IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE MARCIA S. KRIEGER

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

DEFENDANT'S REPLY TO OBJECTION BY THE UNITED STATES TO THE DEFENDANT'S WAIVER OF HIS RIGHT TO BE PRESENT AT RESENTENCING

The government concedes that Nacchio may waive his right to be present at the evidentiary hearings scheduled for April 21 and 22, 2010. The government does object to Nacchio's waiver of his own right to be present at resentencing—*i.e.*, the imposition of sentence on June 24, 2010—but its brief is most notable for what it does not address: the Tenth Circuit law holding that a defendant may waive the right to be present at sentencing. The government's arguments about the structure and purpose of the rule and "the practicalities of the Defendant's custody" are irrelevant.

A. The Government Ignores Tenth Circuit Case Law

Though the government's argument meanders for sixteen pages, it fails to address the dispositive fact: the Tenth Circuit has already spoken. The Tenth Circuit has held that Rule 43 permits a defendant to knowingly and voluntarily waive his Rule 43 right to be present at all

critical stages of his trial, including this resentencing. Indeed, this Court has already correctly noted that Nacchio has the right to be present for resentencing but he also has the right to "waive his appearance if he chooses." Transcript of Scheduling Hearing at 17:13-14 (Feb. 18, 2010) (Docket No. 598).

Instead of addressing the controlling law in the Tenth Circuit, the government reaches back to 1912, before Rule 43 was enacted, for a case canvassing *state court* holdings—in *dicta*—and addressing a question of the laws of the Philippines. *See Diaz v. United States*, 223 U.S. 442 (1912). The government contends that a defendant in custody cannot be "voluntarily absent" "because his presence or absence is not within his own control." *Id.* at 455. Even if *Diaz* were directly on point, courts of appeals—including the Tenth Circuit—have acknowledged the evolution of the law during the last 98 years.

Courts now recognize that a defendant in custody may "voluntarily absent" himself by waiving his right to be present. *See e.g., L'Abbe v. DiPaolo*, 311 F.3d 93, 99 (1st Cir. 2002) ("[T]he judge gave voice to [the custodial defendant's] choice to absent himself from the trial."); *United States v. Scroggins*, 485 F.3d 824, 830 n.23 (5th Cir. 2007) (expressly stating with regard to an incarcerated defendant that he "is entitled to voluntarily waive his presence at a sentencing hearing"); 27 *Moore's Federal Practice* § 643.08[1] (3d ed. 2009) ("A defendant is entitled to voluntarily waive his presence at a sentencing hearing."). Courts have correctly noted that "the scope of a defendant's right to be present at every trial stage … has evolved from *Diaz* … to our current view that there is 'no principled basis for limiting … a defendant's ability knowingly, voluntarily, and intelligently to waive the right of presence.'" *United States v. Mitchell*, 502 F.3d 931, 987 (9th Cir. 2007) (citation omitted).

Likewise, case law from the Tenth Circuit and other courts, which the government does not discuss, establishes that the right to presence at critical stages of trial, including sentencing, is the defendant's right which he may voluntarily waive. *See United States v. Jurado-Lara*, 287 Fed. Appx. 704, 707 (10th Cir. 2008) ("The rights afforded by Rule 43 and due process … can be waived with the *express* or implied *consent of the accused*.") (emphasis added); *United States v. Arrous*, 320 F.3d 355, 360 (2d Cir. 2003) ("The current rule arises out of respect for a *defendant's right* to be present at a sentencing proceeding, to allocute, and to respond to the definitive decision of the sentencing judge.") (emphasis added); *United States v. Alvarez-Pineda*, 258 F.3d 1230, 1241 n. 8 (10th Cir. 2001) (citing then Fed. R. Crim. P. 43(b), which is now Fed. R. Crim. P. 43(c) for the proposition that *"[a] defendant in a non-capital case can waive this right*" and "a disruptive defendant can forfeit this right") (emphasis added); *United States v. Sealander*, 91 F.3d 160, 1996 WL 408368, at *15 (10th Cir. July 19, 1996) (defendant "knowingly and voluntarily *waived his right to be present during the sentencing hearing*"); *United States v. Edmonson*, 962 F.2d 1535, 1543 (10th Cir. 1992) (noting that "this Court is of the opinion that a Defendant's presence at trial may be waived" under Rule 43); *United States v. Ammar*, 919 F.2d 13, 17 (3rd Cir. 1990) (district court could properly resentence defendant in absentia because "[t]hat decision is up to the petitioner") (internal quotation marks omitted); *Larson v. Tansy*, 911 F.2d 392, 396-97 (10th Cir. 1990); *United States v. Fontanez*, 878 F.2d 33, 35 (2d Cir. 1989) (holding that "[d]espite the constitutional and statutory dimensions of a defendant's right to be present, the right may be waived").

