UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 18 Cr. 35 (Tharp, J.)
v.	)	
JAMES VORLEY and CEDRIC CHANU,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO THE GOVERNMENT'S MOTION TO PERMIT TWO-WAY LIVE VIDEO WITNESS TESTIMONY

Defendants James Vorley and Cedric Chanu respectfully submit this opposition to the Government's Motion to Permit Two-Way Live Video Witness Testimony dated July 27, 2020 (Dkt. 256) (the "Motion").

PRELIMINARY STATEMENT

On July 15, 2020, the government indicated that it would be ready for trial, stating that there was "no blanket prohibition" on travel that would pose an obstacle to a September 14 trial as long as people arrived in Chicago two weeks in advance. Tr. 7/15/20 at 8:5-18. Now, two weeks later, the government for the first time seeks permission to call at least three of its witnesses by two-way video based, in part, on a travel ban first issued by the Prime Minister of Australia as far back as March 24, 2020.[1] The government also argues that two witnesses, Professor Kumar Venkataraman and Travis Varner, should not have to testify in person because they live in Texas,

[1] *See* "COVID-19 and the border Leaving Australia," https://covid19.homeaffairs.gov.au/leaving-australia (last visited July 30, 2020); "Covid 19 – Ban on Departure from Australia," https://usa.embassy.gov.au/news/covid19-stay-informed#departure-ban (last visited July 30, 2020).

which has experienced an increase in COVID-19 infections in recent months. The government says this trial-by-video proposal is warranted in light of the "unique circumstances of trying this transnational criminal case amidst a global pandemic," and it promises that two-way video will not prejudice the defendants because of "the anticipated nature of the [witnesses'] testimony." Mot. 1. Unless the Court permits the government to introduce these witnesses' testimony—and perhaps any number of others—by two-way video, thereby depriving the jury of the ability to observe the witnesses' direct and cross-examination testimony in person, the government will seek to delay the trial. *Id.* at 8 n.1.

As explained below, allowing the government's witnesses to testify by video would violate the defendants' Confrontation Clause and Due Process rights. The Motion should therefore be denied. But the government should not be granted a continuance. The government has already secured an exemption from Chicago's two-week quarantine requirements for the two witnesses in Texas, *id.* at 3, and the defendants have proposed a compromise whereby Professor Venkataraman, the government's principal expert—and the only one who has even looked at the trading data—would testify by video in exchange for allowing its responsive expert, Dr. Walton, who resides in the United Kingdom, to testify by video as well. (This compromise would respect the defendants Speedy Trial rights and also eliminate the need to obtain an exemption from the Executive Order barring U.K. nationals from entering the United States[2] for Dr. Walton.) With respect to Mr. Jukes, who is expected "to identify certain characteristics of spoofing and to share his opinion of the negative impact that spoofing has on financial markets," Mot. 4, there can be no need for the

[2] *See* Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus, Mar. 14, 2020, https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus-2/ (last visited July 30, 2020).

government to call a witness from Australia to testify generally about spoofing and its effect on market integrity. Mr. Jukes's testimony is unnecessary to prove any element of the charged crimes, cumulative of Professor Venkataraman's and that of a witness from the Chicago Mercantile Exchange, and otherwise inadmissible.

That leaves Mr. Varner, an employee of Quantlab, one of two alleged victims in the case, who has a young child and "is required to be physically present at work on specific days because he is a trading supervisor." Mot. 4. If the government insists on being able to call Mr. Varner, who has no actual memory of the alleged trading at issue (which was executed by a high-frequency computer algorithm) and whose testimony will be largely duplicative of the testimony of another alleged victim (from Citadel in Chicago), it should be required to call him in person. The government is bringing its cooperating witness from Singapore to testify in person, despite the asserted public health risks, and if it requires Mr. Varner's testimony it can issue him a trial subpoena. Because the government has obtained an exemption from the two-week quarantine requirement, the Court and the parties can easily accommodate his scheduling issues.

If the government is unprepared to go forward with trial after more than two years of delays, then it should say so and risk dismissal. Fed. R. Crim. P. 48(b)(3); 18 U.S.C. §§ 3161(c)(1) & 3162(a)(2). It cannot shift the burden onto the defendants to waive either their Confrontation Clause or their Speedy Trial rights.

