

1 MANISH KUMAR (CSBN 269493)  
2 LESLIE A. WULFF (CSBN 277979)  
3 MIKAL J. CONDON (CSBN 229208)  
4 ANDREW SCHUPANITZ (CSBN 315850)  
5 U.S. Department of Justice, Antitrust Division  
6 450 Golden Gate Avenue  
7 Box 36046, Room 10-0101  
8 San Francisco, CA 94102  
9 Telephone: (415) 934-5300  
10 andrew.schupanitz@usdoj.gov

11 Attorneys for the United States

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15 UNITED STATES OF AMERICA

16 v.

17 CHRISTOPHER LISCHIEWSKI,

18 Defendant.

No. 18-cr-00203-EMC

**UNITED STATES' MEMORANDUM  
REGARDING WAIVER OF LIVE  
APPEARANCE FOR SENTENCING  
UNDER THE CARES ACT**

Date: June 3, 2020

Time: 2:30 p.m.

Judge: Hon. Edward M. Chen

Courtroom: 5, 17<sup>th</sup> Floor

**INTRODUCTION**

At the May 22, 2020 status conference, the Court raised the possibility of conducting sentencing in two parts: an initial videoconference hearing to determine defendant’s guidelines calculation, and a second in-person hearing to consider application of 18 U.S.C. § 3553(a) and to impose the sentence. The Court ordered briefing on whether the first part of this phased sentencing can proceed by videoconference on June 3, and whether defendant can waive physical appearance at the first hearing in light of the ongoing COVID-19 pandemic. (Dkt. No. 669.)

The government respectfully submits that while defendant’s waiver of physical appearance is necessary under the CARES Act, the Court nevertheless may only proceed by videoconference upon a specific finding that delay in sentencing would result in “serious harm to the interests of justice.” CARES Act, Pub. L. 116-136, 134 Stat. 281, § 15002. Accordingly, before any part of sentencing is conducted via videoconference, the Court must make such a finding on the record. The government is unaware, however, of any “serious harm to the interests of justice” that would result from a continuance in this case.

**ARGUMENT**

A defendant’s physical presence generally is “required” at sentencing, but not if “[t]he proceeding involves only a conference or hearing on a question of law.” Fed. R. Crim. P. 43(a)(3), 43(b)(3). A defendant also may waive presence at sentencing. Fed. R. Crim. P. 43(c)(1)(B); *see, e.g., Brewer v. Raines*, 670 F.2d 117, 118-19 (9th Cir. 1982) (observing that while presence is “one of the most basic rights” of defendants, “[i]t is equally true... that this right is a right that can be waived”); *United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016) (“[U]nder Rule 43, so long as the defendant’s absence is ‘voluntary,’ the district court may proceed with trial and sentencing in absentia.”). Accordingly, the Court may proceed with the first part of sentencing without defendant being present. Here, the issue is whether defendant may appear by videoconference.<sup>1</sup>

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<sup>1</sup> Courts have found that videoconferencing does not meet the presence requirement of Rule 43. *See United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011); *United States v. Thompson*, 599 F.3d 595, 600-01 (7th Cir. 2010); *United States v. Torres-Palm*, 290 F.3d 1244,

1 In light of the COVID-19 pandemic, the CARES Act authorized courts to conduct  
 2 sentencing hearings by videoconference as an alternative to in-person proceedings. In order to  
 3 proceed by videoconference, the CARES Act imposes two requirements. *First*, the CARES Act  
 4 requires a finding by the district court judge “for specific reasons that... [sentencing] cannot be  
 5 further delayed without serious harm to the interests of justice[.]” CARES Act, Pub. L. 116-136,  
 6 134 Stat. 281, § 15002(b)(2)(A).<sup>2</sup> *Second*, the CARES Act requires the consent of the defendant.  
 7 *Id.* § 15002(b)(4) (“Video teleconferencing or telephone conferencing authorized under  
 8 paragraph (1) or (2) may only take place with the consent of the defendant.”); *United States v.*  
 9 *Johnson*, No. 19-CR-39, Dkt. No. 32 (D. Nev. Apr. 9, 2020) (Attachment A) (continuing change  
 10 of plea hearing where defendant consented to video conferencing but where “counsel cannot  
 11 identify any reason why the change of plea cannot be further delayed without serious harm to the  
 12 interests of justice.”).

