COURT

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Criminal Division - Felony Branch

UNITED STATES OF AMERICA	:	
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	:	**Criminal No. 2011 CF1 15683**
v.	:	**Judge Canan**
	:	**Trial Date: March 25, 2013**
	:	
ALBRECHT MUTH	:	

MOTION FOR RELEASE OR RECONSIDERATION OF THE COURT'S PLAN TO VIDEO CONFERENCE DEFENDANT'S PRESENCE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Mr. Albrecht Muth, through undersigned counsel, pursuant D.C. Code 23-1325, requests that he be released to facilitate his presence at trial or, alternatively, pursuant to the 5th and 6th Amendments to the Constitution of the United States and Superior Court Rule of Criminal Procedure 43, respectfully requests that the Court reconsider its ruling on having Mr. Muth appear by video conference for the first day of trial and warning him that if he does not comply with the Court's orders to eat the trial will continue in his absence.

In support of this Motion, counsel states:

1. Albrecht Muth is charged by indictment with First Degree Murder with Aggravating Circumstances, for the murder of Viola Drath, his wife. Mr. Muth's trial is scheduled to begin on March 25, 2013.

2. On December 20, 2012 the Court found Mr. Muth competent to stand trial and to represent himself, after a contested competency hearing. On the same day, Mr. Muth began a religious fast that has lasted until the present.

3. During various hearings in from February 21, 2013 to March 14, 2013, the Court found that Mr. Muth, while weak from his fast, was still mentally competent to stand trial but questioned his ability to phsyically appear and at defense counsel's held a hearing on Mr. Muth's physical status. The Court heard testimony from Dr. Ghebrai, Mr. Muth's attending physician at United Medical Center, who testified that Mr. Muth, who is unable to stand or sit in a wheelchair, could be transported on a stretcher. Dr. Ghebrai also testified that Mr. Muth is not receiving any medical care, which he has refused, and has entered a Do Not Rescusitate (DNR) order. Dr. Ghebrai testified that even resuming eating could be life threatening for Mr. Muth. The Court also accepted defense counsel's proffer that a private ambulance company has the capacity to provide transportation (and medical care if required) for Mr. Muth, while in custody of the Department of Corrections (DOC). DOC indicated that it was unwilling to pursue such an alternative to transport on a stretcher. The Court indicated it was considering video conferencing Mr. Muth from the hospital for trial. The Court also found that Mr. Muth was being disruptive by fasting and had voluntarily put himself in the position of being unable to be present.

4. On March 14, 2013 the Court again heard from Dr. Ghebrai who testified that Mr. Muth had eaten a few times over the previous three days, was in critical condition and again cannot sit in a wheelchair. He testified that transportation to Court could be harmful to Mr. Muth. Despite his previous testimony regarding resuming eating, Dr. Ghebrai testified that the hospital could get Mr. Muth back to normal strength in 72 hours if Mr. Muth agreed. Dr. Ghebrai also testifed that Dr. Lisa Gordon, a psychiatrist at UMC, had found Mr. Muth incompetent to make medical

decisions. Dr. Ghebrai testified that he would still honor Mr. Muth's DNR and that he did not detect any delirium or altered mental status in Mr. Muth.

5. On March 14, 2013 defense counsel raised Mr. Muth's competence again.

6. The government asked the Court to vacate the March 25, 2013 trial date to allow the parties to fully brief the issue of video conferencing, stating they wanted to research a solution that would withstand appellate review.

7. The Court indicated that it was planning to video conference Mr. Muth into Court on the first day of trial and would warn him that if he failed to discontinue his fast the Court would deem him to have knowingly, intelligently, and voluntarily absented himself and the Court would exclude him from trial.

8. Mr. Muth wants to attend his trial, has not waived his presense and has never disrupted the proceedings.

9. Mr. Muth asks the Court to release him. Because of his physical state he is neither a danger nor a flight risk and can be transported to Court if not in DOC custody.

10. Alternatively, the Court should reconsider its proposal and order DOC to transport Mr. Muth to court for trial or vacate the trial date until a time when DOC will transport him.

11. Finally, the Court should reconsider its proposed solution to video conference Mr. Muth into Court on the first day of trial and would warn him that if he failed to discontinue his fast the Court would deem him to have knowingly, intelligently, and voluntarily absented himself and the Court would exclude him from trial.

