

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2023

TERRILL GOODS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a defendant who does not clearly and expressly waive his presence at his sentencing hearing may be sentenced in absentia under Fed. R. Crim. P. 43?

LIST OF PARTIES

1. Terrill Goods, an individual.
2. The United States of America.

There is no parent or subsidiary company. Cf. Sup. Ct. R. 29.6.

RELATED CASES

United States v. Goods, United States District Court for the Eastern District of Kentucky, No. 2:22-cr-17.

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CITATIONS OF THE OPINIONS BELOW

The unofficial report of the opinion of the United States Court of Appeals for the Sixth Circuit is located at *United States v. Goods*, No. 23-5489 (6th Cir. March 18, 2024). A copy of the opinion is included as Appendix A. The district court did not publish an opinion in this case.

STATEMENT OF JURISDICTION

A criminal complaint was filed against Terrill Goods in the Eastern District of Kentucky on January 28, 2022, alleging distribution of methamphetamine and cocaine. (R. 3, Criminal Complaint, p. 27.)¹ An indictment was filed on February 10, 2022, alleging conspiracy and distribution of methamphetamine and cocaine in violation of 21 U.S.C. §§ 841(a), 846, and possession of a firearm by a felon, a violation of 18 U.S.C. § 922(g), and possession of a firearm during and in connection with a drug offense, a violation of 18 U.S.C. § 924(c), and forfeiture allegations. (R. 11, Indictment, p. 52.) After a first superseding indictment, a second superseding indictment was filed on April 14, 2022 involving the same offenses. (R. 41, Second Superseding Indictment, p. 153.) The district court possessed subject-matter jurisdiction over this case pursuant to 18 U.S.C. § 3231, which grants subject-matter jurisdiction to the United States district courts over cases involving offenses against the United States.

The district court entered judgment against Mr. Goods on May 24, 2023.

¹ Page citations are to the "PgID#" in the district-court record.

(R. 208, Judgment, p. 2294.) A timely notice of appeal was filed on May 24, 2023.

(R. 209, Notice of Appeal, p. 2302.) The Court of Appeals possessed jurisdiction over Mr. Goods' appeal pursuant to 28 U.S.C. § 1291.

The Court of Appeals entered its judgement and opinion rejecting Mr. Goods' appeal on March 18, 2024.

The Court possesses jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

....

(c) Waiving Continued Presence.

(1) *In General.* A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

- (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
- (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
- (C) when the court warns the defendant that it will remove the

defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) *Waiver's Effect.* If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Fed. R. Crim. P. 43.

STATEMENT OF THE CASE

This is a federal criminal case on direct appeal involving the requirement under Fed. R. Crim. P. 43 that the defendant be present for his sentencing hearing unless he has voluntarily absented himself from the sentencing hearing or he is removed from the courtroom for disruptive behavior after being warned.

In this case, Mr. Goods proceeded to trial, at which the jury found him guilty on all counts. (R. 158, Verdict, p. 716.) The district court then conducted a sentencing phase of the trial related to the United States' allegations regarding prior convictions for "serious drug offenses," and the jury determined that Mr. Goods had served two prior sentences of incarceration for over one year within fifteen years of the offenses charged in this case. (R. 159, Phase II Verdict, p. 721.)

After preparation of the presentence investigation report and the parties' sentencing memoranda and objections related thereto, the district court conducted Mr. Goods' sentencing hearing. At that sentencing hearing, the following colloquy took place:

THE DEFENDANT: I'm kind of agitated that you just breezed through my allegation that I just made against this lawyer. So you honestly gonna sit here and go on with the hearing, despite what I said? You just called me a liar.

THE COURT: I didn't call anybody a liar.

THE DEFENDANT: I just told you what happened, and you just going along with this hearing like, basically what I said doesn't matter.

THE COURT: It matters.

THE DEFENDANT: Why are we going through here when I don't want him speaking on my behalf? I don't want him speaking on my behalf at all. So why are we continuing just like I'm not sitting here? Because if that's the case, I'll go to the back. Come on.

