IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 05-cr-00545-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

OBJECTION BY THE UNITED STATES
TO THE DEFENDANT'S REQUEST
NOT TO ATTEND HIS SENTENCING

As directed by the Court at the February 18, 2010 scheduling hearing, the Government hereby responds to the Defendant's "Notice of Intent to Waive His Right to Be Present at Resentencing" (Docket #600), which essentially states that he does not wish to attend his resentencing and is thus waiving his right to attend it. The Government's position is that (1) the Court need not require the Defendant's presence at the April 2010 evidentiary hearing regarding gain, but (2) the Court should require the Defendant's presence at the June 2010 imposition of sentence.

With respect to the hearing on gain, the Government submits that the Defendant's attendance is not required because, as explained below, Federal Rule of Criminal Procedure 43 requires presence only at the imposition of sentence, not at other preliminary sentencing hearings.

With respect to the June 24, 2010 hearing where sentence will be imposed, the Government submits that the Court should require the Defendant's presence because, as noted, Rule 43 requires the Defendant to attend the imposition of sentence.

Moreover, even if Rule 43 did not require his attendance, the Court would still need to determine whether, in its discretion, to impose sentence on the Defendant *in absentia*. The Court should not do so here. No exception to the ordinary rule of presence is warranted for the Defendant here. And requiring him to attend will accord with several recognized goals of sentencing, including having the defendant personally receive the official expression of the condemnation of his conduct, showing confidence in the justness of the sentence, promoting respect for the law, promoting deterrence, and treating victims fairly.

I. The Government does not object to the Defendant's non-attendance at the April 2010 hearings on gain.

The Government submits that the Court need not require the Defendant's presence at the hearings on gain set for April 21-23, 2010. While Rule 43(a) generally requires attendance at "sentencing," the history and structure of that rule make clear that the defendant's presence is required only at the *imposition* of sentence.

In its current form, Rule 43 provides that unless that rule or another provides otherwise, "the defendant must be present at:... (3) sentencing." Fed. R. Crim. P. 43(a). The term "sentencing" is not defined, but its meaning can be determined from the history of the rule. In 2002, Rule 43(a) was amended slightly to require presence: the rule formerly required the defendant's presence at the "imposition of sentence"; after the amendment, the rule required his presence at "sentencing."

There is no indication that this amendment intended to extend the presence requirement to sentencing proceedings other than the imposition of sentence. On the contrary, the Advisory Committee made clear that the changes were "stylistic only." *See United States v. Mitchell*, 502 F.3d 931, 988 n.21 (9th Cir. 2007) (observing that "[t]he history of recent changes made to Rule 43 ... indicates that 'sentencing' means the pronouncement of sentence," and discussing those changes), *cert. denied*, 128 S. Ct. 2902 (2008). As the *Mitchell* court further explained, the "sentencing" referred to in Rule 43(a) "[l]ogically and structurally ... connotes the proceeding when judgment is pronounced and sentence is imposed, not the proceeding during which it is determined ... what sentence to recommend." *Id.* at 988.

As set forth below, there are many reasons for requiring the defendant's presence at the *imposition of sentence*, but those reasons have little or no application here. In sum, the Government submits that the Court need not, and should not, require the Defendant's presence at the April 2010 hearing. The Government does not intend of its own accord (unless, of course, it is directed otherwise) to request that the U.S. Marshal bring the Defendant to attend the April 2010 hearings in person. *See* 18 U.S.C. § 3621(d) (providing that "on order of a court of the United States or on written request of an attorney for the Government," the United States marshal "shall ... bring a prisoner into court").

II. The Court should not permit the Defendant to skip the imposition of sentence.

The Defendant is required by Rule 43 to attend to the imposition of sentence. Moreover, even if Rule 43 did not require his presence, this Court has discretion to determine whether to resentence him *in absentia*; here, several factors weigh against

proceeding *in absentia*.

