

THOMAS E. MOSS
 UNITED STATES ATTORNEY
 TRACI J. WHELAN, ISB #4416
 WENDY J. OLSON, CASB #150279
 ASSISTANTS UNITED STATES ATTORNEY
 DISTRICT OF IDAHO
 205 N. FOURTH STREET, ROOM 306
 COEUR D'ALENE, IDAHO 83814
 TELEPHONE: (208) 667-6568
 FAX (208) 667-6568

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)	Criminal No. 07-023-N-EJL
)	
Plaintiff,)	STIPULATION
)	
-vs-)	
)	
JOSEPH EDWARD DUNCAN, III,)	
)	
Defendant.)	

The United States of America, by and through Thomas E. Moss, United States Attorney for the District of Idaho and the undersigned Assistant U.S. Attorney and the Defendant, by and through his attorney, Thomas Monaghan, jointly move this Court for an Order pursuant to 18 U.S.C. §§ 3509(d) and (e).

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 (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

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.

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--

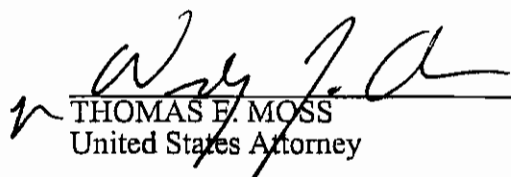
- (i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;
- (ii) employees of the court;
- (iii) the defendant and employees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

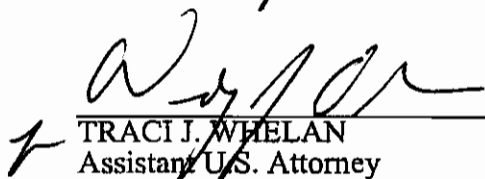
(Emphasis added.)

Even though there has been substantial media attention given to this case, and the minor victim's name is well known, that does not change the legal requirements as outlined above. Therefore, the parties request an order from the Court which tracks the statutory language. For purposes of this stipulation, the parties ask that the child simply be referred to by her first name.

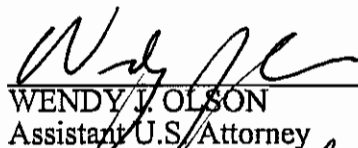
DATED this 7th day of ~~June~~^{JULY} 2007.



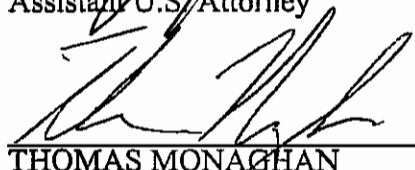
THOMAS E. MOSS
United States Attorney



TRACI J. WHELAN
Assistant U.S. Attorney



WENDY J. OLSON
Assistant U.S. Attorney



THOMAS MONAGHAN
Attorney for Defendant Joseph Edward Duncan, III