IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Appellant,	)	
	)	
v.	)	
	)	**Case No. 08-4358**
STEVEN J. ROSEN and	)	
KEITH WEISSMAN,	)	
Appellees.	)	

APPELLEES' MOTION TO DISMISS

On March 27, 2008, the government filed a Notice of Appeal in the U.S. District Court for the Eastern District of Virginia in which it seeks to appeal from four orders and memorandum opinions issued by the district court, T. S. Ellis, J., in this prosecution under the Espionage Act, 18 U.S.C. § 793.[1] The government identified § 7 of the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA"), and the collateral order doctrine as providing jurisdiction for its interlocutory appeal.[2] Appellees Steven J. Rosen and Keith Weissman respectfully submit that the government may appeal only one of the noticed decisions. Under CIPA § 7(a), the government may appeal only the March 19, 2008 CIPA § 6(c)

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[1] The four district court decisions noticed in the government's appeal are: (1) the August 9, 2006 Memorandum Opinion and Order denying defendants' motion to dismiss the Indictment; (2) the November 16, 2006 Order denying the government's motion to reconsider the August 9, 2006 decision; (3) the November 1, 2007 Memorandum Opinion setting forth the principles it would apply in its CIPA § 6(c) Order; and (4) the district court's March 19, 2008 CIPA § 6(c) Order.

[2] (*See* Gov't Docketing Statement 1, Apr. 11, 2008.)

Order. With respect to the other three decisions, this Court is without jurisdiction to hear the government's appeal, and those appeals should be dismissed.[3]

BACKGROUND

In August 2005, the government indicted Appellees, Dr. Rosen and Mr. Weissman, two lobbyists for the American Israel Public Affairs Committee (AIPAC), a well-known pro-Israel advocacy group, for an alleged conspiracy to disclose classified national defense information (NDI) shared with them by U.S. government officials. While employed by AIPAC, Rosen and Weissman regularly met with high-level U.S. government officials to discuss U.S. foreign policy. The government contends that some of the information that the government officials discussed with Rosen and Weissman between 1999 and 2004 was classified NDI. The government further contends that Rosen and Weissman thereupon discussed this information with others, such as other AIPAC employees, members of the press, and representatives of the Israeli government, allegedly in violation of § 793.

This is not a typical espionage case. Everyone who spoke with Rosen and Weissman did so voluntarily, knew that Rosen and Weissman were not government officials, and knew that they did not have security clearances. Rosen and Weissman did not receive money or material goods from foreign governments

[3] Although Appellees believe there is no jurisdiction for the appeal of three of the decisions, in order to preserve their appeal rights if this Court finds jurisdiction, Appellees filed a notice of cross-appeal in the district court on April 10, 2008.

or others in exchange for information; they did not speak in code; they did not conduct their meetings in secret; they are not charged with serving as agents of a foreign government, let alone with being spies; they did not receive or pass on classified documents; they did not pay any bribes to or threaten government officials. They simply engaged in lobbying – conduct that the district court, despite its decision not to dismiss the case, characterized as conduct "*at the core of the First Amendment's guarantees*." *United States v. Rosen*, 445 F. Supp. 2d 602, 630 (E.D. Va. 2006) (*Rosen I*) (emphasis added).

Highlighting the curious underpinnings of this prosecution, the high-level government officials with whom Rosen and Weissman regularly met and who, according to the Indictment, illegally disclosed classified NDI, have not – with but one exception – been charged criminally. Indeed, one of the disclosing officials has since received, not charges or reprimands, but a series of promotions to one of the highest, most sensitive positions in the government.

Because the government alleges that the information orally disclosed to Rosen and Weissman was classified and seeks to prove this by introducing classified documents containing the same information, the district court has conducted two years of proceedings under CIPA. In the initial CIPA § 6(a) proceedings, which began in June 2006, the district court held twelve days of hearings and issued a 102 page CIPA § 6(a) Order. At the CIPA § 6(c) stage, the

district court held twenty-one days of hearings and on March 19, 2008 issued a 278 page CIPA § 6(c) Order meticulously addressing each page of each document involved, often down to the exact words to be used. It is this CIPA § 6(c) Order from which the government now appeals, pursuant to CIPA § 7. Appellees do not contest this Court's jurisdiction to hear the government's appeal from that Order.