ARGUMENT

I. THE COURT SHOULD RELEASE MR. MUTH TO ALLOW HIM TO BE PRESENT FOR TRIAL AS HE WISHES

Mr. Muth wishes to be present for his trial.[1] Because of Mr. Muth's weak and fragile physical state he is not a danger nor is he a flight risk and therefore he must be released. See *Blackson v. United States*, 897 A.2d 187 (D.C. 2006) and *Pope v. United States*, 739 A.2d 819 (D.C. 1999). While DOC refuses to bring Mr. Muth to court for trial, if released could be brought to court.

II. MR. MUTH'S PRESENCE IS REQUIRED BY LAW AND THE COURT CANNOT HAVE HIM APPEAR BY VIDEOCONFERENCE OR DEEM HIM DISRUPTIVE AND HAVING WAIVED HIS RIGHT TO BE PRESENT

Mr. Muth has a right to be physically present at his trial. "It is a basic premise of our justice system that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. This longstanding right reflects the notion that a fair trial [can] take place only if the jurors me[e]t the defendant face-to-face and only if those testifying against the defendant [do] so in his presence.

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[1] In fact he wishes to represent himself and there has been no determination that he is incompetent to do so under the *Faretta* standard. *Faretta v. California*, 422 U.S. 806 (1975).

Thus in general, if [the defendant] is absent [from trial], . . . a conviction will be set aside." *Fairey v. Tucker*, 132 S. Ct. 2218 (2012) (citing *Crosby* v. *United States*, 506 U. S. 255 (1993)). [2]

Superior Court Rule of Criminal Procedure 43[3] requires the presence of the defendant at "every stage of trial to and including the impaneling of the jury and the return of the verdict...except ...as otherwise provided by the Rule." Sup. Ct. R. Crim. 43 "The defendant shall be considered to have waived the right to be present whenever a defendant, **initially present**, (1) is voluntarily absent after the trail has commenced... or (2) after being warned by the Court that disruptive conduct will cause removal of the defendant from the courtroom, persistis in conduct which is such as to justify exclusion." *Id.* (emphasis added) Rule 43 incorporates protections of the Sixth Amendment Confrontation Clause, Fifth Amendment Due Process Clause and common-law right of presence. *See Welch v. United States*, 466 A.2d 829 (D.C. 1983); *Beard v. United States*, 535 A.2d 1373 (1988).

The rule requires that a defendant be initially physically present and the law is clear that "a defendant's right to be present requires physical presence and is not satisfied by participation through video conference." *United States, v. Salim*, 690 F.3d 115 (C.A.2 N.Y. 2012) (citing *United States v. Williams,* 641 F.3d 758, 764–65 (6th Cir.2011); *United States v. Torres–Palma,* 290 F.3d 1244, 1245–48 (10th Cir.2002); *United States v. Lawrence,* 248 F.3d 300, 301, 303–04

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[2] "'It is well settled that . . . at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony.'" W. Mikell, Clark's Criminal Procedure 492 (2d ed. 1918); *Diaz* v. *United States*, 223 U. S. 442, 455 (1912) (right to be present is "scarcely less important to the accused than the right of trial itself ").

[3] This rule is identical to Federal Rule of Criminal Procedure (except regarding sentencing which is not at issue in this case).

(4th Cir.2001); *United States v. Navarro,* 169 F.3d 228, 235–39 (5th Cir.1999), *cert. denied,* 528 U.S. 845, 120 S.Ct. 117, 145 L.Ed.2d 99 (1999). In this case, Mr. Muth must be physically present for the trial to begin and video conferencing cannot substitute for physical presence (regardless of whether the Court determined that Mr. Muth has voluntarily orchestrated his own unavailability).[4]

The rule and the case law have acknowledged only two exceptions to the rule requiring presence at trial, neither of which are present in Mr. Muth's case. First, a defendant may waive his right to be present "if, **after the trial has begun in his presence**, he voluntarily absents himself." *Crosby v. United States*, 506 U. S. 255 (1993)(emphasis added). This Court relied on *Cuoco v. United States*, 208 F.3d (2nd Cir. 2000) for the proposition that a defendant can voluntarily absent himself from trial. That proposition is not in dispute. However, in *Cuoco*, unlike here, the defendant, after testifying at a motions hearing and upon learning the jury was being empaneled, indicated he did not wish to be present for trial. In *Cuoco* the Court upheld the conviction, "because the waiver in this case took place in open court after a full explanation of the advantages Cuoco would lose by leaving the courtroom and while the jury venire was in the