ARGUMENT

THE GOVERNMENT'S PROPOSED VIDEO TESTIMONY VIOLATES THE CONFRONTATION CLAUSE.

A. Legal Standard

The Confrontation Clause of the Sixth Amendment provides that every criminal defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This

Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988); *see also California v. Green*, 399 U.S. 149, 157 (1970) (explaining that the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause").

Not only does physical confrontation at trial serve as a symbol of fairness, but it also promotes reliability because "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Coy*, 487 U.S. at 1019. Compelling adverse witnesses at trial to testify in the accused's presence thus "enhances the accuracy of fact-finding" at trial. *Maryland v. Craig*, 497 U.S. 836, 846 (1990). So too does "compelling [witnesses] to stand face to face with the jury" as they tell their side of the story. *Green*, 399 U.S. at 158. "These important components of confrontation are lost when the witness is not testifying in court, regardless of the witness's ability to see the defendant on a screen from a distant location." *United States v. Carter*, 907 F.3d 1199, 1207 (9th Cir. 2018). Any procedure that allows an adverse witness to testify remotely necessarily diminishes "the profound [truth-inducing] effect upon a witness of standing in the presence of the person the witness accuses," *Coy*, 487 U.S. at 1020, as well as the *jury's* ability to "look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief," *Green*, 399 U.S. at 158 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

Given the constitutional weight of the right to in person confrontation, the Supreme Court has cautioned that, though not absolute, this requirement should not "easily be dispensed with." *Craig*, 497 U.S. at 850. Consistent with this view, the Supreme Court has carved out a narrow exception to this right when (1) the "denial of such confrontation is necessary to further an important public policy," and (2) "the reliability of the testimony is otherwise assured." *Id.* The

Supreme Court has also rejected a proposed change to Federal Rule of Criminal Procedure 26 that would have permitted unavailable witnesses to testify via two-way video. Order of the Supreme Court, 207 F.R.D. 89, 91 (2002). In an accompanying statement, Justice Scalia wrote, "I share the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause. . . ." *Id.* at 93 (statement of Scalia, J.). He added:

> As we made clear in *Craig*, the purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

Id. at 94 (citation omitted and emphasis added).

The government's proposal to allow at least three of its witnesses to testify by video, over the objection of the defendants, would violate their Confrontation Clause rights. The facts outlined in the government's Motion simply do not meet the high bar set by the Supreme Court for dispensing with in person testimony.

B. The Government Has Failed to Demonstrate that Video Testimony Is Necessary.

Craig requires a showing that the furtherance of an important public policy makes it *necessary* to deny the defendants their right to a physical face-to-face confrontation. *See* 497 U.S. at 837. The government posits three public policy concerns: (1) ensuring that three "crucial" witnesses can testify; (2) mitigating risks to the witnesses' health; and (3) avoiding undue hardship on Mr. Varner, his family, and his employer. None of these concerns comes close to clearing *Craig*'s high bar.

1. Allowing Video Testimony Is Not "Crucial" to the Government's Ability to Proceed.

First, the government posits that the ability of Professor Venkataraman, Mr. Jukes, and Mr. Varner to testify by video is "crucial" to its case and thus furthers an important public policy. Mot. 7-8. But the government has not shown that its witnesses are *unavailable*, much less that they are critical to the government's case.

"Unavailability" is an exceedingly high bar: courts have found that witnesses are available to testify so long as they are "not dead, beyond the reach of process nor permanently incapacitated." *United States v. Jacobs*, 97 F.3d 275, 282 (8th Cir. 1996) (internal citations and quotations omitted). Here, Professor Venkataraman and Mr. Varner have already been exempted from Chicago's travel restrictions by the Chicago Department of Public Health, allowing them to enter Chicago and testify without undergoing the full 14-day quarantine period, as long as they follow "a specific protocol." Mot. 3.[3] Certainly, if the government can fly in its star cooperating witness, David Liew, from *Singapore* to testify, it can find a way to corral Mr. Varner, another fact witness, from Texas, even if it means serving him with a trial subpoena. And Australia's travel ban preventing Mr. Jukes from traveling to Chicago for trial has been in place since March, leaving the government ample time (even still) to undergo the roughly four-week process of seeking an exemption.[4] Thus, none of the three witnesses is sufficiently "unavailable" to render their live testimony impossible.