A. Rule 43 requires the Defendant to attend his sentencing.

As noted above, Rule 43 generally requires a defendant to be present at the imposition of his sentence. Rule 43(a) provides that unless that rule or another provides otherwise, "the defendant must be present at:... (3) sentencing." Fed. R. Crim. P. 43(a).[1]

Rule 43(c) provides some exceptions to the presence requirement, but the exceptions apply only in certain defined circumstances. The rule's list of exceptions to the presence requirement is exclusive — *i.e.*, if the rule does not provide for an exception, none exists. *Cf. Crosby v. United States*, 506 U.S. 255, 259 (1993) (explaining that the list in Rule 43 of situations where a defendant need not be present at trial is "exclusive"). Rule 43 thus is not a rule that may be waived whenever the defendant so chooses. Rather, it defines the circumstances when a defendant must be present, and when the defendant need not be present. To take an example, even if a defendant in a capital case sought to waive his presence at his sentencing, he could not, because the rule does not permit a waiver in that situation. *See* Fed. R. Crim. P. 43(c). The initial issue here, therefore, is whether the situation falls into the exceptions defined by Rule 43.

The sole exception on which the Defendant relies here is Rule 43(c)(1)(B), which permits a defendant to waive presence "in a noncapital case, when the defendant is voluntarily absent during sentencing." There are other exceptions mentioned elsewhere

---

[1] The fact that this is a resentencing does not change this analysis. The Tenth Circuit has held that if a case is "remanded for resentencing, the new sentence is a part of the criminal proceeding and the presence of the defendant is necessary." *United States v. Alvarez-Pineda*, 258 F.3d 1230, 1240-41 (10th Cir. 2001) (quotation omitted).

in Rule 43 — *e.g.*, certain misdemeanor cases, statutory reductions of sentence — but none apply here.[2]

Rule 43(c)(2) does not apply here because a defendant in custody cannot "voluntarily" decide not to attend his sentencing. This understanding — that a defendant in custody cannot be "voluntarily absent" for purposes of Rule 43(c)(1)(B) — is supported by Supreme Court precedent on which Rule 43 was based, by the practicalities of the Defendant's custody, by the rule's structure, and by the rule's purposes.

***First*,** the Supreme Court has repeatedly taken the view that a defendant in custody cannot be "voluntarily absent." In *Diaz v. United States*, 223 U.S. 442 (1912), the Court explained that a defendant "who is in custody" cannot waive attendance at court proceedings "because his presence or absence is not within his own control." *Id.* at 455; *see also id.* (holding that it is only "where the offense is not capital and the accused is not in custody" that a defendant can waive his right to attend by "voluntarily absent[ing] himself" from the trial).

While *Diaz* preceded the adoption of Rule 43, there is no indication that the rule intended to reject *Diaz*'s view that "voluntary absence" does not apply to defendants in custody. On the contrary, *Diaz* was cited with approval in the original 1944 Advisory Committee Notes to Rule 43. *See* 1944 Adv. Comm. Notes to Fed. R. Crim. P. 43, par. 1 (citing *Diaz*). And since the adoption of Rule 43, the Supreme Court has reaffirmed the logic of *Diaz* in interpreting that rule. In *Taylor v. United States*, 414 U.S. 17 (1973), the

---

[2] For example, the Court can permit a defendant not to attend his trial or sentencing in certain misdemeanor cases, so long as the defendant provides a written consent. Fed. R. Civ. P. 43(b)(2). A court can also proceed without the defendant if the proceeding is merely a reduction or correction of sentence under the authority of Rule 35 or 18 U.S.C. § 3582(c). Neither of those provisions apply here.

