

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.<sup>1</sup> 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

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<sup>1</sup> 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.”<sup>2</sup>

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

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<sup>2</sup> 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](mailto:andrew_grindrod@fd.org)

**CERTIFICATE OF SERVICE**

I certify that on this 20<sup>th</sup> 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](mailto:andrew_grindrod@fd.org)

EXECUTIVE DEPARTMENT  
STATE OF CALIFORNIA

EXECUTIVE ORDER N-33-20

**WHEREAS** on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

**WHEREAS** in a short period of time, COVID-19 has rapidly spread throughout California, necessitating updated and more stringent guidance from federal, state, and local public health officials; and

**WHEREAS** for the preservation of public health and safety throughout the entire State of California, I find it necessary for all Californians to heed the State public health directives from the Department of Public Health.

**NOW, THEREFORE, I, GAVIN NEWSOM**, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567, 8627, and 8665 do hereby issue the following Order to become effective immediately:

**IT IS HEREBY ORDERED THAT:**

- 1) To preserve the public health and safety, and to ensure the healthcare delivery system is capable of serving all, and prioritizing those at the highest risk and vulnerability, all residents are directed to immediately heed the current State public health directives, which I ordered the Department of Public Health to develop for the current statewide status of COVID-19. Those directives are consistent with the March 19, 2020, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, found at: <https://covid19.ca.gov/>. Those directives follow:

ORDER OF THE STATE PUBLIC HEALTH OFFICER  
March 19, 2020

To protect public health, I as State Public Health Officer and Director of the California Department of Public Health order 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, as outlined at <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>. In addition, and in consultation with the Director of the Governor's Office of Emergency Services, I may designate additional sectors as critical in order to protect the health and well-being of all Californians.

Pursuant to the authority under the Health and Safety Code 120125, 120140, 131080, 120130(c), 120135, 120145, 120175 and 120150, this order is to go into effect immediately and shall stay in effect until further notice.

The federal government has identified 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or

destruction would have a debilitating effect on security, economic security, public health or safety, or any combination thereof. I order that Californians working in these 16 critical infrastructure sectors may continue their work because of the importance of these sectors to Californians' health and well-being.

This Order is being issued to protect the public health of Californians. The California Department of Public Health looks to establish consistency across the state in order to ensure that we mitigate the impact of COVID-19. Our goal is simple, we want to bend the curve, and disrupt the spread of the virus.

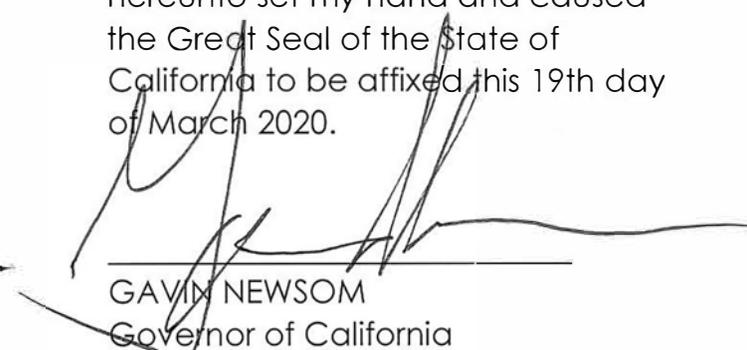
The supply chain must continue, and Californians must have access to such necessities as food, prescriptions, and health care. When people need to leave their homes or places of residence, whether to obtain or perform the functions above, or to otherwise facilitate authorized necessary activities, they should at all times practice social distancing.

- 2) The healthcare delivery system shall prioritize services to serving those who are the sickest and shall prioritize resources, including personal protective equipment, for the providers providing direct care to them.
- 3) The Office of Emergency Services is directed to take necessary steps to ensure compliance with this Order.
- 4) This Order shall be enforceable pursuant to California law, including, but not limited to, Government Code section 8665.

**IT IS FURTHER ORDERED** that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

**IN WITNESS WHEREOF** I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 19th day of March 2020.



\_\_\_\_\_  
GAVIN NEWSOM  
Governor of California

**ATTEST:**

\_\_\_\_\_  
ALEX PADILLA  
Secretary of State

[CORONAVIRUS](#)

## California issues statewide stay-at-home order in coronavirus fight

The order, which takes effect Thursday night, asks residents to leave their homes only when necessary.



March 19, 2020, 10:00 PM EDT / Updated March 19, 2020, 10:29 PM EDT

By **Phil Helsel**

The governor of California on Thursday evening issued a statewide stay-at-home order to help combat the spread of the [coronavirus](#).

The order, which takes effect Thursday night, asks residents to leave their homes only when necessary. It will remain in place until further notice.

Gov. Gavin Newsom's announcement came about an hour after officials in [Los Angeles County ordered people to stay home](#) except for essential needs or jobs and for indoor shopping malls and nonessential retail to close.

[San Francisco and surrounding counties](#) had previously issued orders to stay at home to stop the spread of the coronavirus and the illness it causes, COVID-19.

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Newsom said the statewide order is consistent with the local orders. Places like grocery and convenience stores, delivery restaurants, gas stations, pharmacies, banks and laundromats will remain open.

