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9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 CHRISTOPHER LISCHEWSKI,

17 Defendant.

Case No. 3:18-cr-00203-EMC

**DEFENDANT CHRISTOPHER
 LISCHEWSKI'S BRIEF REGARDING
 THE COURT'S AUTHORITY TO HOLD A
 HEARING TO ADDRESS THE
 SENTENCING GUIDELINES BY
 VIDEOCONFERENCE**

Date: June 3, 2020
 Time: 2:30 p.m.
 Dept. Courtroom 5 – 17th Floor
 Judge: Hon. Edward M. Chen

1 **I. INTRODUCTION**

2 In accordance with the Court’s instructions at the May 22, 2020 status conference,
 3 Defendant Christopher Lischewski respectfully submits this brief to address the Court’s plan to
 4 conduct a hearing via videoconference on June 3, 2020 to hear legal “arguments related to
 5 guideline calculations,” followed by an in-person “[I]ive final sentencing” on June 16, 2020.¹
 6 ECF 669 at 2. Mr. Lischewski consents to proceed with the June 3 hearing via videoconference,
 7 and nothing in the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) prevents
 8 the Court from proceeding in this manner. Indeed, courts in this district and across the country
 9 have held full-blown sentencings via videoconference under the authority granted in the CARES
 10 Act. Thus, *a fortiori*, the Court’s plan to hold a preliminary hearing addressing only the
 11 Guidelines, during which it will impose no actual sentence, satisfies any applicable requirements
 12 in the Act.

13 **II. ARGUMENT**

14 As an initial matter, it is doubtful that the CARES Act applies under these circumstances.
 15 The provisions of the CARES Act that the government cited at the May 22 status conference only
 16 apply to “felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure.” *See*
 17 CARES Act, Pub. L. 116-136 § 15002(b)(2)(A). The June 3 hearing to address legal issues
 18 regarding the computation of advisory Guidelines is not a “felony sentencing” under the Criminal
 19 Rules. At that hearing, the Court would not address the Section 3553 sentencing factors; it would
 20 not take allocution from the defendant; it would not hear from any supposed victims; and it would
 21 not impose any sentence. Following the initial June 3 hearing, the Court would conduct a
 22 subsequent in-person “felony sentencing” on June 16. As such, the CARES Act provisions
 23 addressing “felony sentencings” do not apply to the June 3 hearing.

24 Even assuming *arguendo* that the CARES Act applies, the Court’s plan easily satisfies the
 25 statute’s requirements. Under the CARES Act, District Judges are specifically authorized to
 26 conduct “felony sentencings” by video or telephonic conference: (1) upon “consent of the

27 _____
 28 ¹ The June 16 in-person hearing would take place subject to certain restrictions to protect the
 health and safety of the attendees and court staff.

1 defendant ... after consultation with counsel”; (2) when such hearings “cannot be conducted in
2 person without seriously jeopardizing public health and safety”; and (3) when “the district judge
3 in a particular case finds for specific reasons that the plea or sentencing in that case cannot be
4 further delayed without serious harm to the interests of justice.” CARES Act, Pub. L. 116-136 §§
5 15002(b)(2), (4). Here, all three elements are met.

6 *First*, Mr. Lischewski, after consultation with counsel, formally consents to appear at the
7 June 3, 2020 hearing via videoconference.²

8 *Second*, under the authority granted by the CARES Act, and based on findings of the
9 Judicial Conference of the United States that emergency conditions due to the national emergency
10 with respect to COVID-19 have affected and will materially affect the functioning of the federal
11 courts, the Chief Judge of this District has issued a General Order finding that “felony
12 sentencings under Rule 32 of the Federal Rules of Criminal Procedure ... cannot be conducted in
13 person without seriously jeopardizing public health and safety.” *See* General Order No. 74,
14 Temporary Use of Teleconferencing, Videoconferencing, and Other Procedures in Criminal
15 Matters Pursuant to the Coronavirus Aid, Relief, and Economic Security Act (“CARES ACT”), at
16 2 (N.D. Cal. Mar. 30, 2020).