THE COURT: No. Hold on.

DEPUTY MARSHAL: Sit down.

THE DEFENDANT: I'm not gonna sit here.

DEPUTY MARSHAL: Sit down.

THE DEFENDANT: You can't make me sit here.

THE COURT: Hold on. Listen, listen.

THE DEFENDANT: I'm going to the back.

THE COURT: Hold on. Would you like me to sentence you in absentia?

THE DEFENDANT: You gonna do it anyway.

THE COURT: I'm asking.

THE DEFENDANT: You gonna do it anyway. I'm going to the back. I'm not sitting here. It's like what I just said didn't matter so I'm not sitting here.

THE COURT: It matters.

THE DEFENDANT: No, it doesn't matter.

THE COURT: It does matter.

(Indiscernible crosstalk.)

THE COURT: I tell you what we'll do. We'll proceed without Mr. Eckes, and you can just represent yourself. How's that?

THE DEFENDANT: I didn't say that. I got a right to counsel. Not his counsel, though, first of all.

THE COURT: How many times have you asked a judge in your life that you want to represent yourself?

THE DEFENDANT: All I'm saying, if I'm making the complaint, you just said that what I basically said didn't matter. So why am I even sitting here? I'll just go in the back. I don't want to cause no problems. Just give me my papers, and you can have the hearing without me.

THE COURT: Here's what we're going to do. So you're saying you want to have another -- you want me to continue this yet again so that you can have another lawyer that you can't afford to hire; is that right?

THE DEFENDANT: What I'm saying is I'm not a liar.

THE COURT: I didn't say you were.

THE DEFENDANT: You called me a liar. I just told you, and your explanation was nobody's ever complained about this man before. Basically, just what am I? Pushover Louie?

THE COURT: Pushover what?

THE DEFENDANT: Pushover Louie.

THE COURT: Pushover Louie? I've never heard that before.

THE DEFENDANT: It means I'm a doormat. I'm not even sitting here. I mean, it's not a big deal. You gonna give me time anyway.

THE COURT: You're going to stay in the courtroom unless you tell me you want me to sentence you in absentia, which means --

THE DEFENDANT: I'm saying I want real counsel. I want counsel that's not lied to me. I told you what happened. You won't believe it so --

THE COURT: You know what? I believe it. I believe it. How's that? Is that better? I believe it.

THE DEFENDANT: But I don't want him speaking on my behalf, period.

THE COURT: Then fine. You can represent yourself, then. Those are you[r] choices. You can --

(Indiscernible crosstalk.)

THE DEFENDANT: You're trying to make me represent myself like you did last time. I didn't say that. You can't put words in my mouth. So if

you gonna give me time, if you gonna keep your man on the case, keep him here and send it to me in the mail. I'll be in the federal penitentiary. Other than that, I mean, listen, this ain't that.

THE COURT: What?

THE DEFENDANT: On top of that, we supposed to talk about the 1951 first anyway because your name is in there and the prosecution and the jail is in there. I got evidence that the the jail conspired with the prosecution to seal this conviction. You're not trying to talk about it until after the sentencing.

Come on. I've seen this move before. I don't want no problems. I mean --

THE COURT: Do you want to take that up? You won't be able to do that if you're back there, right?

THE DEFENDANT: I could care less at this point. I'm still good. I'll be good on the real judgment day. This ain't a real judgment. This is a kangaroo courtroom. You know what I'm saying? I'm cool.

THE COURT: Okay. We'll just finish in absentia, then.

Mr. Marshal, you can take him out.

THE DEFENDANT: Have fun.

(Defendant was escorted from the courtroom.)

(R. 223, Sentencing Tr., pp. 2410-13.)

For the remainder of the sentencing hearing, Mr. Goods' attorney made arguments on his behalf, and the district court entered its judgment. Mr. Goods was sentenced to imprisonment for 360 months on the drug charges (including a ten-year concurrent charge on a firearms offense), with a five-year consecutive sentence for the firearms charge. (R. 208, Judgment, pp. 2294, 2296.)