But the government has noticed an appeal not only from the § 6(c) Order but also from three other decisions – two orders and a memorandum opinion for which there was no accompanying order – dating back to the August 2006 Order denying defendants' motion to dismiss the Indictment. The three decisions are as follows:[4]

1. Order Denying Defendants' Motion to Dismiss

Relatively soon after the filing of the Indictment, the defendants filed a motion to dismiss the Indictment as violative of the First Amendment and the Due Process Clause. On August 9, 2006 – some 20 months before the government's recently filed Notice of Appeal – the district court denied the motion. In the course of reconciling this prosecution with defendants' rights under the First Amendment and Due Process Clause, the district court detailed the elements of the crime that the government must prove, including, *inter alia*, that defendants: (1) knew the information the conspiracy sought to disclose was NDI, i.e., knew the information was closely held by the government and disclosure of the information could

[4] Pursuant to Federal Rule of Appellate Procedure 27(a)(2)(B), copies of the three decisions are attached to this Motion as Exhibits 1, 2, and 3.

damage national security; (2) knew the information was classified; (3) knew the persons to whom disclosures would be made were not authorized to receive the information; (4) knew the disclosures were unlawful; (5) had a bad faith reason to believe the disclosures could be used to the injury of the United States or to the aid of a foreign nation; and (6) intended that such injury to the United States or aid to a foreign nation occur. *See Rosen I*, 445 F. Supp. 2d at 623-26; *United States v. Rosen*, 520 F. Supp. 2d 786, 793 (E.D. Va. 2007) (*Rosen X*).

2. Order Denying Government's Motion for Clarification

On August 21, 2006, the government filed what it captioned a "Motion for Clarification" of the August 6, 2006 Order denying defendants' motion to dismiss the Indictment. In essence, though the government liked the result – the motion to dismiss was denied – it did not like the district court's rationale. The new motion invited the court to revise its discussion of the elements the government must prove at trial. By Order dated November 16, 2006, the court denied what it correctly characterized as a motion to reconsider and reiterated the statute's elements.[5]

3. District Court's Silent Witness Rule Opinion

During the CIPA proceedings, the government filed a number of motions designed to allow the introduction of classified evidence at trial without the

[5] As the orders denying the motion to dismiss and the motion to reconsider address the same issues – namely reconciling the instant § 793 prosecution with the First Amendment and Due Process Clause – appealability of the two orders is addressed jointly herein and the analysis hereafter refers to the "First Amendment Orders."

evidence being heard in open court or otherwise being made available to the public. In its first such motion, filed in February 2007 pursuant to CIPA § 6(c), the government sought to protect classified evidence from public disclosure at trial by showing certain documents to the jury but not to the public, by playing certain tape recordings for the jury but not for the public, and by extensively using techniques such as the "silent witness rule," whereby witnesses would be required to testify in codes that would be understood by the jury but not the public. *See United States v. Rosen*, 487 F. Supp. 2d 703, 707-10 (E.D. Va. 2007) (*Rosen VII*). The district court granted defendants' motion to strike the government's motion in its entirety, finding that "the wholesale use of the silent witness rule, coded testimony, and redacted recordings effectively closes the trial" and is therefore unconstitutional. *Id*. at 720. In so holding, the district court ruled that any partial closure of trial could be justified only under the heavy constitutional burden set forth in *Press-Enterprise* v. *Superior Court of California*, 464 U.S. 501 (1984), and *Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000). *Rosen VII*, 487 F. Supp. 2d. at 715-16.

