safeguarding them from any further trauma and embarrassment, is exactly the type of overriding interest needed to overcome the presumption in favor of an open trial. See, Jarvis, 236 F.3d at 167-168.

In the current case, the victim presents the overriding interest of protecting her dignity and preventing undue embarrassment, which justifies the temporary closure of the courtroom during her testimony. As in Jarvis, the victim in the current case will testify about her victimization in sex crimes while under 15 years of age. Recalling the details of these crimes in front of disinterested peers and the media will be sensitive and embarrassing. Thus, her overriding interest is to mitigate the trauma on her psychological and physical well-being, as well as to prevent the undue embarrassment that providing detailed sexual information in an open courtroom is likely to cause. See, e.g., Latimore, 561 F.2d at 694 - 695 (noting that “exclusion of spectators during the testimony of an alleged rape victim ‘is a frequent and accepted practice when the lurid details of such a crime must be related by a young lady’ ”(quoting Harris, 361 F.2d at 891; Kobli, 172 F.2d at 923 (noting the common practice of closing the courtroom to members of the public not directly connected with the trial when “the prosecuting witness is of such tender

years as to be seriously embarrassed in giving her testimony by the presence of spectators not concerned with the trial’’)). Allowing the victim to testify in front of disinterested parties will bring about the exact types of harm sought to be protected by 18 U.S.C. § 3509 (e), as well as hinder the victim from communicating effectively. See, e.g., United States v. Withorn, 204 F.3d 790, 795 (8th Cir. 2000) (courtroom partially cleared to prevent substantial psychological harm to witness and enable her to communicate effectively). For this reason, the victim presents an overriding interest that to a “substantial probability” will be prejudiced by allowing an open courtroom during her testimony.¹

2. Temporary Closure Of The Courtroom During The Testimony Of The Victim Is No Broader Than Necessary To Protect The Interests At Stake.

Temporary courtroom closure during the victim’s testimony satisfies the second Waller factor, which provides that courtroom closure be no broader than necessary to protect the interest at stake. Waller, 467 U.S. at 48. To accomplish this, the courtroom closure should only last during the course of the minor victim’s testimony. See, Bell, 236 F.3d at 168. Since the compelling interest in this case is to protect the victim during her testimony, limiting closure to her testimony is “imminently tailored to serve that interest.” See, Bell, 236 F.3d at 168. This closure should not be unnecessarily limited by excluding court personnel, the parties, or the attorneys. Id. at 168. Furthermore, the proceedings should be recorded, and this recording should be transcribed for the public. Jarvis, 236 F.3d at 168 - 169; see also, Ayala, 131 F.3d at 72

¹ Analogous to this situation is the Second Circuit’s acceptance of partial courtroom closures during the testimony of adult undercover law enforcement agents that exhibit an overriding interest in maintaining their safety, hidden identity, and effectiveness. See, Bowden v. Keane, 237 F.3d 125, 127 (2d Cir. 2001) (temporary closure justified under four prongs of Waller test); Ayala, 131 F.3d at 72.

(availability of transcript a factor in determining whether partial closure violated Sixth Amendment right to a public trial).

In the present case, courtroom closure is justified if used for the limited purpose of protecting the victim during her testimony. Pursuant to 18 U.S.C. § 3509 (e), the Court may keep out any parties not directly interested in the proceedings, including the media. The temporary courtroom closure during the victim's testimony is consistent with the interest of protecting the victim during her potentially harmful and embarrassing testimony.

3. There Are No Reasonable Alternatives To Closing The Courtroom.

The third Waller factor is that the trial court consider reasonable alternatives to closing the courtroom prior to actual closure taking place. Waller, 467 U.S. at 48. In satisfying this requirement, the Fourth Circuit has held that a trial judge has presumably considered alternatives by ordering only a temporary closure as opposed to a full closure. See, Jarvis, 236 F.3d at 169. Other alternatives that have been found unacceptable include using a screen to block the victim's view of the courtroom public, excluding only certain people, or testifying by means of a closed-circuit television. See, Jarvis, 236 F.3d at 169 n.12; see also, 18 U.S.C.A § 3509 (b) (1) (West 2000) (child's live testimony by two-way closed circuit television).