[3] It bears noting that defendants also have witnesses who would be subject to Chicago's 14-day quarantine if not granted an exemption—Raymond Keenan (from North Carolina) and Jerry Markham (from Florida)—both of whom are willing to appear if necessary. (The government has not offered to obtain exemptions for these defense witnesses.)

[4] *See* "COVID-19 and the border Leaving Australia," https://covid19.homeaffairs.gov.au/leaving-australia (last visited July 30, 2020); "Covid 19 – Ban on Departure from Australia (last visited July 30, 2020). The government's speculative claim that Mr. Jukes "*does not appear* to meet any of the defined exceptions to Australia's international ban" is insufficient to establish his unavailability. Mot. 4-5 (emphasis added).

Moreover, neither Mr. Jukes's nor Mr. Varner's testimony is in any way "crucial" enough to justify depriving the defendants of their rights to a speedy trial with in-person confrontation.[5] For starters, Mr. Jukes's generalized testimony—which will cover "certain characteristics of spoofing" and "the negative impact that spoofing has on financial markets," Mot. 4-5—is duplicative, unnecessary, and inadmissible. The government's other witnesses, Professor Venkataraman and a representative of the Chicago Mercantile Exchange, will cover the same general substance in their own testimony. *See* Fed. R. Evid. 403 (providing for the exclusion of testimony that is "needlessly . . . cumulative"); *Laplace-Bayard v. Batlle*, 295 F.3d 157, 163-64 (1st Cir. 2002) (affirming district court's exclusion of expert testimony that was cumulative under Rule 403).

Mr. Jukes's testimony is likewise inadmissible under Rule 702 given its overbroad nature and the risk of juror confusion. Expert testimony must be "sufficiently tied to the facts of the case [to] aid the jury in resolving a factual dispute," *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (internal citations and quotations omitted). Mr. Jukes's conclusory testimony about the supposed impact of spoofing on markets at large—without any reference to the defendants' specific trading data—is an oversized fit for the facts of this case and risks distracting the jury's focus from the most central issue: whether the defendants conspired to defraud and in fact defrauded other traders. There is no need for the government to call an expert from Australia—either in person or via video—to provide such generalized, cumulative, and inadmissible testimony.

[5] Without waiving any arguments as to admissibility and without conceding the importance of his testimony, the defendants have proposed a compromise, whereby Professor Venkataraman, who has actually analyzed the trading data, and the defendants' responsive expert, Dr. Walton, to testify by video.

Mr. Varner's testimony is similarly duplicative and unnecessary. The government states that he will testify that the defendants' trading was material to Quantlab's trading decisions and that "he views live market orders as communicating an intent to trade." Mot. 4. But he does not have any memory of the actual trading, which was executed a decade ago by a high-speed computer algorithm, and his subjective beliefs about live market orders are irrelevant. His testimony will simply echo that of the government's other alleged victim-witness, Citadel. *United States v. Cinergy Corp.*, No. 1:99-CV-1693-LJM-JMS, 2009 WL 1124969, at *3 (S.D. Ind. Apr. 24, 2009) (excluding a witness's testimony as cumulative and unnecessary where the party's other witnesses had testified on the same topic). Indeed, Professor Venkataraman will also testify about the supposed materiality of the defendants' trades, making Mr. Varner's testimony truly unnecessary. The asserted need to present such cumulative evidence is not a sufficient reason to dispense with in person testimony.

2. COVID-19-Related Health Risks Are Not a Sufficient Public Policy Concern Under *Craig*.

Second, the government contends that the COVID-19-related health risk to the testifying witnesses and their families, or the risk the witnesses' presence would pose to the individuals present in the courthouse, outweigh the defendants' right to in person confrontation. *See* Mot. 7-10. But if the Court were to approve the use of video testimony, on this record, every prosecutor wishing to present testimony from a witness in another state or overseas could argue that mitigating the threat of COVID-19 is an important public policy that supports the admission of testimony by two-way video conference.[6]

[6] If this Court finds that reducing the spread of COVID-19 by avoiding travel is a sufficient public policy goal to dispense with in-person testimony, the government could easily seek to extend this ruling to other witnesses. Indeed, it has already reserved the right to move to present the testimony of "additional witnesses" by live video feed "depending on how the pandemic develops and how local, national, and foreign governments respond." Mot. 8 n.1.