The government thereafter filed a second CIPA § 6(c) motion, in which it limited its request for use of the "silent witness rule," and proposed various redactions, summaries, and substitutions for much of the classified information at issue. The district court held numerous hearings on the motion, carefully examining each proposed substitution, redaction, and stipulation, as required under

CIPA § 6. On March 19, 2008, the district court entered its final CIPA § 6(c) Order, in which it granted some, but not all, of the government's requests to use the silent witness rule, redactions, and substitutions.

Because the content of the CIPA § 6(c) Order is under seal, before issuing its final order, the district court issued a public memorandum opinion – but no order – in which it laid out the general principles that it would apply in its § 6(c) Order. *See Rosen X*, 520 F. Supp. 2d at 802. Specifically, the district court considered whether CIPA's detailed protections for classified information precluded use of the silent witness rule. *Id*. at 795-96. The court concluded that they did not. *Id*. The district court further analyzed whether the "silent witness rule" constituted a stipulation, substitution, or summary of information under CIPA § 6(c). *Id*. at 797. The court concluded that it did not. *Id*. The court, however, indicated that in its final CIPA § 6(c) Order it would not preclude the government's use of the "silent witness rule" in its entirety so long as its use complied with the *Press-Enterprise* standard for trial closure. *Id*. at 797-98. The district court also held that the defendants can overcome the government's common law classified information privilege by showing that disclosure of the information is relevant and helpful to their defense or essential to a fair determination of the cause. *Id*. at 800-01.

At no point in this opinion did the district court rule on a specific piece of evidence. It left those determinations for the March 19, 2008 CIPA § 6(c) Order.

Nonetheless, the government has included this November 1, 2007 Memorandum Opinion analyzing the legal underpinnings of the "silent witness rule" (the Silent Witness Rule Opinion) in its Notice of Appeal.

ARGUMENT

Although many of the legal issues raised by this novel prosecution are complex, the question of appellate jurisdiction is straightforward. Under well-established law, this Court has jurisdiction to hear an interlocutory government appeal only of the March 19, 2008 CIPA § 6(c) Order.

The Supreme Court has long recognized that courts of appeal lack jurisdiction to hear government appeals in criminal cases, except in those limited situations where "expressly authorized by statute to do so." *Arizona v. Manypenny*, 451 U.S. 232, 238 (1981).[6] Here, as grounds for jurisdiction, the government invokes CIPA and the collateral order doctrine, a narrow construction of 28 U.S.C. § 1291's final judgment provision. But, as demonstrated below, neither CIPA nor the collateral order doctrine applies to the First Amendment Orders or Silent Witness Rule Opinion. Moreover, 18 U.S.C. § 3731 – not cited by the government – precludes jurisdiction over the First Amendment Orders and offers no support for jurisdiction over the Silent Witness Rule Opinion.

[6] *See also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977) ("It has long been established that the United States cannot appeal in a criminal case without express congressional authorization.").

I. The First Amendment Orders are not Appealable by the Government

A. The First Amendment Orders are not Appealable under CIPA § 7

The First Amendment Orders – which do not authorize the disclosure of any classified evidence – are not CIPA orders such that § 7 would authorize the government to appeal. *See United States v. Moussaoui*, 333 F.3d 509, 514-15 (4th Cir. 2003) (*Moussaoui I*) (denying an attempt to use § 7 for an interlocutory appeal where the order appealed from did not authorize disclosure of classified information at trial). CIPA § 7 is limited to appeals of decisions "authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information." 18 U.S.C. App. 3 § 7(a). The First Amendment Orders, however, do not authorize disclosure of classified information, impose sanctions, or refuse a protective order. Indeed, the orders have nothing to do with disclosure of classified information at trial or otherwise.

Not only is CIPA § 7 limited to orders authorizing disclosure of classified information, it is even further limited in that it applies only to orders authorizing such disclosure *at trial*. *Moussaoui I*, 333 F.3d at 514-15. In *Moussaoui I*, this Court found that CIPA § 7 did not apply after the government presented a colorable, though unsuccessful, argument that the district court order could result in classified information being disclosed to the defendant during discovery. *Id*.