Court quoted with approval the portion of *Diaz* that rejects the view that a defendant in custody can be voluntarily absent from a court proceeding. The Court explained that the provision in Rule 43 addressing voluntary absence "reflects the longstanding rule recognized by this Court in *Diaz*." *Id.* at 18-19 (approving a district court's continuation of a trial in the defendant's absence). More recently, the Seventh Circuit has observed that "a defendant taken into legal custody is not voluntarily absent." *See United States v. Achbani*, 507 F.3d 598, 602 (7th Cir. 2007) (citing *Larson v. Tansy*, 911 F.2d 392, 397 (10th Cir. 1990)).[3]

***Second*,** this view from *Diaz* and *Taylor* — that a defendant in custody cannot truly be voluntarily absent from his sentencing — accords with the practical reality of custody. Because the Defendant is within the custody of the Bureau of Prisons, he does not have the power to "voluntarily" decide whether or not to attend a court proceeding. Rather, it is the Bureau that has been granted the authority to determine the Defendant's place of confinement. *See* 18 U.S.C. § 3621. Congress has further provided that upon an order by a court, or a request by the government, the U.S. Marshal shall bring an inmate to court. 18 U.S.C. § 3621(d).

---

[3] In *Achbani*, the Seventh Circuit cited *Larson v. Tansy*, 911 F.2d 392, 397 (10th Cir. 1990), for the proposition that a defendant in legal custody cannot be voluntarily absent. *Larson* does not exactly reach this holding; it analyzed, more narrowly, whether it was valid for a defense counsel to waive the defendant's *constitutional* right to presence at trial and at a competency hearing where the defendant was confined to a state psychiatric institution. *Id.* at 396 (noting that the court must "indulge every reasonable presumption against waiver of fundamental constitutional rights"). *Larson* did not address Rule 43. But in *Larson* the Tenth Circuit did cite *Diaz*, and it did recognize that a defendant in custody may not have the ability to voluntarily decide whether to attend a court proceeding. *Id.* at 397. So this dicta from *Larson* does lend support to the Seventh Circuit's more sweeping statement in *Achbani* that a defendant cannot truly absent himself "voluntarily" when he is in government custody.

In sum, if there is a request for the Defendant to be brought to a court proceeding, the Defendant does not have the ability to "voluntarily" decide not to comply. Here, unless directed otherwise, the Government intends to request, under § 3621(d), that the U.S. Marshal bring the Defendant to court for the June 24, 2010 imposition of sentence. If there is such a request or a court order, the Defendant cannot "voluntarily" decide that he would rather not attend.

***Third*,** the structure of Rule 43 further supports the view that the drafters did not intend to permit felony defendants in custody to elect not to attend simply by filing a written pleading. This can be seen by comparison with Rule 43(b)(2), which provides that certain misdemeanor defendants can file a "written consent" that permits the court to proceed *in absentia*. Notably, the drafters included no similar "voluntary consent" provision for *felony* defendants. As one court has explained, this structure strongly indicates that the drafters did not intend to allow felony defendants to avoid attending their sentencing merely by filing a written consent:

> If the drafters of Rule 43 intended for a defendant to be able to waive presence under Rule 43(c)(1)(B), by written consent, then the drafters could have easily included in that section the same language that is found in Rule 43(b)(2). Thus, it is doubtful that a [felony] defendant can waive presence at sentencing under Rule 43(c)(1)(B) solely by written consent and 'voluntarily absent' must require something more.

United States v. Jones, 410 F. Supp. 2d 1026, 1031-32 (D.N.M. 2005) (rejecting a defendant's argument that he should be sentenced by videoconference on the ground that he was entitled to waive his attendance at sentencing altogether).

Finally, the purposes of the rule support the view that a defendant in custody cannot avoid attending his sentencing simply by seeking to voluntarily absent himself from the proceeding.