In *United States v. Sapse*, No. 2:10-CR-00370-KJD, 2012 WL 5334630 (D. Nev. Oct. 26, 2012)—the only criminal case relied upon by the government in support of its posited interest in "preserving witnesses' health"[7]—the witnesses themselves were "severely disabled to the point that at least four of the six have lost the use of their legs, many are incontinent, several require the aid of permanent caregivers and cannot perform the most basic functions of life without assistance" and therefore "unavailable due to their extreme, not day-to-day or ordinary, health problems." *Id.* at *1, 2. That is (fortunately) not the case here. Allowing video testimony would risk a slippery slope where, as here, the witnesses and their families are not actually infected and merely risk becoming infected or infecting others if they leave their homes and travel to Chicago in order to provide in-court testimony. *Cf. United States v. Jacobs*, 97 F.3d 275, 282 (8th Cir. 1996) ("Mere speculation is insufficient to justify abridgement of defendant's constitutional right to confront his accuser face-to-face in the jury's presence."). Such an outcome would effectively erase the constitutional guarantee of face-to-face confrontation as long as the pandemic continues.

As a general matter, the scales tip in a criminal defendant's favor—even amidst a pandemic—when their constitutional rights are on the line. Accordingly, the Coronavirus Aid, Relief, and Economic Security (CARES), Act, H.R. 748, signed into law on March 27, 2020, expressly authorizes the use of video and telephone conferencing during the course of the COVID-19 pandemic for various criminal case events, but not during any phase of a criminal trial. This was no oversight: a defendant's right to in person confrontation generally will outweigh COVID-19-related health concerns absent a more specific personal showing.

[7] The government otherwise relies entirely on civil cases—where the Confrontation Clause is never implicated—to support its position that "reducing the spread of an infectious disease" is a sufficiently compelling public policy interest to warrant disposal of in person confrontation. *See* Mot. 8-9.

3. The "Undue Hardship" on Mr. Varner, His Family, and His Employer Is Not a Sufficient Public Policy Concern Under *Craig*.

Finally, the government contends that requiring Mr. Varner to travel to Chicago would "cause an undue hardship on [him], his family, and his employer" and "be severely detrimental" to his employer, Quantlab, a high-frequency trading firm. Mot. 9-10. Of course, as with most criminal cases, "enforcing the Confrontation Clause will impose costs and inconvenience on the Government and its witnesses despite their lack of responsibility" for the current travel restrictions. *United States v. Rivera*, 372 F. Supp. 3d 311, 317 (E.D.N.C. 2019). But "a criminal defendant's constitutional rights cannot be neglected merely to avoid added expense or inconvenience." *Carter*, 907 F.3d at 1208. To the contrary, courts have made clear that inconvenience to a government witness or to his or her employer do not rise to the level of an important public policy that justifies depriving a defendant of his Sixth Amendment rights. *See, e.g.*, *Rivera*, 372 F. Supp. at 316-17 (the inconvenience to a government witness of traveling from North Carolina to Hawaii twice did not warrant the use of video testimony); *State v. Smith*, 308 P.3d 135, 138 (N.M. Ct. App. 2013) (a "chemist's busy schedule and inconvenience to him or his laboratory caused by traveling to testify" did not justify the use of video testimony). To the extent the government insists on calling Mr. Varner, whose testimony is in any event largely duplicative of the other alleged victim's testimony, the Court and the parties can easily accommodate his work schedule.