The Court found that CIPA § 6 was inapplicable because it concerned, not disclosure to a defendant, but disclosure at trial. *Id*. As the *Moussaoui* district court order granting defendant discovery did not directly authorize disclosure at trial, the order was not appealable under CIPA § 7. *Id*. In this case, the First Amendment Orders upholding the constitutionality of the Indictment likewise do not authorize disclosure of classified information at all, let alone at trial, and CIPA § 7 therefore does not authorize interlocutory appeal of those orders.

B. The First Amendment Orders Are Not Appealable Under 28 U.S.C. § 1291 or the Collateral Order Doctrine

The government cannot contend that the First Amendment Orders are "final" within the meaning of 28 U.S.C. § 1291. Indeed, this Court has stated, "[a]s a general rule, the denial of a motion to dismiss is not a final order and is therefore not appealable under 28 U.S.C. § 1291." *United States v. Ellis*, 646 F.2d 132, 133 (4th Cir. 1981). The Court has explained further:

> A "final" judgment is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. In the criminal context, finality comes with the conviction and imposition of sentence.

Moussaoui I, 333 F.3d at 513-14 (order granting defendant Rule 15 depositions of detainees at Guantanamo Bay was not a final judgment) (citations omitted).[7]

[7] *See also United States v. Moussaoui*, 483 F.3d 220, 227 (4th Cir. 2007) (*Moussaoui II*) (order granting discovery to victims not final judgment under § 1291 as they had no role in termination of litigation).

In civil cases and for defendants in criminal cases, the Supreme Court has recognized the collateral order doctrine as a practical construction of the finality requirement in § 1291. *See Will v. Hallock*, 546 U.S. 345, 349 (2006).[8] The collateral order doctrine "accommodates a 'small class' of rulings, not concluding the litigation, but conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action'." *Will*, 546 U.S. at 349. The district court ruling must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from final judgment." *Id.*; *Breeden*, 366 F.3d at 372-73. "In the criminal context, the court applies these requirements with the utmost strictness." *Breeden*, 366 F.3d at 373 (citation omitted).[9]

For criminal *defendants*, the collateral order doctrine provides limited interlocutory appeal rights from, *inter alia*, a denial of a motion to dismiss where the right requiring protection is in essence the right not to be tried.[10]

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[8] *See also Carroll v. United States*, 354 U.S. 394, 397 (1957); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *United States v. Breeden*, 366 F.3d 369, 372 (4th Cir. 2004); *Moussaoui I*, 333 F.3d at 515-16.

[9] *See also Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (noting that the policies underlying the finality rule are "especially compelling in the administration of criminal justice").

[10] *See Abney v. United States*, 431 U.S. 651, 658-59 (1977) (motion to dismiss for violation of Double Jeopardy Clause); *Helstoski v. Meanor*, 442 U.S. 500, 506-07 (1979) (motion to dismiss for violation of Speech and Debate Clause); *see also Sell v. United States*, 539 U.S. 166, 176-77 (2003) (collateral order doctrine applied to

For government appeals, the availability of the collateral order doctrine is very rare. The Supreme Court and recently the Fourth Circuit have both noted the rarity of circumstances where a government appeal is permissible under the collateral order doctrine when not explicitly authorized by § 3731. *See Carroll*, 354 U.S. at 403; *Moussaoui II*, 483 F.3d at 229 (citation omitted). In *Moussaoui II*, this Court cautioned:

> [W]e do not accept jurisdiction lightly and hasten to add that the circumstances from which the Government may appeal in a criminal case pursuant to the collateral order doctrine are exceedingly rare. Although this case represents one of those rare instances, we will continue to treat with suspicion future attempts by the Government to invoke our jurisdiction in criminal cases pursuant to § 1291.