Although the government ignores the majority of the case law cited above, the precedent it does rely on actually supports Nacchio's position that he may voluntarily and knowingly waive

his right to be present. The government cites *Alvareda-Pineda* for the proposition that if a case is "'remanded for resentencing, … the presence of the defendants is necessary,'" 258 F.3d at 1241 (citation omitted)—but it neglects to cite the rest of that decision which states that it is "the *defendant's right* to be present that extends to the imposition of sentence" and that "[a] defendant in a non-capital case *can waive this right*, and a disruptive defendant can forfeit this right." *Id*. at 1240-41 & n.8 (emphasis added). In fact, other circuits have recognized that there is no "logic in the proposition that a right that may be waived by disruptive behavior cannot be waived by an affirmative petition freely made and based on informed judgment." *Campbell*, 18 F.3d at 672.

Moreover, the government cites *Larson*, 911 F.2d at 397—in the body of its brief—for the proposition that "a defendant taken into legal custody is not voluntarily absent." Gov't Opp. at 6 (Docket No. 601). The government then inexplicably admits—in a footnote—that "*Larson* does not exactly reach this holding," Gov't Opp. at 6 n. 3, which it must do because *Larson* plainly states, "[w]e recognize that there may be times when a defendant in custody could waive his right to be present." 911 F.2d at 397. In other words, *Larson* stands for the exact opposite proposition for which the government cites it.

The government's remaining arguments concerning the "practical reality of custody," and the purpose and structure of Rule 43 are smoke screen given the Tenth Circuit's precedent. Indeed, Nacchio is unaware of any Tenth Circuit case in which a court required the defendant's presence at sentencing (or any other critical stage) despite his knowing and voluntary waiver of the right to be present.

B. The Court Should Accept Nacchio's Voluntary And Knowing Waiver Of His Own Right To Be Present At Resentencing

The government argues in the alternative that even if the Court determines that a defendant may waive his presence, it should ignore that waiver and still require his presence. The government's argument is unsupported, not sensible, and ignores the weight of the defendant's right.

We are aware of no case where a court has done what the government suggests—that is, recognize that a defendant has the right to waive his presence, receive that waiver, and then force him to attend anyway. This would, of course, *dis*respect the defendant's right and render his exercise of his rights nugatory. Rule 43 expressly authorizes a court to proceed with the sentencing—in this case, resentencing—once the defendant knowingly and voluntarily waives his right to be present.

The government nevertheless faults Nacchio for not advancing "any compelling reason" not to be present at his sentencing, but there is no "compelling reason" requirement for a defendant to waive or exercise his rights. The only requirement is that his waiver be voluntary and knowing. *United States v. Davis*, 61 F.3d 291, 302 (5th Cir. 1995) (in deciding whether to continue proceedings, trial judge must determine whether the defendant's absence is knowing and voluntary). If so, the district court has not abused its discretion in continuing the proceedings. *See United States v. Wright*, 932 F.2d 868, 879 (10th Cir. 1991) (noting that on appeal the district court's decision to continue the proceedings in the defendant's absence is reviewed for an abuse of discretion), *overruled in part on other grounds*, *United States v. Flowers*, 464 F.3d 1127 (10th Cir. 2006).

The government's attempt to ignore its contrary (and more reasonable) position in the *Rigas* case, *see United States v. Rigas*, 02-cr-1236, 2008 WL 2544654 (S.D.N.Y. June 24, 2008), *aff'd*, 583 F.3d 108 (2d Cir. 2009), is unpersuasive. There, the government did not oppose *either* defendants' waiver of their right to be present at resentencing. In an attempt to distinguish *Rigas*, the government points out that *one* of the defendants was elderly and suffered from health problems as an apparent justification (which still undermines the government's core argument that a defendant cannot waive the right to be present at sentencing). The government's omission of any discussion regarding *the other* defendant is revealing: it fails to mention that the second defendant was not elderly and had no health problems but simply waived his right to be present—without government opposition.

The government's reference to *United States v. Songer*, 842 F.2d 240 (10th Cir. 1988) does not change the result and its reasoning is even less applicable here for a *re*sentencing. The "victims" already were present for Nacchio's sentencing, and filled the courtroom as well as an overflow courtroom. Nacchio has already appeared for sentencing and received from the Court the "official expression of the condemnation of his conduct" that the government appears so eager for Nacchio to again receive. Gov't Opp. 2. The government, moreover, need not worry that Nacchio has forgotten—he is, of course, in prison. And this resentencing is required only because the government pressed an incorrect interpretation of the sentencing guidelines. The

laudable goals of *Songer* have already been achieved,[1] and the government's insistence on Nacchio's presence—for a second time—raises questions.

Finally, Nacchio notes that he made clear in his intent to waive presence that he "is willing to execute whatever document the Court deems appropriate to reflect his knowing and voluntary waiver." Notice of Intent to Waive at 4 (Docket No. 600). Thus, the Government's concerns regarding Nacchio's waiver are unfounded. *See* Gov't Opp at 16 n. 6.

Respectfully submitted this 19th day of March, 2010.

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[1] The government also does not explain why the societal interests it identifies would trump a defendant's knowing and voluntary waiver of his right to be present, but would not when a defendant fails to appear or is so disruptive that he forfeits the right to be present.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March 2010, I electronically filed the foregoing **DEFENDANT'S REPLY TO OBJECTION BY THE UNITED STATES TO THE DEFENDANT'S WAIVER OF HIS RIGHT TO BE PRESENT AT RESENTENCING** with the Clerk of the Court using the Court's CM/ECF system, which will send notification of the filing to the following:

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