The purpose of the rule regarding voluntary absence at sentencing (Rule 43(c)(1)(B)) shows that it was not intended to extend to defendants in custody. Rather, the purpose was to allow a court to sentence a defendant who fled before sentencing. This purpose can be seen in the 1995 Advisory Committee Notes to Fed. R. Crim. P 43, which observe that the amendments made that year, which extended the "voluntary absence" rule to sentencing, were intended make clear that a defendant "who .... [is convicted] but who voluntarily flees before sentencing, may nonetheless be sentenced *in absentia*." *See also id.* ("The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed."); *cf. United States v. Latham*, 874 F.2d 852, 858-59 (1st Cir. 1989) (holding that the defendant's ingestion of a near-lethal dose of cocaine, and subsequent hospitalization, was not a "voluntary absence" from trial under Rule 43 because assuming the defendant was seeking to be hospitalized, "he would end up in custody (hospitalized) and upon recovery would still have to attend trial," which "is markedly different from fleeing to avoid the trial altogether").

More broadly, the purpose of Rule 43's presence requirement is not just to protect defendants; it also protects the *public* interest. The Tenth Circuit has observed that Rule 43 stands in part on "a common law footing." *United States v. Songer*, 842 F.2d 240, 242 (10th Cir. 1988). The *Songer* court observed, in discussing a prior version of Rule 43, that "[c]onfusion of thought will result if we fail to mark the distinction between

requirements ... of presence that have their source in the common law," such as Rule 43, and "requirements that have their source, either expressly or by implication, in the federal constitution." *Id.* at 242 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)). The *Songer* court observed that the common law not only reflected a desire to protect the defendant's rights but also acknowledged that the *public*, too, may have an interest in the presence of the defendant at sentencing. *Songer*, 842 F.2d at 243; *accord United States v. Wise*, 489 F. Supp. 2d 968 (D.S.D. 2007) (observing that Rule 43 does not define a defendant's *constitutional* right to attend proceedings, but instead reflects a balance of interests as defined in the criminal rules that may prevent a defendant from avoiding attendance to "accommodate the public's interest as Congress perceives the same").

In sum, the Court should determine that Rule 43(a) requires the Defendant to attend the imposition of sentence, and that Rule 43(c) does not excuse his presence because he cannot be voluntarily absent from sentencing as that rule is understood in light of precedent, the practicalities of the Defendant's custody, and the structure and purpose of the rule.

II. The Court also may, in its discretion, deny the Defendant's request to avoid attendance at sentencing.

Even if the Court were to rule that Rule 43 does not require the Defendant's presence, the Court would need to determine, in its discretion, whether to sentence him *in absentia*. Because the purposes and goals of sentencing are furthered by requiring the Defendant's presence, the Court should require the Defendant to attend the imposition of sentence in this Court.

A. Even when Rule 43 does not require a defendant's presence, the Court has discretion to determine whether to proceed *in absentia*.

Once a defendant properly waives a right to attend his sentencing under Rule 43, the court is not *required* to sentence the defendant *in absentia*. The court still must determine whether to do so. Rule 43(c) leaves the court discretion by providing that when there is a proper waiver under Rule 43, the trial "*may* proceed" to verdict and sentencing despite the defendant's absence. *See* Fed. R. Crim. P. 43(c)(2) (emphasis added). This use of the word "may" indicates that the rule grants the Court *discretion* to determine whether to proceed *in absentia*.

This discretion accords with the overall structure of Rule 43. The rule does not grant misdemeanor defendants the automatic right to excuse themselves from sentencing. Instead, the drafters left the decision in such cases about whether to proceed *in absentia* to the court's discretion, commenting that it would be "discretionary with the court to permit defendants in misdemeanor cases to absent themselves." 1944 Adv. Comm. Notes to Fed. R. Crim. P. 43, par. 3. Given that the rule leaves it to the court's discretion to decide whether to proceed *in absentia* with a *misdemeanor* defendant, it seems unlikely that the drafters intended to deprive courts of similar discretion with felony defendants.