Moussaoui II, 483 F.3d at 233.[11]

In this case, the government seeks appeal from the *denial* of defendants' motion to dismiss, a curious procedural posture. Presumably, of course, the government will not argue that dismissal of the Indictment was appropriate, but rather that some aspect of the district court's rationale was flawed – *i.e.*, the elements of proof identified by the district court as necessary for the prosecution to

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order requiring defendants to be medicated against his will in order to be competent to stand trial); *but see Flanagan v. United States*, 465 U.S. 259, 266 (1984) (collateral order doctrine did not apply to defendant's appeal of order disqualifying counsel).

[11] *Compare Moussaoui I*, 333 F.3d at 515 (collateral order doctrine not available for government appeal of order granting discovery); *with Moussaoui II*, 483 F.3d at 230 (collateral order doctrine applied to government appeal of district court order compelling disclosure on non-public documents to crime victims in a civil suit).

comply with the First Amendment and the Due Process Clause. The district court's rationale underlying the denial of the defendants' motion to dismiss, however, is not appealable under the collateral order doctrine.

First, the First Amendment Orders do not "conclusively determine the disputed question" – *i.e.*, the government's burden of proof in this case. The orders are not the final word on the government's burden at trial. In eleven different published opinions, the district court has discussed the government's burden, the elements of the crime, defenses available to defendants, and evidence relevant to those defenses. The First Amendment Orders are merely one step in the analysis. Indeed, argument over jury instructions – the final articulation of the government's burden of proof – has yet to occur. Second, the elements, as discussed in the orders, are at the very heart of the case; they certainly are not "completely separate from the merits of the action." *Will*, 546 U.S. at 349.[12]

In these respects, the government's attempt to appeal the district court's decisions explaining its denial of defendants' motion to dismiss does not fit within the narrow exception to § 1291 provided by the collateral order doctrine.

[12] *See United States v. Williams*, 413 F.3d 347, 355 (3d Cir. 2005) (admissibility of evidence at trial is not separate from the merits of the case); *cf. Moussaoui II*, 483 F.3d at 230, 232 (finding order completely separate from merits of criminal action where it required government to disclose non-public documents to crime victims).

C. 18 U.S.C. § 3731 Implicitly Precludes Appeal of the First Amendment Orders

Section 3731 does not permit the government to appeal the First Amendment Orders; instead, by strong implication, it bars such an appeal. In relevant part, § 3731 authorizes government interlocutory appeals from the *granting* of a motion to dismiss. 18 U.S.C. § 3731.[13] Plainly, the First Amendment Orders did not grant the defendants' motion to dismiss, and § 3731 does not authorize the government to bring an interlocutory appeal where a motion to dismiss was *denied*.[14]

Indeed, in enacting § 3731, Congress directly addressed the appealability of motions to dismiss. As is clear from the statutory language, Congress expressly conferred a right of appeal only where the motion was *granted*, not where, as here, the motion was *denied*. *See United States v. Margiotta*, 662 F.2d 131, 141 (2d Cir. 1981) (order approving disputed jury instruction was not appealable as dismissal of an indictment as it "merely enumerates the requisite legal elements of the mail

[13] Section 3731 also authorizes government interlocutory appeals of orders suppressing or excluding evidence and orders releasing a defendant on bail. 18 U.S.C. § 3731. Clearly, the First Amendment Orders do not fall in either category. *See, e.g., United States v. Dean*, 989 F.2d 1205, 1210-11 (D.C. Cir 1993) (order deferring ruling on exclusion of evidence until trial was not order "suppressing or excluding evidence" under § 3731 that would authorize government appeal).