C. Video Testimony Will Be Inherently Less Reliable Than In Person Testimony.

Contrary to the government's suggestions, *see* Mot. 10-13, two-way video conferencing is in no way constitutionally equivalent to the face-to-face confrontation envisioned by the Sixth Amendment. *See United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) ("The simple truth is that confrontation through a video monitor is not the same as physical face-to-face

confrontation."); *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005) ("[T]wo-way closed circuit television is not constitutionally equivalent to face-to-face confrontation."). One court explained:

> Two-way video conferencing allows for the witness to testify remotely and not come to the courthouse at all. The physical presence of the witness in the courthouse is, itself, a significant moment for the witness, during which any witness in a criminal proceeding understands the wide ranging implications their testimony may have on the life of another. Foregoing in person testimony potentially removes a witness's understanding of the enormity of those implications.

State v. Seale, No. 2017-cr-141, 2020 WL 4045227, at *8 (Tenn. Crim. App. July 20, 2020).

In touting the reliability of video testimony, the government fails to cite a single case endorsing live two-way video testimony in the context of a criminal trial, where, unlike civil trials, hearings, and Rule 15 depositions, a defendant's right to face-to-face confrontation is critically implicated. *See, e.g.*, *Yates*, 438 F.3d at 1314 (noting that, in contrast to two-way live video testimony, Rule 15 depositions give the defendant "the opportunity to be present at the deposition and thus an opportunity for physical face-to-face confrontation"). Moreover, the government argues that these particular witnesses do not need to be present in the courtroom because of the nature of their testimony, which, according to the government "will focus on their expert opinions or (in Mr. Varner's case) his company's trading strategies." Mot. 12-13. In the government's view, "given the nature of the testimony that the government seeks to present through video feed in this case, there is no meaningful benefit to having the defendants physically near the witness." *Id.* This is wrong for two reasons.

First, the government ignores the need for the confrontation and cross-examination of government witnesses to take place *in the presence of the jury*. *United States v. Carter*, 907 F.3d 1199, 1207 (9th Cir. 2018) ("[C]ompelling [witnesses] to stand face to face with the jury" as they tell their side of the story "enhances the accuracy of fact-finding at trial." (internal citations and

quotations omitted)). Jurors' truth-seeking function is further impeded by the difficulty in evaluating witnesses' demeanor through a screen:

> With video testimony, the courtroom door never opens to reveal the next witness; nuances in inflection, facial expressions, and hesitation get lost or chalked up to technical glitches; electronic feedback and internet lag interfere with a witness's response; and the rhythm and visual impact of a cross-examination is disrupted as the witness and counsel attempt to discuss a document or piece of physical evidence remotely.

Jessica Arden Ettinger et al., *Ain't Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause?*, 44 Champion 56, 58 (May 2020); *see also* Kate Murphy, *Why Zoom is Terrible*, N.Y. Times (Apr. 29, 2020), https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html (last visited July 30, 2020) ("The problem is that the way the video images are digitally encoded and decoded, altered and adjusted, patched and synthesized introduces all kinds of artifacts: blocking, freezing, blurring, jerkiness and out-of-sync audio. These disruptions, some below our conscious awareness, confound perception and scramble subtle social cues.").

Second, contrary to the government's suggestion, Mot. 13, the defense *does* expect to show through cross-examination that the witnesses' testimony is biased and not credible. In fact, all three provide ample fodder for such cross-examinations: two are expert witnesses *retained by the government* to testify about the government in a criminal trial and a third is a purported victim of the defendants' alleged trading activity.

For those reasons, video testimony is not an adequate substitute for in person testimony, particularly where the defendants' constitutional rights are on the line.[8] In any event, the

[8] Even if the Court finds that the video testimony meets *Craig*'s stringent standard, such testimony should nonetheless be excused under Federal Rule of Evidence 403. Rule 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. The potential technical difficulties and other inherent limitations of two-

government's assurances that its proposed live-testimony procedures will "ensure reliability" are meaningless absent a showing of necessity under *Craig*. *See Carter*, 907 F.3d at 1210 (finding that the government's claim that the two-way video procedure preserved "all other elements of the confrontation right" was insufficient absent a showing that dispensing with physical confrontation was necessary).

CONCLUSION

For the foregoing reasons, the government's Motion to Permit Two-Way Live Video Witness Testimony should be denied.

way video testimony will distract the jury, create unnecessary delays, waste time, and unduly prejudice defendants by depriving them of their constitutional rights. *See* Ettinger et al., *supra*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 30th day of July, 2020, I filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Roger A. Burlingame
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