Accordingly, when courts have found that a defendant has voluntarily chosen not to attend a trial or sentencing proceeding, such courts have often turned to the question whether, in their discretion, the sentencing should proceed with or without the defendant. *United States v. Wright*, 932 F.2d 868, 879 (10th Cir. 1991) ("After resolving the issue of waiver, the court must decide whether to proceed in a defendant's absence."), overruled on other grounds by United States v. Flowers, 464 F.3d 1127 (10th Cir. 2006); *cf. United States v. Lumitap*, 111 F.3d 81, 84 (9th Cir. 1997) (finding no abuse of discretion where a

court denied a defendant's request not to appear at trial where the request may have been made to avoid being identified); *United States v. DeHaro*, No. 06-40001, 2007 WL 1302566, at *1 (D.S.D. May 2, 2007) (Magistrate Judge order) (observing that whether a defendant "can waive his *right* to be present" at sentencing is different from whether he may avoid attendance; the court construed the defendant's filed waiver-of-attendance as a motion for permission not to attend, and denied the motion), *objection overruled*, 2007 WL 1521547 (D.S.D. May 21, 2007).

Accordingly, even if the Court finds that Rule 43 does not require the Defendant to attend the imposition of his sentence, the Court should still determine whether there is sufficient reason to have him attend. Here, as set forth below, there are several good reasons for having the Defendant attend.

B. No special exception should be made for the Defendant.

As a general matter, felony defendants are sentenced in person. No exception should be made here. The Defendant here has not advanced any compelling reason for an exception. Indeed, he has not advanced any reason at all. He has not identified any reason why his attendance would impose a special burden on him as opposed to any other inmate in custody.[4] Given the lack of any such reason, it might create the impression of unfairness to allow the Defendant to skip his sentencing.

It is notable that the Defendant advances no reason for not attending his sentencing, other than that he is waiving his rights. This case is thus nothing like *United*

---

[4] The Defendant will have to travel further than many inmates to the sentencing, but only because the Bureau of Prisons has incarcerated the Defendant at an institution that is close to his family, as opposed to the district where the sentencing took place. This is not a reason to grant the Defendant any special treatment.

States v. Rigas, 02-cr-1236, 2008 WL 2544654 (S.D.N.Y. June 24, 2008), which the Defendant cites. *See* Docket #600 at 4. In that case, the defendants' sentences were being reduced, *see* 2008 WL 2544654, and it appears that this was done (with the government's consent) by videoconference, *see* Ex. A (press reports of *Rigas* sentencing; relevant portions are highlighted), an option that is not available here under controlling Tenth Circuit precedent. *Cf. United States v. Hertz*, No. 09-cr-384-MSK, 2010 WL 447749, at *3 (D. Colo. Feb. 4, 2010) (discussing Tenth Circuit law on videoconferencing at sentencing). Moreover, it appears that one of the defendants being resentenced in the *Rigas* case was over eighty years old and suffered from a variety of health problems, including bladder cancer. *See* Ex. A. No such facts are present here.

The context here is also very different from the context presented in *United States v. Saenz*, 429 F. Supp. 2d 1109 (N.D. Iowa 2006), which the Defendant also cites. *See* Docket #600 at 3. In *Saenz*, the district court explained that it was "particularly skeptical of the government's motivation" in moving to have the defendant sentenced in person. The court cited several reasons for its skepticism, including that (1) the government had previously expressly waived that precise argument, (2) based on that waiver, the defendant had *already* been sentenced *in absentia*, (3) the defendant had been sentenced to a lower sentence that the government had sought, which had led to the government's motion for sentencing in person, and (4) in order to be resentenced in person, the defendant was going to have to travel at her own expense. None of those circumstances are present here.

C. Requiring the Defendant's presence at his resentencing would serve several recognized purposes of sentencing.

Requiring the Defendant's presence at his resentencing also would serve several recognized purposes of sentencing.