A timely notice of appeal was filed on May 24, 2023. (R. 209, Notice of Appeal, p. 2302.) The Court of Appeals rejected Mr. Goods' appeal on March 18, 2024.

Mr. Goods now seeks review of the Court of Appeals' judgment by writ of certiorari.

REASONS FOR GRANTING THE PETITION

This case involves the application of Fed. R. Crim. P. 43, which provides, in pertinent part:

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

....

(c) Waiving Continued Presence.

(1) *In General.* A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

- (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
- (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
- (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) *Waiver's Effect.* If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

The Rule starts with a requirement that the defendant be present

during sentencing. Rule 43(a)(3).

In the event that a defendant is disruptive, a district court may remove the defendant from the courtroom. Rule 43(c)(1)(C). But the district court may do so in that circumstance only after the district court "warns the defendant that it will remove the defendant from the courtroom for disruptive behavior," In this case, Mr. Goods did not engage in overly disruptive behavior, and the district court certainly did not give him a warning that he could be removed from the courtroom. Therefore, Rule 43(c)(1)(C) does not apply.

The only possible basis for the district court's sentencing of Mr. Goods in absentia is Rule 43(c)(1)(B). That subsection permits the sentencing of a defendant in absentia, in noncapital cases, "when the defendant is voluntarily absent during sentencing." Respectfully, the fact that the district court instructed the marshal to remove Mr. Goods from the courtroom, Sentencing Tr. at 2413, precludes any conclusion that Mr. Goods was "voluntarily absent during sentencing."

Even if there were any ambiguity about the district court's order to remove the defendant from the courtroom (and again, without complying with Fed. R. Crim. P. 43(c)(1)(C)), Mr. Goods' discussion with the district court at the hearing did not constitute a "knowing and intelligent relinquishment or abandonment of a known right or privilege." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Moreover, as the Court has long

established, there is a presumption against the waiver of constitutional rights. *Hodges v. Easton*, 106 U.S. 408 (1882). See also, *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)(establishing constitutional right to attendance at criminal proceedings); *Illinois v. Allen*, 397 U.S. 337, 343 (1970)(permitting expulsion of defendant from criminal proceedings after being warned to cease his disruptive behavior).

In this case, Mr. Goods said, before the district court ordered his removal from the courtroom, "I could care less at this point. I'm still good. I'll be good on the real judgment day. This ain't a real judgment. This is a kangaroo courtroom. You know what I'm saying? I'm cool." R. 223, Sentencing Tr., p. 2314. Those words, while certainly deserving of a warning under Rule 43(c)(1)(C), did not and cannot logically mean that Mr. Goods voluntarily left the courtroom, particularly after the marshal was told to take Mr. Goods out.

While at first blush, Mr. Goods' case may appear to be a straightforward application, by the Court of Appeals, of Rule 43 and this Court's decision in *Crosby v. United States*, 506 U.S. 255 (1993)(directly applying Rule 43 with regard to appearance at trial), Mr. Goods respectfully submits that the Court should use this case to establish a requirement that, for a defendant to be sentenced in absentia, and in the absence of prior-warned disruptive behavior, there must be evidence of on the record of a clear and unequivocal, intentional absenting of the courtroom by the defendant.

The Courts of Appeals have taken a variety of approaches in assessing the proof of "voluntary absence" from a criminal trial/sentencing. For example, the Fifth Circuit has held that absence alone is proof of voluntary absence. *United States v. Ewuzie*, 2002 U.S. App. Lexis 29534 (5th Cir. August 8, 2002). The Seventh Circuit, in contrast, requires some evidence of the voluntary nature of a defendant's absence from court. *United States v. Watkins*, 983 F.2d 1413 (7th Cir. 1993). The Ninth Circuit puts the burden on the defendant to prove that his or her absence was *involuntary*. *United States v. Ornelas*, 828 F.3d 1018 (9th Cir. 2016). The Eleventh Circuit uses a weighing test, weighing the public's right to an efficient proceeding against the defendant's right to be present (or voluntarily absent) from the criminal proceeding. *United States v. Bradford*, 237 F.3d 1306 (11th Cir. 2001).