Bars, nightclubs, theaters, gyms and convention centers have been ordered closed.

The goal is to encourage "social distancing," which health experts have stressed can slow the spread of the disease and keep health systems from being overwhelmed.



**Gavin Newsom**  
@GavinNewsom

CA is issuing a statewide, mandatory STAY AT HOME order.

Those that work in critical sectors should go to work. Grocery stores, pharmacies, banks and more will stay open.

We need to meet this moment and flatten the curve together.

Go to [covid19.ca.gov](https://covid19.ca.gov) to learn more.

**California Coronavirus COVID-19 Response**  
We're all in this together. We are working rapidly to keep our state healthy.  
[covid19.ca.gov](https://covid19.ca.gov)

22.6K 10:00 PM - Mar 19, 2020

[15.4K people are talking about this](#)

The governor said he hopes people will voluntarily obey the order to stay at home if possible, saying, "There's a social contract here."

"People, I think, recognize the need to do more and to meet this moment," Newsom said.

California, which has a population of around 40 million, is among the first states to order restrictions statewide. Earlier in the week, Nevada said that all non-essential businesses should close for 30 days.

"We project that roughly 56 percent of our population – 25.5 million people – will be infected with the virus over an eight week period," Newsom wrote [in a letter](#) to President Donald Trump [dated Wednesday](#).

**[Full coverage of the coronavirus outbreak](#)**

Newsom said Thursday evening: "That number in and of itself shouldn't be overly alarming – the vast majority of us, the overwhelming majority of us, won't have symptoms, will be perfectly fine. But there is a subset that we're concerned about" who will be more seriously affected.

The state has more than [870 cases and has had 17 deaths](#) linked to the illness, according to an NBC News count of reported cases which includes those who have recovered, those who have died and those repatriated to the U.S. from other countries.



Phil Hesel

Phil Hesel is a reporter for NBC News.



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**TODAY**



1 if the Court develops a view during the hearing that a sentence of greater than time served may be  
2 warranted, it will give defense counsel the opportunity to request that the hearing be continued  
3 until such time as Trejo is able to participate. Counsel is therefore directed to contact Court Call  
4 at (866) 582-6878 as soon as possible to arrange their participation at tomorrow's 2:30 pm  
5 telephonic hearing.

6  
7 **IT IS SO ORDERED.**

8  
9 Dated: March 16, 2020

10  \_\_\_\_\_  
11 RICHARD SEEBORG  
12 United States District Judge

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United States District Court  
Northern District of California

**From:** [Helen Abdi](#)  
**To:** [Andrew Grindrod](#)  
**Subject:** Re: Attend Sentencing By Video or Telephone  
**Date:** Friday, March 20, 2020 5:40:28 PM

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Hello Andrew,

Yes, I confirm. Please request to the court that I attend the hearing by videoconferencing or by phone as I have lung damage and it would be a high risk with my age as well in the current situation surrounding Covid-19.

Thank you!

On Fri, Mar 20, 2020 at 2:23 PM Andrew Grindrod <[Andrew\\_Grindrod@fd.org](mailto:Andrew_Grindrod@fd.org)> wrote:

Dear Ms. Kennedy,

This email is to confirm in writing our discussions about your desire to waive your right to be physically present in the courtroom for sentencing in your federal criminal case, United States v. Kennedy, E.D. Va. Case No. 2:19cr158. You and I have discussed that you have the absolute right to be physically present in the courtroom, but you have told me that you wish to voluntarily give up that right and ask the Court to instead allow you to attend the hearing by telephone or videoconference. You have expressed that you understand that the sentencing hearing may include the presentation of evidence and argument respecting the appropriate sentence as well as rulings on objections to the presentence investigation report or matters affecting the Sentencing Guidelines. You will have the right to make an unsworn statement, which you may do by telephone or videoconference. Can you confirm that it is your desire to give up your right to be physically present in the courtroom at sentencing and that this decision is being made by you free from any threats or promises with an understanding of your rights and of your own free will?

Sincerely,

*Andrew W. Grindrod*

Assistant Federal Public Defender

Office of the Federal Public Defender

Eastern District of Virginia

150 Boush Street, Suite 403

Norfolk, Virginia 23510

Ph. (757) 457-0860

Fax (757) 457-0880

[andrew\\_grindrod@fd.org](mailto:andrew_grindrod@fd.org)

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Sincerely,  
Helen Kennedy  
949-355-7270

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.	)	

**ORDER**

**AND NOW**, for good cause shown and pursuant to Rule 43(c)(1)(B) of the Federal Rules of Criminal Procedure, Defendant’s motion to allow Defendant to voluntarily attend sentencing by video or teleconference is **GRANTED**. The parties are directed to coordinate with Court staff about arrangements for Defendant to appear by telephone or videoconference.

**IT IS SO ORDERED**

\_\_\_\_\_  
Hon. Rebecca Beach Smith  
United States District Judge

Norfolk, Virginia

Date:

I ASK FOR THIS:

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](mailto:andrew_grindrod@fd.org)