In the present case, the granting of a temporary courtroom closure only during the testimony of the victim would satisfy the third Waller requirement. As was seen in Jarvis, granting only a temporary or limited closure is viewed as a reasonable alternative to closing the courtroom during the entirety of the proceedings. Likewise, temporary closure would be the most appropriate means of balancing the victim's overriding interest with the defendant's Constitutional right to receive a public trial. See, Jarvis, 236 F.3d at 169. Although a full closure

would not be warranted, a temporary closure would clearly be a reasonable alternative.

4. The Trial Court Must Make Findings Adequate To Support The Courtroom Closure.

The fourth Waller factor provides that the trial court make findings adequate to support a courtroom closure. Waller, 467 U.S. at 48. A *per se* rule of closure has been condemned. See, Globe Newspaper, 457 U.S. at 609 (mandatory courtroom closures violate the First Amendment). However, the court in Globe determined that closure during the testimony of a victim of child sex abuse is appropriate as long as the trial court determines on a case-by-case basis that the well-being of the victim necessitates closure. 457 U.S. at 609. In ordering closure, the trial judge need not articulate explicit or detailed findings regarding the victim's maturity, understanding, or willingness to testify. See, Jarvis, 236 F.3d at 171.

Following the rationale of the courts in Globe and Waller, the trial judge has discretion in the present case to make findings as to whether the victim's well being necessitates closure. These findings need not be detailed or exhaustive. The victim's situation in the present case shows a need for closure. As discussed above, recalling the details of sexual activities in front of a group of disinterested peers will cause her undue embarrassment, as well as psychological and possible physical harm. The situation presented here makes it clear that closure is necessary.

B. A PROTECTIVE ORDER BARRING THE USE OF THE VICTIM'S NAME AND OTHER IDENTIFYING INFORMATION SHOULD BE ISSUED.

The parties stipulate that the witness's name and the contents of her testimony should be protected pursuant to 18 U.S.C. § 3509(d) concerning the witness's name and contents of her testimony.

Title 18, United States Code, Section 3509(d)(1) provides:

(d) Privacy protection.--

(1) Confidentiality of information.--(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding **shall--**

- (i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and
- (ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to--

- (i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;
- (ii) employees of the court;
- (iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and
- (iv) members of the jury.

(Emphasis added.)

Attached to the GAL's motion are two sealed affidavits which supports the parties stipulation regarding confidentiality and closing the courtroom. Additional support can be garnered from the fact that the Attorney General for the United States has ordered the United States Attorney and his assistants to file any papers that disclose the name of or any other information concerning a child under seal. See *Attorney General Victim Witness Guidelines*. Further the knowing or intentional violation of the privacy protection accorded children in 18 U.S.C. § 3509 is a criminal contempt punishable by not more than one year's imprisonment, or fine, or both. (18 U.S.C. § 403). Therefore based upon the case law, the statute, the stipulation and other evidence, the United States respectfully requests this Court grant the GAL's motion.

The motion filed by the GAL also asks this Court to allow an adult attendant to accompany S.G. and to allow her to testify by live 2-way closed circuit television. The United States joins in that motion as well.

1. Adult attendant.

The language of 18 U.S.C. § 3509(a)(1) contains both mandatory and discretionary language in that it says the child **shall** have the right to be accompanied by an adult attendant but the physical location of the adult attendant in relationship to the physical location of the child is at the discretion of the court. The United States submits that the GAL's motion sets forth sufficient facts to establish why the support person should be allowed to sit by the minor child. The child witness in this case has undergone tremendous trauma she should be allowed to have the adult attendant of her choice, not a witness of course, seated by her during questioning.