13 Defendant has consented to proceeding by videoconference for the first part of  
 14 sentencing, but has not made a showing that a continuance would result in “serious harm to the  
 15 interests of justice.” *See United States v. Boatwright*, No. 19-CR-301, Dkt. No. 69 at 2 (D. Nev.  
 16 Apr. 28, 2020) (Attachment B) (“[T]he combination of the Federal Rules of Criminal Procedure  
 17 and the CARES Act create a presumption in favor of continuance. Defendant, as the party  
 18 opposing the continuance, bears the burden to show that delay would do serious harm to the  
 19 interests of justice. Defendant cannot merely waive his appearance.”). Likewise, the  
 20 government is unaware of “serious harm to the interests of justice” that would result from  
 21 continuing the sentencing in light of the COVID-19 pandemic.<sup>3</sup>

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 23 1248 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001); *United*  
*States v. Navarro*, 169 F.3d 228, 230 (5th Cir. 1999).

24 <sup>2</sup> The CARES Act distinguishes between certain proceedings, including felony sentencings  
 25 under Rule 32, which require the specific finding by the district court judge, and a host of other  
 26 criminal proceedings, which do not. *Compare* CARES Act, Pub. L. 116-136, 134 Stat. 281, §  
 15002(b)(1) *with* § 15002(b)(2)(A).

27 <sup>3</sup> The Court may also consider the rights of victims to participate in, and the rights of the  
 28 general public to attend, the entirety of the sentencing. *Cf.* 18 U.S.C. § 3771(a) (discussing the  
 rights of victims not to be excluded from court proceedings); *Richmond Newspapers, Inc. v.*  
*Virginia*, 448 U.S. 555, 580 (1980) (holding that the public’s right to attend criminal trials is  
 “implicit in the guarantees of the First Amendment”).

1 The only harm identified by defendant at the May 22 status conference was the psychic  
 2 burden of having to endure further delay in sentencing. Defendant is not in custody, however,  
 3 and a delay here does not implicate fundamental due-process rights in a way that other courts  
 4 have found would risk “serious harm to the interests of justice” under the CARES Act. *See, e.g.,*  
 5 *United States v. Collazo*, No. 19-CR-120, 2020 WL 1905293 (S.D.W.V. Apr. 17, 2020) (finding  
 6 that delay would result in prejudice where defendant had already been in custody longer than the  
 7 sentence called for under the guidelines). *Cf. United States v. Emory*, No. 19-CR-109, 2020 WL  
 8 1856454 (D. Haw. Apr. 13, 2020) (finding no harm to the interests of justice where defendant  
 9 had already served eight months but potential guidelines range was between 12 and 18 months).  
 10 By itself, defendant’s understandable desire to move on with his life does not appear to be a  
 11 cognizable harm under the CARES Act. *See United States v. Thibeault*, No. 19-CR-81, Dkt. No.  
 12 59 (W.D. Okla. Apr. 20, 2020) (Attachment C) (“It appears that, because defendant is not in  
 13 custody, sentencing in this case can be delayed without serious harm to the interests of justice,  
 14 the public or the Defendant.”).

15 **CONCLUSION**

16 In order to proceed by videoconference under the CARES Act, the Court must find that  
 17 continuing the sentencing until all parties may appear in person would risk “serious harm to the  
 18 interests of justice.” The government is unaware of any “serious harm to the interests of justice”  
 19 that would result from a continuance in this case.