17 *Finally*, “sentencing in [this] case cannot be further delayed without serious harm to the
18 interests of justice.” CARES Act, Pub. L. 116-136 §§ 15002(b)(2). The Federal Rules of
19 Criminal Procedure direct courts to “impose sentence without unnecessary delay.” Fed. R. Crim.
20 P. 32(b)(1). A “delay in sentencing may leave the defendant, as well as the victim, in limbo
21 concerning the consequences of conviction. It postpones the commitment of the defendant to
22 corrections facilities, may have a detrimental effect on rehabilitation, and suspends the appellate
23 review of error.” *United States v. Ray*, 578 F.3d 184, 198 (2d Cir. 2009).

24 Mr. Lischewski has been in limbo following his conviction for nearly six months, and the
25 uncertainty and stress that he and his family have been living with has been agonizing. Mr.
26 Lischewski is entitled to be sentenced so that he can close this painful chapter of his life, begin

27 ² The Court’s Standing Order does not require the defendant’s consent to be in writing. *See*
28 General Order No. 74 at 2.

1 serving his sentence, and rebuild his life. As the Court knows, Mr. Lischewski's sentence was
 2 originally scheduled for April 8, 2020, and it already has been delayed by two months due to the
 3 COVID-19 outbreak. Further delaying his sentencing, even if for another month, only will
 4 exacerbate the anxiety that Mr. Lischewski and his family are experiencing. Taking these factors
 5 into consideration, continuing Mr. Lischewski's sentencing any further would impose
 6 unnecessary additional punishment on him and would seriously harm the interests of justice.

7 For these reasons, numerous courts have gone forward with sentencings via video under
 8 the authority granted to them by the CARES Act.³ Indeed, just last week, a court in the Southern
 9 District of New York, granted a defendant's request, over the government's objection, to proceed
 10 with sentencing via videoconference for precisely the reasons Mr. Lischewski articulates here.
 11 *See United States v. Cohen*, No. 19CR741, 2020 WL 2539115 (S.D.N.Y. May 19, 2020). As the
 12 court in *Cohen* explained, the "uncertainty" of awaiting sentencing "impair[s] the interests of
 13 justice," and delaying sentencing would only "multiply the existing backlog" on the Court's
 14 docket. *Id.* at *2. In another case allowing sentencing to proceed by videoconference, the Chief
 15 Judge of the Northern District of Texas explained that delaying sentencing, as the government
 16 proposes, "would cause serious harm to the interests of justice" by forcing the defendant "to
 17 undergo the added stress" of "further delay." *United States v. Kelly*, 09-cr-00051-M, Dkt. 63 at 2
 18 (N.D. Tex. Apr. 2, 2020). Just as in those cases, Mr. Lischewski "deserves a date-certain for
 19 sentencing and to complete this portion of the criminal process." *Id.*

20 III. CONCLUSION

21 For the foregoing reasons, the Court should adhere to its plan to hold a preliminary
 22 hearing by videoconference on June 3 to address the Guidelines, followed by an in-person
 23 sentencing hearing on June 16.

24
 25 ³ *See, e.g., United States v. Traore*, 20-cr-00029-VC-1, Dkt. 41 (N.D. Cal. May 2, 2020); *United*
 26 *States v. Ortega*, 2020 WL 2093728, at *3 (E.D. Cal. May 1, 2020); *United States v. Maccow*, 16-
 27 *cr-00108-WHP* (S.D.N.Y. May 8, 2020); *United States v. Reichert*, 11-cr-01056 (DLC) (S.D.N.Y.
 28 *April 3, 2020*); *United States v. Henriquez*, 19-cr-10080 (NMG) (D. Mass. March 27, 2020);
United States v. Puckett, 19-cr-00150 (JBA) (D. Conn. April 13, 2020); *United States v.*
Burroughs, 19-cr-00292 (VAB) (D. Conn. April 16, 2020); *United States v. Kyriacou*, 18-cr-
 00102 (KAM) (E.D.N.Y. May 4, 2020).

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Respectfully submitted,

Dated: May 27, 2020

KEKER, VAN NEST & PETERS LLP

By: /s/ Elliot R. Peters

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