2. Testifying by 2-way closed circuit television

18 U.S.C. § 3509(b)(1)(B) specifically provides for the procedure requested by the Government in cases where the victim is a minor child who is unable to testify in front of her abusers because of fear or the likelihood of emotional trauma. As indicated above, by the GAL's motion, the minor victim in this case will likely be unable to testify in a traditional courtroom setting. See GAL Motion and Accompanying Sealed Affidavits.

As provided in the statute, 2-way closed circuit testimony is the functional equivalent of live, in-court testimony; this procedure raises few constitutional problems. *Maryland v. Craig*, 497 U.S. 836 (1990); *United States v. Etimani*, 382 F.3d 493 (9th Cir. 2003); *United States v. Rouse*, 111 F.3d 561, 568-69 (8th Cir. 1997). The child testifies from a room outside the courtroom; counsel for both parties are present in the room with the child. The judge,

Defendants, jury, other courtroom personnel, and spectators remain in the courtroom. The testimony is contemporaneously transmitted on a monitor into the courtroom. Direct and cross examination proceed as usual. The Defendants and the child are able to see each other on the monitor, thus satisfying confrontation issues. However, the child is physically removed from the Defendants' direct presence, thus lessening the fear and trauma for the child.

The only difference between testimony via two-way closed-circuit television and traditional in-court testimony is that the former reduces or eliminates the risk that a child will suffer severe emotional harm or be unable to testify as a result of the fear-inducing trauma caused when the child testifies within feet of the defendant. The reduction or elimination of this trauma does not implicate the Confrontation Clause, because that constitutional provision does not guarantee to a defendant a right to instill fear of physical harm in the witness. Indeed, the fear of physical retribution by the defendant, be it real or imagined, has never been viewed as a component of the truth-instilling role of the Confrontation Clause. *Reynolds v. United States*, 98 U.S. 145, 158 (1878) (the right to confrontation does not exist when the defendant voluntarily keeps the witness from testifying).

In *Maryland v. Craig*, the Supreme Court stated that before this procedure can be used, the Government must establish an adequate showing of necessity. 497 U.S. at 845. The trial court must find on the record that the child would be traumatized if required to testify in the presence of the defendant. *Id.* It is the Government's position that under the circumstances of this case, 2-way closed circuit testimony is appropriate. This young victim was severely traumatized by the Defendant and witnessed and experienced horrific acts at the Defendant's hand. It would be truly devastating to her to be forced to testify in the direct presence of the Defendants. Under 18

U.S.C. § 3509(b), the Defendants' interests in maintaining the right to confrontation, while affording some protection for the victims, will be satisfied by utilizing this procedure. Should the Court require an evidentiary hearing to determine whether this child would be traumatized, the United States requests that such hearing take place prior to the trial.

CONCLUSION.

The United States respectfully requests the Court grant the Motion of the GAL in this case and order a protective order to reduce the opportunity for this minor victim to be further traumatized.

DATED this 19th day of November 2007.

/s/ _____
THOMAS E. MOSS
United States Attorney

/s/ _____
Traci J. Whelan
Assistant United States Attorney

/s/ _____
Wendy J. Olson
Assistant United States Attorney

CERTIFICATE OF SERVICE

I CERTIFY that I am an employee of the United States Attorney's Office for the District of Idaho, and that a copy of the foregoing United States' Joint Motion for Protective Order (Under Seal) was served on all parties named below this 19th day of November 2007.

- United States Mail, postage prepaid
- Hand delivery
- Facsimile Transmission (fax)
- Federal Express
- ECF Filing

Thomas Monaghan
Federal Defenders of Idaho
Jefferson Place Building, Suite 301
350 North 9th Street
Boise, Idaho 83702

Mark Larranaga
Attorney at Law
705 Second Ave., No. 405
Seattle, Washington 98104

Judy Clarke
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101

Roger Peven
Federal Defenders of Eastern Washington and Idaho
10 N Post
Spokane, WA 99201

Attorneys for Joseph Edward Duncan, III

/s/ _____
Priscilla A. Foster