

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES )  
 )  
 v. ) CR. No. 92-10369-RWZ  
 )  
 ALFRED TRENKLER )

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR A  
HEARING ON REMAND AND TO APPEAR AT SAME**

The United States, by United States Attorney Michael J. Sullivan, and Assistant United States Attorneys James Lang and Maxim Grinberg, responds herein to the defendant's motion captioned "Motion For A Hearing on Remand and Motion to Appear at Same" (Def. Mot.). For all of the reasons set forth below, Trenkler's motion should be summarily denied.

**I. BACKGROUND**

On November 6, 2006, the defendant filed a petition for a writ of error *coram nobis*. The Court granted the petition and, at a sentencing hearing on April 4, 2007, vacated Trenkler's two concurrent sentences of life imprisonment, each corresponding to a count of his conviction in 1993 for illegal receipt and use of explosives, in violation of 18 U.S.C. §§ 844(d) and (i). The Court imposed a new sentence of 37 years of imprisonment. At the sentencing hearing, the defendant allocuted and the victims presented their impact statements. The parties cross-appealed. The First Circuit held that this Court lacked jurisdiction to

consider Trenkler's petition for a writ of error *coram nobis* because the petition was, in fact, a second or successive petition under 18 U.S.C. § 2255. Trenkler v. United States, 536 F.3d 85, 97-98 (1st Cir. 2008). The First Circuit remanded the case and instructed this Court "to vacate the amended judgment" and to "reinstate the original sentence."<sup>1</sup> Id. at 100. The defendant now claims that the Constitution and Fed. R. Crim. P. 43 mandate that the Court hold another sentencing hearing and allow him "to appear, allocute, and raise appropriate objections." [Def. Mot. 1]. Neither authority affords the defendant these rights given that the Court has been expressly directed to reinstate his original sentence.

## II. ARGUMENT

The Constitution guarantees the defendant "the right to be

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<sup>1</sup>The cross appeals of the parties were docketed in the Appeals Court in both the original criminal case, as Numbers 07-1676 (the government's appeal) and 07-1677 (the defendant's appeal), and in the civil case that was opened upon the filing of the petition for a writ of error *coram nobis*, as Numbers 07-1678 (the government's appeal) and 07-1679 (the defendant's appeal). The First Circuit issued two mandates on October 6, 2008. The mandate in the civil case tracked verbatim the language the court used in its opinion: "The district court order granting the writ of error *coram nobis* is reversed, the writ is quashed, and the case is remanded to the district court with directions to vacate the amended judgment in the criminal case and reinstate the original sentence." The mandate issued in the criminal was to the same effect, but with slightly different verbiage: "The government's appeal is sustained pro forma and the defendant's appeal is dismissed, all for the reasons set out in the opinion of even date in Trenkler v. U.S., Nos. 07-1678, 07-1679. The amended judgment and sentence are vacated and the district court shall proceed forthwith to reinstate the original sentence."

present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. 730, 745 (1987). The defendant's presence must have "a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" Id., quoting Snyder v. Massachusetts, 291 U.S. 97, 105-106 (1934). The Constitution does not guarantee the defendant the right to be present "when presence would be useless, or the benefit but a shadow." Id., quoting Snyder, 291 U.S. at 106-107.

Rule 43(a)<sup>2</sup> provides that "the defendant must be present at . . . sentencing." This right is broader than the defendant's right to be present at a criminal proceeding under the Constitution. United States v. Parish, 427 F.3d 1345, 1348 (11th Cir. 2005). "[I]f . . . [R]ule [43] does not require a defendant's presence at a given proceeding, neither does the Constitution." United States v. Boyd, 131 F.3d 951, 953 n.3 (11th Cir.1997) (citing other circuits).

