

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

UNITED STATES OF AMERICA,)
)
 v.) Criminal Case No. 2:19cr158
)
 HELEN KENNEDY,)
 Defendant.)

**DEFENDANT’S MOTION TO ALLOW DEFENDANT TO ATTEND
SENTENCING BY VIDEO OR TELECONFERENCE**

The defendant, Helen Kennedy, by counsel and pursuant to Rule 43(c)(1)(B) of the Federal Rules of Criminal Procedure, moves this Court to enter an order authorizing the defendant to voluntarily attend the scheduled sentencing hearing by video or teleconference. The government declined to join in this motion.

Helen Kennedy pleaded guilty to all counts of the instant indictment and was ordered to appear for sentencing before this Court on April 8, 2020, at 11:00AM. ECF No. 17. At all relevant times, Ms. Kennedy has resided in California.¹ After making her Rule 5 appearance in the Central District of California, Ms. Kennedy physically appeared in this district for both her arraignment and her plea hearing. ECF Nos. 9, 17. The PSR notes that Ms. Kennedy “has been under Pretrial supervision since September 27, 2019,” and that she “has been compliant with her conditions of release.” ECF No. 23, at 3. She remains out of custody at this time. Absent new information or alleged violations of her release conditions, the United States has told

¹ The victim of the instant offense resides in the Eastern District of Virginia and wired money to Ms. Kennedy in California from a bank in this District, thus creating the requisite nexus for her prosecution here.

undersigned counsel that it does not expect to oppose a defense request that Ms. Kennedy be permitted to self-surrender after sentencing, which will likely be to a BOP facility in California.

The need for travel restrictions and social distancing in light of the COVID-19 pandemic is well known. In light of the pandemic, this Court issued general orders continuing almost all hearings through March 31, 2020, and extending associated filing deadlines. *See* General Order 2020-03 (E.D. Va. Mar. 16, 2020) (Davis, C.J.). The impact of the outbreak in California has been particularly dramatic. On March 19, 2020, the governor of California issued Executive Order N-33-20 ordering “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.” *See* Ex. 1 (Executive Order N-33-20); *see also* Ex. 2 (NBC News article respecting California’s statewide stay-at-home order). As a resident of California, Ms. Kennedy is covered by that order. She is also 61 years old and suffers from lung issues that make her particularly vulnerable to complications from COVID-19. *See* ECF No. 23, ¶¶ 74-75.

The Fourth Circuit has held that Rule 43’s requirement that a defendant be “present” for sentencing is *not* satisfied by video conferencing. *See United States v. Lawrence*, 248 F.3d 300, 303 (4th Cir. 2001). The *Lawrence* court noted, however, that the right to be “present” under Rule 43 “is not absolute.” *Id.* at 304. Rule 43(c)(1) provides that a “defendant ... who had pleaded guilty ... waives the right to be present

... in a noncapital case, when the defendant is voluntarily absent during sentencing.”²

In discussing the circumstances in which a defendant is “voluntarily absent” during sentencing, the Fourth Circuit cited the Supreme Court’s decisions in *Ricketts v. Adamson*, 483 U.S. 1 (1987) and *Johnson v. Zerbst*, 304 U.S. 458 (1938), which apply the conventional standard for a knowing and intelligent waiver. *See Lawrence*, 248 F.3d at 304-05. Because the defendant in *Lawrence* had objected to attendance by videoconference, the Fourth Circuit held that his absence was not voluntary. *Id.* Still the Fourth Circuit’s discussion in *Lawrence* strongly suggests that a knowing, intelligent, and voluntary decision by a defendant to be physically absent from the courtroom during sentencing would satisfy Rule 43. *Accord United States v. Salim*, 690 F.3d 115, 122 (2d Cir. 2012) (“In a non-capital case, a defendant may waive his right to be present as long as that waiver is knowing and voluntary.”). *But see, e.g., Walker*, 2016 WL 9776580, at *4 (holding that “[t]he purpose of the provisions in Rule 43(c)(1) regarding ‘voluntary absence’ is to prevent the defendant from obstructing trial and sentencing by absconding” and that “[i]f the drafters had intended to allow an express waiver of presence for sentencing on a felony, they could have drafted a straightforward provision saying that the defendant can execute a knowing and

² The language in Rule 43(c)(1)(B) appeared in Rule 43(b)(2) at the time of the 2001 decision in *Lawrence*. The restyling amendments to Rule 43 in 2002 and the 2011 amendments adding the current version of Rule 43(b) do not appear to change the meaning of the provision discussed in *Lawrence* as Rule 43(b)(2), which now appears in Rule 43(c)(1)(B). *But see United States v. Walker*, No. 15-2846, 2016 WL 9776580, at *4 (D.N.M. Oct. 6, 2016) (holding that the “express authorization for videoconferencing in some situations indicates that it is not allowed in other situations; again, the drafters could have expressly allowed videoconferencing for sentencing on felonies when they amended Rule 43 in 2011—but they did not do so”).

voluntary waiver, instead of referring to situations in which a defendant is ‘voluntarily absent’”).

During the COVID-19 public health crisis, other courts have authorized sentencing hearings to be conducted without a defendant’s physical presence in the courtroom. *See, e.g., United States v. Bustillo-Sevilla*, No. 20-21, 2020 WL 1239669, at *1 (N.D. Cal. Mar. 15, 2020) (ordering sentencing hearing to take place as scheduled but to be held telephonically); *United States v. Stoltz*, No. 2:18cr31, ECF No. 56 (E.D. Cal. Mar. 19, 2020) (conducting sentencing hearing with defendant’s voluntary presence by videoconference). At least one court has proceeded with sentencing when a defendant voluntarily consented to being absent entirely because even telephonic attendance could not be arranged. *See United States v. Trejo*, No. 3:19cr535, ECF No. 23 (N.D. Cal. Mar. 16, 2020) (attached as Ex. 3).

As a general matter, the Fourth Circuit is correct that “virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.” *Lawrence*, 248 F.3d at 304. But the COVID-19 pandemic is an extraordinary time that calls for an exception to the general rule. With Ms. Kennedy’s voluntary consent, this Court possesses the authority to conduct her sentencing hearing without her physical presence in the Virginia courtroom. Undersigned counsel has discussed this matter with Ms. Kennedy and she has consented in writing to voluntarily waive her right to be physically present at sentencing, opting instead to appear by telephone or videoconference. Ex. 4 (email

from H. Kennedy to A. Grindrod, Mar. 20, 2020). Ms. Kennedy attended her presentence report interview by videoconference, so it can be done from a logistical perspective. Accordingly, the defense respectfully asks this Court to issue an order authorizing Ms. Kennedy to attend the April 8 sentencing hearing by video or teleconference. If such order issues, the defense will expeditiously make the necessary arrangements.

Respectfully submitted,

HELEN KENNEDY

By: _____ /s/ _____

Andrew W. Grindrod
Virginia State Bar #83943
Assistant Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510
Telephone: (757) 457-0800
Facsimile: (757) 457-0880
Email: andrew_grindrod@fd.org

CERTIFICATE OF SERVICE

I certify that on this 20th day of March, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to:

Joseph L. Kosky
United States Attorney Office - Norfolk
101 W. Main St., Suite 8000
Norfolk, VA 23510
Telephone: (757) 441-6331
Email: joseph.kosky@usdoj.gov

_____/s/_____

Andrew W. Grindrod
Virginia State Bar #83943
Assistant Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510
Telephone: (757) 457-0800
Facsimile: (757) 457-0880
Email: andrew_grindrod@fd.org