The Tenth Circuit has offered the following as a "thoughtful summary" of the reasons underlying the common law rule regarding the presence of the defendant at sentencing:

> Presence is of instrumental value to the defendant for the exercise of other rights, such as to present mitigating evidence and challenge aggravating evidence, and it may also be advantageous to him that the decisionmaker be required to face him. The state may have an interest in the presence of the defendant in order that the example of personal admonition might deter others from similar crimes. Moreover, it may sometimes be important that the convicted man be called to account publicly for what he has done, not to be made an instrument of the general deterrent, but to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation of his conduct. The ceremonial rendering of judgment may also contribute to the individual deterrent force of the sentence if the latter is accompanied by appropriate judicial comment on the defendant's crime.
>
> However, there is an additional and perhaps more fundamental justification for the right to be personally present. Respect for the dignity of the individual is at the base of the right of a man to be present when society authoritatively proceeds to decide and announce whether it will deprive him of life or how and to what extent it will deprive him of liberty. It shows a lack of fundamental respect for the dignity of a man to sentence him in absentia. The presence of the defendant indicates that society has sufficient confidence in the justness of its judgment to announce it in public to the convicted man himself. Presence thus enhances the legitimacy and acceptability of both sentence and conviction.

United States v. Songer, 842 F.2d 240, 243 (10th Cir. 1988) (quoting Note, Procedural Due Process at Judicial Sentencing, 81 Harv. L. Rev, 821, 831 (1968))[5]; *cf. United States v. Villano*, 816 F.2d 1448, 1452 (10th Cir. 1987) (observing that "[s]entencing should be conducted with the judge and defendant facing one another" in holding that an oral pronouncement of sentence trumped a later written order); *cf. United States v. Wright*, 342 F. Supp. 2d 1068, 1070 (M.D. Ala. 2004) (observing that "both the letter and spirit" of Rules 32 and 43 supporting having the judge and defendant "'eyeball' each other" at sentencing, and rejecting the defendant's motion for leave to be sentenced *in absentia* due to his medical ailments).

Other courts have similarly noted the value of having a defendant attend the imposition of sentence. *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999) (observing "the value of face-to-face sentencing," including that "[i]n the most important affairs of life, people approach each other in person," in holding that Congress did not provide in Rule 43 for a defendant to attend his sentencing by videoconference) (internal quotation marks omitted); *United States v. Curtis*, 523 F.2d 1134, 1135 (D.C. Cir. 1975) (observing that the ordinarily rule that the defendant be present when sentence is imposed "has deep common law origins" that reflect not only the defendant's interest in being present but also that "the state has an independent interest in requiring a public sentencing to assure the appearance of justice and to provide a ceremonial ritual at which society

---

[5] The Tenth Circuit's recognition in *Songer* that a variety of *public* interests support in-person sentencing is markedly different from the far narrower view taken by the district court in *United States v. Saenz*, 429 F. Supp. 2d 1109 (N.D. Iowa 2006), a case on which the Defendant relies and which is discussed above. *See* Docket #600 at 3. In *Saenz*, the district court made clear that it was assuming that Rule 43 existed solely for the benefit of the defendant. 429 F. Supp. 2d at 1112.

pronounces its judgment"); *United States v. Jones*, 410 F. Supp. 2d 1026, 1031 (D.N.M. 2005) (in rejecting a defendant's request to appear at his sentencing by videoconference, observing that Rule 43 differs from the constitutional right to presence, and that in Rule 43 Congress may have decided to "not allow[] certain types of waiver" but instead "that it is in the public's interest that the defendant be personally present at sentencing").

Moreover, the various factors that the Court must consider in determining a sentence, *see* 18 U.S.C. § 3553(a), further counsel in favor of requiring the Defendant's presence when that sentence is imposed. For example, leaving it to the Defendant to decide whether to skip does not "promote respect for the law." 18 U.S.C. § 3553(a)(2)(A). It should not be up to the Defendant to decide, "I'd rather not be lectured." Another relevant sentencing consideration is the need to "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Sentencing the Defendant in person furthers this goal of deterrence. Securities fraud is a sophisticated crime that can be deterred, and a public sentencing involving the Defendant will further the purpose of deterrence.