In light of the divergence of approaches by the Courts of Appeals regarding proof of voluntariness under Rule 43, this case is appropriate for review by the Court. Mr. Goods' clear removal from the courtroom, without any prior warning regarding that possibility, provides the Court the opportunity to establish a clear legal standard for proof of "voluntariness" under Rule 43. Cf. E.L. Shapiro, "Examining an Undeveloped Constitutional Standard: Trial in Absentia and the Relinquishment of a Criminal Defendant's Right to be Present," 96 *Marq. L. Rev.* 591 (2012). See also, *Fairey v. Tucker*, 567 U.S. 924 (2012)(Sotomayor, J., dissenting from the

denial of certiorari)(supporting presumption against waiver of presence at trial).

CONCLUSION

The petition should be granted, the writ should issue, and the Court should address the question presented in this case.

June 12, 2024

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APPENDIX A

No. 23-5489

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
TERRILL GOODS,
Defendant-Appellant.

On appeal from the
United States District Court
for the Eastern District of
Kentucky

O R D E R

Before: McKEAGUE, MURPHY, and BLOOMEKATZ, Circuit Judges.

Terrill Goods appeals the 420-month sentence imposed by the district court after a jury convicted him of federal drug and firearms offenses. Goods contends that the district court violated Federal Rule of Criminal Procedure 43(c)(1)(B) by sentencing him in absentia. Goods has also filed a pro se motion for the appointment of substitute appellate counsel. The parties have waived oral argument, and the panel unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a). For the reasons that follow, we affirm Goods's sentence and deny his motion for appointment of substitute counsel.

A grand jury charged Goods in a second superseding indictment with conspiracy to possess with intent to distribute and distribution of controlled

substances, possessing a firearm in furtherance of drug-trafficking crimes, and being a felon in possession of firearms. During the pretrial phase of the case, Goods cycled through a series of appointed and retained attorneys. Eventually, after holding a hearing under *Faretta v. California*, 422 U.S. 806 (1975), the district court discharged Goods's fourth appointed attorney and granted Goods's motion to proceed *pro se*. Goods represented himself during the trial, and the jury convicted him of all counts.

After the trial, Goods filed a motion claiming that the district judge, the government, and his former retained counsel violated the Hobbs Act, 18 U.S.C. § 1951, by conspiring to extort a retainer fee from him and to secure his conviction. The district court denied this motion. Goods also moved the district court to appoint an attorney to represent him for the remainder of the proceedings. The court granted that motion and appointed Eric Eckes to represent Goods. Goods then filed a *pro se* interlocutory appeal of the court's denial of his § 1951 motion. But after consulting with Eckes, Goods voluntarily dismissed his appeal a month later. See *United States v. Goods*, No. 23-5205 (6th Cir. Mar. 29, 2023).

A probation officer prepared a presentence report (PSR) that concluded that Goods was a career offender with a sentencing range of 420 months to life imprisonment. Eckes filed objections to the PSR and a sentencing memorandum on behalf of Goods. But the day before the sentencing hearing, the district court received a letter from Goods asking it to discharge Eckes because Eckes had allegedly lied to him and conspired with the government to persuade him to

voluntarily dismiss his interlocutory appeal.

The district court addressed this letter at the beginning of the sentencing hearing and explained to Goods that his *pro se* appeal likely would have been dismissed even if he had not withdrawn it. The court further explained to Goods that he would have an opportunity to file an appeal after sentencing, at which time he would be able to raise any and all issues concerning the trial and the court's rulings. Goods reiterated his allegations that Eckes had lied to him about his appeal. The court responded that it had never received such a complaint about Eckes before. Eckes denied that he lied to Goods, and the court stated, "I didn't think you did, and I wouldn't think you would."