[14] *See, e.g., United States v. Tom*, 787 F.2d 65, 71 (2d Cir. 1986) (no appellate jurisdiction under § 3731 because "we do not believe we have authority to disregard entirely the statutory language Congress has chosen to use").

fraud offense the Government must prove to obtain a conviction").[15] Finding a government right to appeal under § 3731 in this case – where the government appeals the rationale underlying a denial of a motion to dismiss – would require reading in statutory authorization where none exists, indeed, where Congress spoke on the issue and declined to include the authorization. *See Manypenny*, 451 U.S. at 247 (requiring that "Congress speak with a clear voice when extending to the Executive a right to expand criminal prosecutions").[16]

II. The Silent Witness Rule Opinion is not Appealable by the Government

In its Notice of Appeal, the government also identifies the Silent Witness Rule Opinion as a decision for appeal. Notably, the opinion was not accompanied by an order of the district court. Rather, the opinion is an explanation of the legal principles the court applied in the CIPA § 6(c) proceedings, as reflected in its CIPA § 6(c) Order. On its own, the Silent Witness Rule Opinion is not an appealable judgment under CIPA § 7(a), § 3731, or the collateral order doctrine.

As discussed above with respect to the First Amendment Orders, § 3731 authorizes interlocutory appeals in limited circumstances, none of which applies to

[15] *See also United States v. Booth*, 669 F.2d 1231, 1240 (9th Cir. 1981) (section 3731 did not permit government appeal of order granting *admission* of evidence; section 3731 only permitted appeal of orders *suppressing* evidence).

[16] One can only imagine the number of appellate cases that would arise if the government (or any party) won a motion and then had the right to appeal its victory because it did not like the reasons the trial court gave.

an isolated memorandum opinion articulating legal principles. *See* 18 U.S.C. § 3731. Similarly, the collateral order doctrine does not apply to the Silent Witness Rule Opinion as it does not "conclusively determine the disputed question." *Will*, 546 U.S. at 349 (citation omitted).

In isolation, the Silent Witness Rule Opinion is not an appealable CIPA order under § 7(a). Section 7 provides for appeal only of a district court order: (1) authorizing the disclosure of classified information; (2) imposing sanctions for nondisclosure of classified information; or (3) refusing a protective order. 18 U.S.C. App. 3 § 7(a). The Silent Witness Rule Opinion does none of the above.

Indeed, the Silent Witness Rule Opinion is meaningful only insofar as the principles outlined therein relate to a specific determination to disclose a specific piece of classified information in the CIPA § 6(c) Order. In *Moussaoui I*, this Court found that CIPA did not directly apply to an order granting Rule 15 depositions because the order did not address CIPA's concern about "whether any particular statement of th[e] witness would be admitted at trial." 333 F.3d at 514. Similarly, here, the opinion does not direct that a particular statement or piece of classified information will be admitted at trial.

Under CIPA § 7, any appeal by the government must be limited to a targeted challenge to specific disclosures ordered in the CIPA § 6(c) Order. *See United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) (review of an interlocutory

CIPA appeal addresses only "a series of very narrow, fact-specific evidentiary determinations"). The government's effort to appeal legal principles generally, and in the abstract, does not meet the requirements for interlocutory appeal under CIPA § 7. *See id*. The Silent Witness Rule Opinion is not appealable.

III. The Government's Notice is Untimely

In addition, the government's Notice of Appeal is untimely as to the First Amendment Orders and Silent Witness Rule Opinion.[17] The most recent of the three decisions – the November 1, 2007 Silent Witness Rule Opinion – was entered more than four months before the government filed its Notice of Appeal on March 27, 2008. Under the timeliness restrictions of CIPA § 7, 18 U.S.C. § 3731, and the collateral order doctrine, this Court lacks jurisdiction to hear an appeal of those decisions.

It is well-established that, where a party fails to file an interlocutory appeal within the applicable time limits, the appellate court lacks jurisdiction to hear the appeal. *See United States v. Hankish*, 462 F.2d 316, 317-19 (4th Cir. 1972).[18] The

[17] Defendants acknowledge that the Notice of Appeal is timely as to the March 19, 2008 CIPA § 6(c) Order.