Finally, respect for the many victims of the Defendant's crime also militates in favor of requiring his presence at the resentencing. This case involves a large fraud involving a number of victims who are hard to identify. Such victims have a right not to be excluded from the process, and they must "be treated with fairness." 18 U.S.C. § 3771(a)(8). There may well be an important value to such victims in being able to attend a sentencing proceeding where the Defendant is physically present. *Cf. Kenna v. United States District Court*, 435 F.3d 1011, 1016 (9th Cir. 2006) (observing that one purpose of the Crime Victims' Rights Act was "to force the defendant to confront the human cost of

his crime"); *Hertz*, 2010 WL 44749, at *3 n.3 (observing that allowing a defendant to appear at his sentencing by videoconference "could arguably dilute the rights of victims to be present at proceedings involving the Defendant").[6]

CONCLUSION

Both Rule 43 and a broad range of other reasons support requiring the Defendant to attend the imposition of his sentence. The Government requests that the Court issue an order ruling that the Defendant need not attend the gain hearing scheduled for April 21-23, 2010, but that he must attend the June 24, 2010 resentencing in person.

---

[6] If the Court decides (notwithstanding the concerns outlined herein) to permit the Defendant *not* to attend the imposition of his sentence, the Court may wish to require the Defendant to file not only the pleading already filed by his defense counsel, but also a waiver signed by the Defendant himself. The Tenth Circuit has observed that when a defendant is in custody, "it is certainly more difficult to establish" a waiver of the constitutional right to presence. *Larson v. Tansy*, 911 F.2d 392, 397 (10th Cir. 1990) (holding that the defendant's presence at a competency hearing and at trial was not properly waived where the waiver was stated by defense counsel rather than the defendant, who was confined to the psychiatric ward of a state hospital); *see also United States v. Lockwood*, 165 F.3d 919 (Table), 1998 WL 840945, at *1 (9th Cir. Nov. 23 1998) (unpublished) ("Caution is in order when a court is asked to accept a waiver of presence through counsel without clear evidence that the defendant himself was knowingly and voluntarily waiving his presence rights."); *United States v. Watkins*, 983 F.2d 1413, 1420 (7th Cir. 1993) (observing that a district court, before proceeding with a trial *in absentia*, should "attempt to secure explicit evidence" of the defendant's wishes); *United States v. Mendez*, 06:99-cr-131, 2010 WL 271434, at *2 n.2 (M.D. Fla. Jan. 15, 2010) (observing that "it is appropriate to require the voluntariness of Defendants' absence to be clearly established").

Respectfully submitted this 15th day of March, 2010.

DAVID M. GAOUETTE
UNITED STATES ATTORNEY

s/Kevin T. Traskos
Kevin T. Traskos
James O. Hearty
Assistant U.S. Attorneys
United States Attorney's Office
1225 17th Street, Suite 700
Denver, Colorado 80202
Telephone: (303) 454-0100
Fax: (303) 454-0400
E-mail: Kevin.Traskos@usdoj.gov

Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Alain Leibman
aleibman@foxrothchild.com

Edward Nathan
enathan@sgklaw.com

Everett Clifford Johnson, Jr.
everett.johnson@lw.com

Herbert J. Stern
hstern@sgklaw.com

Jeffrey Speiser
jspeiser@sgklaw.com

Joel M. Silverstein
jsilverstein@sgklaw.com

Mark Rufolo
mrufolo@sgklaw.com

Maureen E. Mahoney
maureen.mahoney@lw.com

Sean M. Berkowitz
sean.berkowitz@lw.com

Paul E. Pelletier
paul.pelletier@usdoj.gov

Nathan H. Seltzer
nathan.seltzer@lw.com

s/Annette Dolce
United States Attorney's Office
1225 17th Street, Suite 700
Denver, Colorado 80202