The court then moved on to substantive sentencing matters. But Goods interjected and told the court that he was "agitated," that it had "breezed through" his allegations against Eckes. A lengthy exchange between Goods and the court followed, in which Goods (1) accused the court of calling him a liar, (2) repeatedly stated that he did not want to proceed with Eckes and that he was going "to the back," (3) tried to leave the courtroom without being excused, and (4) told the court to hold the hearing without him. The court then asked a marshal to escort Goods from the courtroom, at which point Goods said, "Have fun."

Next, the court denied Goods's request to discharge Eckes. As to continuing without Goods being present, the court found that "[h]e's requested to be removed here" and that "[h]e, in essence, has kind of waived his right to

allocate by telling me that I should proceed in absentia.”

The court overruled Goods’s objections to the PSR and, after hearing argument from Eckes and the government on an appropriate sentence, sentenced Goods to a total term of 420 months of imprisonment and 10 years of supervised release.

On appeal, Goods argues that the district court violated Rule 43(c)(1)(B) by sentencing him in absentia. Goods contends that, because a marshal allegedly forcibly removed him from the courtroom, he did not voluntarily waive his right to be present. The government responds that the district court did not clearly err in finding that Goods waived his right to be present, pointing out that Goods repeatedly told the court that he was going to “the back” and that it could “have the hearing without [him].”

Under Federal Rule of Criminal Procedure 43(a)(3), a criminal defendant must be present at sentencing. But under Rule 43(c)(1)(B), a defendant in a non-capital case waives the right to be present when he “is voluntarily absent during sentencing.”² We review a district court’s determination that the defendant was “voluntarily absent” under Rule 43(c)(1)(B) for clear error. *United States v. Watkins*, 86 F. App’x 934, 936 (6th Cir. 2004). We will not find a clear error unless “we are left with the definite and firm conviction that a mistake has been committed.” *United States v. Cooper*, 893 F.3d 840, 843 (6th Cir. 2018).

² Under Rule 43(c)(1)(C), a defendant waives his right to continued presence by persisting in disruptive behavior after being warned by the court about his conduct. But the parties agree that this provision does not apply because the district court did not warn Goods about his conduct.

Here, Goods became angry when the district court rejected his spurious allegations against Eckes and repeatedly told the court that he was going “to the back,” which we interpret to mean the courthouse’s holding cell. At one point, he stood up as if to leave the courtroom and said, “You can’t make me sit here.” Goods also told the court that it could “have the hearing without me.” The record does not support Goods’s contention that a marshal forcibly removed him from the courtroom. Instead, the district court asked the marshal to take Goods from the courtroom after he repeatedly and vociferously stated that he did not want to be present. And instead of protesting his removal, Goods said, “Have fun.” Under those circumstances, the district court did not clearly err in finding that Goods was voluntarily absent from sentencing. *See United States v. Sharp*, No. 22-3569, 2023 WL 3966739, at *7 (6th Cir. June 13, 2023); *United States v. Clark*, 591 F. App’x 367, 373–74 (6th Cir. 2014).

Finally, we conclude that Goods has not shown good cause for the appointment of substitute appellate counsel. *See United States v. Marrero*, 651 F.3d 453, 464 (6th Cir. 2011). Goods does not have substantial grounds for dissatisfaction with his current appointed counsel, *see Benitez v. United States*, 521 F.3d 625, 634 (6th Cir. 2008), and he has not identified an issue on which a different attorney would have a reasonable chance of success, *see United States v. Trevino*, 7 F.4th 414, 429 (6th Cir. 2021). Moreover, Goods did not request a new attorney until well after briefing was completed and his appeal was ready for disposition. Consequently, appointing substitute counsel and giving Goods

additional time to file a supplemental brief would not further “the public’s interest in the prompt and efficient administration of justice.” *Id.*

Accordingly, we AFFIRM Goods’s sentence and DENY his motion to appoint substitute counsel.

ENTERED BY ORDER OF THE COURT

(Signed)

KELLY L. STEPHENS, CLERK