20  
21 Dated: May 27, 2020

Respectfully submitted,

22  
23 /s/ Andrew Schupanitz  
 24 MANISH KUMAR  
 25 LESLIE A. WULFF  
 26 MIKAL J. CONDON  
 27 ANDREW SCHUPANITZ  
 28 Trial Attorneys  
 U.S. Department of Justice  
 Antitrust Division

# ATTACHMENT A

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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
KRISTOPHER JOHNSON,  
  
Defendants.

Case No. 3:19-cr-00039-RCJ-WGC

**ORDER GRANTING CONTINUANCE**

Pursuant to the Court’s Order (ECF No. 29), the parties hereby furnish the following joint status report. According to the Court’s Order, the “parties are directed to file a status report no later than 12:00 noon on Wednesday, April 8, 2020, (1) to advise whether the defendant consents to proceed with the felony plea or sentencing hearing, as scheduled but using video conferencing, and, (2) to explain why the sentencing cannot be further delayed without serious harm to the interests of justice, or (3) to advise whether the parties agree to a continuance, indicating the maximum length of time.”

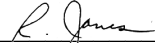
Mr. Johnson consents to conducting his change of plea hearing using video conferencing and the Court has approved of that arrangement. ECF No. 30 (“To the extent the defendant consents to a Video Change of Plea, IT IS ORDERED that a Video Change of Plea Hearing is

1 set for Monday, April 13, 2020 at 11:00 AM before Judge Robert C. Jones.”). Defense counsel  
2 has contacted the Courtroom Administrator as directed and coordinated the details of Mr.  
3 Johnson’s video appearance. At this time, however, counsel cannot identify any reason why the  
4 change of plea cannot be further delayed without serious harm to the interests of justice. *See*  
5 ECF No. 29. To the extent the Court finds that there is no reason why the hearing cannot be  
6 further delayed, the parties would suggest a continuance of no greater than four months from  
7 today’s date. If the Court so determines, the government will file a motion to continue or a  
8 stipulation to continue with the defendant’s consent.

9 Jury trial remains scheduled for April 13, 2020, the same date that Mr. Johnson’s change  
10 of plea hearing is scheduled to take place. To the extent the Court believes the change of plea  
11 hearing should be continued, Mr. Johnson would consent to vacating the jury trial and  
12 continuing the jury trial to a date to coincide with his continued change of plea hearing.

13  
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16 **ORDER**

17  
18 In light of the Joint Status Report (ECF No. 31),  
19 IT IS HEREBY ORDERED that the Court finds that there is no reason why the Change of  
20 Plea hearing set for Monday, April 13, 2020 at 11:00 A.M. cannot be delayed and GRANTS  
21 the parties request for continuance of no greater than four months.  
22 IT IS FURTHER ORDERED that on or before 12:00 P.M, Friday, April 10, 2020, the parties  
23 shall file a stipulation for continuance with defendant's consent, VACATING the Change of  
24 Plea currently set for 11:00 A.M., Monday, April 13, 2020.  
25 IT IS FURTHER ORDERED that the Calendar Call and Jury Trial will be RESCHEDULED  
26 to a Calendar Call set for 10:00 A.M., Monday, August 3, 2020 and Jury Trial for 8:30 A.M.,  
Monday, September 21, 2020, before Judge Robert C. Jones.  
IT IS SO ORDERED this 9<sup>th</sup> day of April, 2020.

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26 \_\_\_\_\_  
ROBERT C. JONES  
United States District Judge

# ATTACHMENT B



1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 UNITED STATES OF AMERICA., )  
4 )  
5 Plaintiff, )  
6 vs. )  
7 )  
8 TERRANCE BOATWRIGHT, )  
9 )  
10 Defendant. )  
11 )  
12 )

Case No.: 2:19-cr-00301-GMN-DJA-2

ORDER

13 Pending before the Court is the Government’s Motion to Continue the Change of Plea,  
14 (ECF No. 62). Defendant Terrance Boatwright (“Defendant”) filed a Response, (ECF No. 65),  
15 and the Government filed a Reply, (ECF No. 68). For the reasons discussed below, the Court  
16 **GRANTS** the Government’s Motion.