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[4] While not a specific argument made by the government, who asked that the trial date be vacated because videoconferencing does not meet the legal standard for presence, they did allude to a potential attempt on Mr. Muth's part to garner sypmpathy and/or inflame the jury with his appearance. Even in in the civil context, where a party has a right to be present that is not as strong as the right of a criminal defendant, the cases make clear that a party cannot be precluded merely because their presence may garner sympathy from the jury. *See Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir App 1985) (agreeing with the proposition that a plaintiff's physical condition alone does not warrant his exclusion from the courtroom during any portion of the proceedings including in a case permitting plaintiff in personal injury action to be brought into court on a cot in order to testify) (internal citation omitted)).

courthouse, the facts argue more strongly for finding a waiver than in any other conceivable circumstance not strictly within the purview of Rule 43(b). Moreover, existing precedent left this court free to determine that trial had begun for the purpose of Rule 43. Cuoco chose to leave the courtroom immediately prior to jury selection." Here, Mr. Muth has not and will not waive his presence and is not present in court to do so.

The second exception to a defendant's right to be present at all stages of trial is where "a defendant can lose his right to be present at trial if, after being warned that he will be removed if he continues his disruptive behavior, he nevertheless insists on **conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.**" *Illinois* v. *Allen*, 397 U. S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (emphasis added).

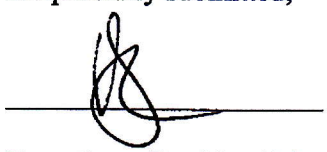
The Court's plan to have Mr. Muth appear by video conference for the start of trial and then warn him that he can choose to discontinue his fast or be found to have knowingly, intelligently and voluntarily waived his presense seems to be loosely based on the exception to the rule requiring presence where the court can warn a disruptive defendant that he may be removed. The Court's plan is flawed in two respects. First, Mr. Muth must initially be present. *See infra*. Second, Mr. Muth is not disruptive. Disruption is conduct that is essentially synonymous with contumacious conduct. *Illinois v. Allen*, 397 U.S. 337 (1970) (where the defendant continuously used "vile and abusive" language with the judge); *see United States v. White*, 670 F.3d 1077 (9th Cir. 2012) (where the defendant lashed out in the courtroom, shouting

obscenities and threats, spitting, and generally disrupting the proceedings). The Court cited *United States v. Benabe,* 654 F.3d 753 (7th Cir. 2011) for the proposition that a disruptive defendant can be excluded from the courtroom. That proposition is not disputed but *Benabe* is not applicable here. In *Benabe*, the defendants, at numerous court hearings, engaged in frequent and undeterred outbursts. *Id.* They challenged the Court's jurisdiction over them, claimed to be immune from prosecution, claimed they were not the person named in the indictment, asked questions of the prosecutor, interrupted the Court and were undettered by the Court's warnings that their out bursts would prejudice them in front of the jury. *Id.* One of the defendants even demanded an explanation for the gold fringe on the flag in the courtroom. *Id.* The judge continually asked the defendants not to disrupt the proceedings but they would not relent. *Id.* Ultimately the court excluded the defendants prior to jury selection, telling that if they promised to comply with his orders they could return. *Id.* In *Benabe* the appellate court found "clear support for the district judge's detemination that, through their tandem campaign of obstreperous interruptions and frivolous legal arguments, [the defendants] knowingly and voluntarily waived their right to be present at trial." *Id.* at 769. While the court found no constitutional error in the exclusion of the defendants, it concluded that "'phrase initially present at trial' in a jury trial must refer to the day that jury selection begins, though not the precise moment that one or more prospective jurors enter the courtroom" and that the court's order excluding the defendants the day before trial did not comply with the rule. *Id.* at 771-772.

Unlike any of the cases where defendants were removed for disruption, Mr. Muth has been nothing but respectful of the Court. He has never shouted, used profanity or even spoken out of turn. In short, Mr. Muth has done nothing disruptive in court that would warrant exclusion. Moreover, as the law is clear he must be present to be disruptive and must be present to be warned that further disruption will result in his removal.

Wherefore, for the foregoing reasons, Mr. Muth request that the Court release him or alternatively reconsider its proposal to have him appear by videoconference and warned that he can be excluded.

Respectfully submitted,

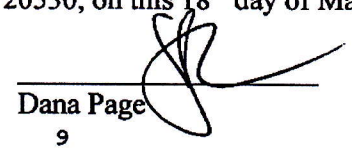


Dana Page Bar No. 484029
Craig Hickein Bar No. 986250

Counsel to Mr. Muth
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 824- 2549
(202) 824-2679 (fax)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion was emailed to Glenn Kirschner and Erin Lyons, Assistant United States Attorneys, Office of the United States Attorney, 555 4th Street, N.W., Washington, D.C. 20530, on this 18th day of March, 2013.



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