

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

STANDING ORDER JCB-CR-43

for cases assigned to

THE HONORABLE J. CAMPBELL BARKER

Pursuant to Federal Rule of Criminal Procedure 57(b), the following regulation of practice applies in any pending criminal case assigned to the undersigned judge:

JCB-CR-43. SENTENCING AND COVID-19

1. To protect public health and safety during the COVID-19 pandemic, the court has not yet resumed scheduling all cases ready for sentencing for an in-person sentencing hearing. But upon a party's motion showing good cause, the court will consider holding a sentencing hearing using remote-conferencing technology. For example, and without limitation, a defendant's motion may note that the Presentence Investigation Report calculates, or is anticipated to calculate, a guidelines term of imprisonment that would be satisfied in light of time already served.
2. Sentencing by remote-conferencing technology will not be granted unless the defendant provides the waiver of rights and consent in Form JCB-CR-43. The completed form, which can be found on the court's website, must be filed with the court.

Explanatory notes:

Federal Rule of Criminal Procedure 43(a)(3) affords a defendant a general right to be present at sentencing. To be "present" under Rule 43, the Fifth Circuit has held, is to be physically located in the courtroom where the sentencing

proceeding occurs. *United States v. Navarro*, 169 F.3d 228, 236-37 (5th Cir. 1999). On that view, a defendant’s participation in the proceeding by video or telephone conferencing is not the required “presence” at sentencing. *Id.*

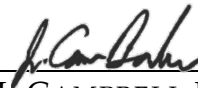
Defendants, however, may waive their right to be present at sentencing. And Federal Rule of Criminal Procedure 43(c) deems certain conduct a waiver of the defendant’s continued presence during criminal proceedings. Subdivision (c)(1)(B) deems a defendant to waive his right to be present if the defendant “is voluntarily absent” during sentencing, after previously pleading guilty to or appearing for trial on a noncapital offense. Fed. R. Crim. P. 43(c)(1)(B). Absence is the opposite of presence. So a defendant’s choice to participate in a sentencing proceeding by remote conferencing would appear to be voluntary physical absence from sentencing, which constitutes waiver under the rule. *United States v. Salim*, 690 F.3d 115, 122 (2d Cir. 2012) (citing Rule 43(c)(1)(B) as establishing waiver from voluntary consent to participate in sentencing by video conferencing).

Regardless, even if a deemed waiver does not exist under a rule, defendants are generally free to affirmatively waive their rights, including constitutional rights. See *New York v. Hill*, 528 U.S. 110, 117 (2000) (“In general, in an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation. We allow waiver of numerous constitutional protections for criminal defendants that also serve broader social interests.”) (cleaned up); *Brady v. United States*, 397 U.S. 742, 748 (1970) (“[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences”); *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) (holding that a defendant can “competently and intelligently waive his constitutional right to assistance of Counsel”). That baseline rule allows waiver of a defendant’s right to be present at

sentencing. *See United States v. Ramos-Gonzales*, 857 F.3d 727, 733 (5th Cir. 2017) (Jones, J., concurring) (“the defendant must first consent before the court may conduct sentencing by videoconference”).

Apart from waiver, the right to be present at sentencing is also limited in certain ways, some turning on the defendant’s consent. For misdemeanor offenses, Rule 43(b)(2) authorizes sentencing by video conferencing with “the defendant’s written consent.” And the Rule 43(a) right is modified for felony sentencings by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), H.R. 748 (2020). That Act’s authorization of felony sentencing by remote conferencing requires both (i) findings by the Judicial Conference of the United States, the chief district judge, and the sentencing judge and (ii) “the consent of the defendant, or the juvenile, after consultation with counsel.” CARES Act § 15002(b)(2), (4). If the relevant findings and consent are in place, the CARES Act thus provides an independent basis—a statutory limitation of the right to be present—to proceed with sentencing by remote-conferencing technology.

So ordered by the court on June 2, 2020.



J. CAMPBELL BARKER
United States District Judge