[18] *See also SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1173 (9th Cir. 2006); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 48 F.3d 373, 375 (8th Cir. 1995); *People Who Care v. Rockford Bd. of Educ*., 921 F.2d 132, 135-36 (7th Cir. 1991); *Kenyatta v. Moore*, 744 F.2d 1179, 1186-87 & n. 29 (5th Cir. 1984) (collecting cases).

government here has failed to meet the applicable time limits under any theory of jurisdiction.

CIPA § 7 requires that the government file its appeal within ten days of the order appealed. 18 U.S.C. App. 3 § 7(b). Section 3731 requires that "appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted." 18 U.S.C. § 3731. For appealable final judgments under 28 U.S.C. § 1291, Federal Rule of Appellate Procedure 4 establishes a 60-day time limit for appeals for cases in which the United States is a party. Fed. R. App. P. 4(a)(1)(B). The First Amendment Orders and the Silent Witness Rule Opinion are well past all of these time limits.

Timeliness requirements apply to the collateral order doctrine as well. *See Hankish*, 462 F.2d at 318. In *Hankish*, the trial court issued an order on January 31, 1972, disqualifying the defendant's attorney, and three months later, on May 1, 1972, the defendant filed a petition for review in the Fourth Circuit. *Id*. at 317. While acknowledging that the trial court's order might have been appealable under the collateral order doctrine, the Fourth Circuit nonetheless found that an appeal was "inexcusably out of time" for purposes of 28 U.S.C. § 1291. *Id*. at 318. The Court therefore declined jurisdiction. *Id*. at 319. Under *Hankish*, the government's appeal here of the First Amendment Orders and the Silent Witness Rule Opinion likewise is "inexcusably out of time."

Although this Court has not addressed the issue since *Hankish*, other courts of appeal enforce timeliness requirements under the collateral order doctrine by applying the time constraints of Rule 4 of the Federal Rules of Appellate procedure. *E.g.*, *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("An appeal taken under the collateral order doctrine is subject to all the usual appellate rules and time periods, including Rule 4 of the Federal Rules of Appellate procedure.").[19] Under Rule 4, the government must file its appeal within 60 days. *See* Fed. R. App. P. 4(a)(1)(B). Thus, whether under *Hankish* or the more recent timeliness requirements applied in other Circuits, the First Amendment Orders and the Silent Witness Rule are not appealable under the collateral order doctrine.

In the many months that have passed since the district court issued the First Amendment Orders and the Silent Witness Rule Opinion, the parties have relied extensively on these rulings in pretrial proceedings, in preparing experts, and in crafting case strategy. To permit appeal at this late date would be prejudicial, inefficient, and directly contrary to the statutes and case law authorizing appeals

[19] *See also Capital Consultants LLC*, 453 F.3d at 1173 (citing Rule 4, the Ninth Circuit stated that the time for appeal of a collateral order begins to run when the court enters the order); *In re Montgomery County*, 215 F.3d 367, 372 (3d Cir. 2000) ("The Rule 4(a) deadline for civil cases applies to all appealable orders, including collateral orders . . ."); *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990) (applying Rule 4 to collateral orders); 15A Charles Alan Wright, et al., *Federal Practice & Procedure* § 3911 at 357 (West 1992) ("it is important to ensure that collateral order appeals cannot be taken long after entry of the challenged order, and the time limits of Rule 4 have properly been invoked to cut off the right of appeal").

from even final orders. Accordingly, even if this Court determines that it has jurisdiction over the subject matter of these earlier decisions, the appeals are untimely and the Court therefore lacks jurisdiction to hear those appeals.

CONCLUSION

For the reasons discussed, this Court should dismiss the government's appeal of the First Amendment Orders and the Silent Witness Rule Opinion because this Court lacks jurisdiction over them.

Statement by Counsel Pursuant to Local Rule 27(a)

Defendants' counsel avers that counsel for the United States was informed of defendants' intent to file this Motion, and the United States indicated that it intends to oppose the Motion.

Respectfully submitted,

/s
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April 29, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Assistant United States Attorney Michael Martin
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I further certify that I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants, addressed as follows:

United States Attorney Chuck Rosenberg
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