17 This case arises from Defendant’s alleged participation in a bank robbery. On  
18 November 13, 2019, Defendant was charged in the Indictment with one count of conspiracy to  
19 commit bank robbery and one count of bank robbery. (*See* Indictment, ECF No. 1). Defendant  
20 initially pleaded not guilty on both counts. (*See* Mins. Proceedings, ECF No. 16). However,  
21 Defendant ultimately executed a plea agreement with the Government, and the Court set a  
22 Change of Plea Hearing (“COP”). (*See* Min. Order, ECF No. 57). In light of the COVID-19  
23 pandemic, the Court scheduled the COP to proceed by video conference on April 29, 2020.  
24 (*See* Min. Orders, ECF Nos. 64, 67). Now before the Court is the Government’s Motion to  
25 Continue the COP. (*See* Mot. Continue, ECF No. 62). The Government argues that a  
continuance is warranted because Defendant must be physically present in court at his plea. (*Id.*  
4:6–5:8).

Before accepting a defendant’s plea, the court “must address the defendant personally in  
open court.” Fed. R. Crim. P. 11; *see also* Fed. R. Crim. P. 43(a)(1) (requiring that “the

1 defendant must be present at . . . the plea.”). Generally, appearance by videoconference does  
2 not suffice. *See Vanzuela-Gonzales v. U.S. Dist. Ct.*, 915 F.2d 1276, 1280 (9th Cir. 1990). Yet,  
3 appearance by videoconference is appropriate under circumstances for which Congress has  
4 determined that such an appearance satisfies the Federal Rules of Criminal Procedure’s  
5 presence requirement. *Id.* at 1281. Given the COVID-19 pandemic’s impact on federal courts’  
6 operations, Congress passed legislation enabling criminal proceedings to be conducted  
7 remotely by video conference or teleconference. *See* CARES Act, Pub. L. 116-136, 134 Stat.  
8 281, § 15002. The Act allows most criminal proceedings to be conducted remotely without  
9 additional factual findings by the court regarding the need to proceed by videoconference. *See*  
10 *id.* § 15002(b)(1). However, the Act imposes additional requirements for felony pleas and  
11 sentencings. *See id.* In order to conduct a felony plea or sentencing hearing by video  
12 conference or teleconference, the court must find that the hearing “cannot be conducted in  
13 person without seriously jeopardizing public health and safety,” and provide “specific reasons .  
14 . . that [the] case cannot be further delayed without serious harm to the interests of justice . . . .”  
15 *Id.* § 15002(b)(2)(A)(5).

16 The Government seeks a continuance under the CARES Act because it argues that  
17 further delay will not do serious harm to the interest of justice. (Mot. Continue 4:6–5:8).  
18 Defendant raises a myriad of arguments opposing the continuance, most of which do not  
19 confront the burdens imposed under the CARES Act. (*See* Def.’s Resp. 2:18–6:11, ECF No.  
20 65). The Court first considers Defendant’s arguments that do not address the CARES Act.  
21 Defendant contends that the COP should continue as scheduled because the Government has  
22 not shown cause for the continuance; the Court has the technological ability to conduct the  
23 COP; and other judges in the District have conducted criminal hearings by video conference.  
24 (*Id.* 2:18–3:22, 4:10–6:11). Defendant misconstrues the burdens established under the CARES  
25 Act. The Federal Rules of Criminal Procedure require Defendant’s physical appearance in

1 open court for his felony plea unless Congress provides otherwise. *See Vanzuela-Gonzales*, 915  
2 F.2d at 1280. Under the CARES Act, Congress continues to require Defendant’s physical  
3 presence unless the case cannot be further delayed without serious harm to the interests of  
4 justice. CARES Act. § 15002(b)(2)(A)(5). Thus, in the context of Defendant’s felony plea, the  
5 combination of the Federal Rules of Criminal Procedure and the CARES Act create a  
6 presumption in favor of continuance. Defendant, as the party opposing the continuance, bears  
7 the burden to show that further delay would do serious harm to the interests of justice.  
8 Defendant cannot merely waive his appearance. *Cf. United States v. Klos*, No. CR-11-233-  
9 PHX-DGC, 2013 U.S. Dist. LEXIS 71079, 2013 WL 2237543 (D. Ariz. May 20, 2013); *United*  
10 *States v. Thomas*, No. CR 06-40079, 2007 U.S. Dist. LEXIS 38086, 2007 WL 1521531 (D.S.D.  
11 May 21, 2007).

12 Next, Defendant argues that continuing the COP would do serious harm to the interests  
13 of justice because it will delay Defendant’s eventual sentencing, causing him to remain in a  
14 detention facility that is farther from his family than his preferred Bureau of Prisons (“BOP”)  
15 facility. (Def.’s Resp. 3:23–4:9). While a legitimate personal interest, the Court finds that a  
16 delay in Defendant’s preferred placement does not do “serious harm to the interests of justice.”  
17 Since the enactment of the CARES Act, most district courts have found that serious harm to the  
18 interests of justice exists when delay risks harm to defendant’s due process rights by, for  
19 example, forcing defendant to serve greater time in custody than the guideline range would  
20 recommend for his offense. *Cf. United States v. Short*, No. 3:15-CR-0174, 1010 U.S. Dist.  
21 LEXIS 72509, 2020 WL 1969395 (D. Conn. Apr. 24, 2020); *United States v. Collazo*, No.  
22 2:19-00120, 2020 U.S. Dist. LEXIS 67949, 2020 WL 1905293 (S.D.W.V. Apr. 17, 2020);  
23 *United States v. Emory*, No. 19-00109 JAO, 2020 U.S. Dist. LEXIS 66148, 2020 WL 1856454  
24 (D. Haw. Apr. 13, 2020); *United States v. Jones*, No. 19-225, 2020 U.S. Dist. LEXIS 58149,  
25 2020 WL 1644257 (D. Minn. Apr. 2, 2020); *United States v. Harry*, No. 19-cr-535, 2020 U.S.

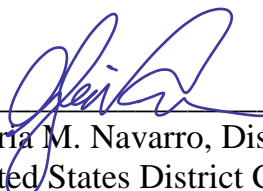
1 Dist. LEXIS 56323, 2020 1528000 (E.D.N.Y. Mar. 31, 2020). Here, Defendant does not argue  
2 that a continuance would force him to serve greater time than his plea agreement provides.  
3 Even if a continuance will delay Defendant's transfer to a BOP facility, it is unlikely that he  
4 would have been able to see his family during the time sentencing is delayed because social  
5 visits have been suspended at BOP facilities due to COVID-19. *See* Federal Bureau of Prisons,  
6 *BOP Implementing Modified Operations*, [https://www.bop.gov/coronavirus/covid19\\_status.jsp](https://www.bop.gov/coronavirus/covid19_status.jsp).  
7 Thus, the Court concludes that a continuance is warranted because it would not present  
8 substantial harm to the interests of justice.

9 Accordingly,

10 **IT IS HEREBY ORDERED** that the Government's Motion to Continue, (ECF No. 62),  
11 is **GRANTED**.

12 **IT IS FURTHER ORDERED** that the Change of Plea currently scheduled for April 29,  
13 2020 at 2:30 p.m., be vacated and continued to June 17, 2020 at 11:00 a.m. in Courtroom 7D  
14 before Judge Gloria Navarro.

15 **DATED** this 28 day of April, 2020.

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Gloria M. Navarro, District Judge  
United States District Court

# ATTACHMENT C