Rule 43(a) does not require the defendant's presence when the district court executes an order of the appeals court to impose a specific sentence, when it reinstates the sentence it

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<sup>2</sup>All references are to the current Rule 43. For the purpose of Trenkler's motion, Rule 43 does not differ materially from its predecessor at the time of Trenkler's original sentencing in 1994.

vacated without jurisdiction, and when it lacks sentencing discretion. For example, in United States v. De Los Santos-Himitola, 924 F.2d 380, 381 (1st Cir. 1991), the district court amended a sentence in response to a 28 U.S.C. § 2255 motion. Subsequently, the district court determined that the original sentence was correct and the new sentence was illegal. Id. at 381. Accordingly, it reimposed the original sentence in the defendant's absence. Id. The First Circuit held that because the sentence "was at all times[] *de facto* if not *de jure*[] the same as it was when originally imposed[,] [there was] no point in another sentencing hearing." Id. at 383. The court reasoned that "the [new] order . . . did no more than eliminate an earlier purported amelioration of sentence which both exceeded the judge's authority and never took practical effect." Id. It noted that the defendants had the opportunity to present their views at the original sentencing hearing on the same, reimposed, sentence and concluded that their presence at the subsequent hearing would have been "an empty ritual." Id.

Similarly, after the First Circuit vacated a sentence, which it held that the district had imposed without jurisdiction, and the court remanded the case with a directive to the district court to reinstate the original sentence, see United States v. Griffin, 524 F.3d 71, 83-85 (1st Cir. 2008), the district court noted on remand that "[t]he matter [was] ministerial and

require[d] no further hearing." United States v. Griffin, 566 F. Supp. 2d 59, 62 (D. Mass. 2008) (Young, J.). See also United States v. Sabatino, 963 F.2d 366 (1st Cir. 1992) (unpublished opinion) (where the First Circuit had previously vacated a sentence and directed the district court to impose a specific sentence, the district court properly imposed a new sentence in the defendant's absence because "no purpose would have been served by the defendant's presence," as the "mandate left no room for sentencing discretion"); United States v. Parker, 101 F.3d 527 (7th Cir. 1996) (when the appeals court vacates a sentence and remands the case "not for a new sentencing hearing but merely for a nondiscretionary correction of the original sentence," the defendant need not be present); United States v. Tamayo, 80 F.3d 1514, 1518-1521 (11th Cir. 1996) (sentencing in the defendant's absence was proper where the discretionary concerns present at the original sentencing were absent on remand).

In this case, the First Circuit vacated the amended judgment and sentence and ordered this Court to "proceed forthwith to reinstate original sentence," leaving the Court no discretion to deviate from this mandate. See United States v. Vigneau, 337 F.3d 62, 67 (1st Cir. 2003) (under the law of the case doctrine, "a district court [must] follow the decisions of a higher court"). On remand, the reinstatement of the defendant's original sentence will be ministerial. The Court has no

discretion to deviate from the First Circuit's very narrow order and, thus, any resentencing hearing would be "an empty ritual." De Los Santos-Himitola, 924 F.2d at 383. Under these circumstances, neither the Constitution nor Rule 43 requires the Court to grant the defendant's request to appear and allocute and the court can permissibly reinstate his original sentence simply by issuing a new judgment.

The defendant relies on two inapposite cases to support his argument that he has the right to be present at the reinstatement of his original sentence. He cites the cases for the proposition that if the appeals court vacates, as opposed to modifies, a sentence, the defendant has the right to be present at any subsequent sentencing proceeding on remand. The holdings of these cases, however, are much narrower and are consistent with the government's position.

In the first case, United States v. Moree, 928 F.2d 654 (5th Cir. 1991), the appeals court vacated a sentence and remanded the case because the district court had improperly included a two-level "vulnerable victim" enhancement. Id. at 655. On remand, the district court committed reversible error when it resentenced the defendant in his absence to a maximum allowable sentence of imprisonment after deducting the two-level enhancement. Id. As the appeals court pointed out, its "mandate did not vacate only the two-level enhancement . . . nor did it instruct the district

court simply to reduce [the defendant's] existing sentence to the legal maximum. Rather, the mandate rendered [the defendant's] previous sentence null and void." Id. at 656. Consequently, the new sentencing proceeding required the defendant's presence. Id.

In the instant case, by contrast, although this Court purported to vacate the original sentence and to impose a new one, it lacked jurisdiction to do so. Trenkler, 536 F.3d at 98. In addition, the First Circuit did not vacate the original sentence. Thus, unlike the vacated sentence in Moree, which was "null and void," the original sentence here has remained intact *de facto* and *de jure*. See De Los Santos-Himitola, 924 F.2d at 383. Moreover, unlike the order in Moree, which implicitly required the district court to exercise sentencing discretion, the order of the First Circuit here expressly left this Court with no sentencing discretion on remand.

In the second case that the defendant cites, United States v. Arrous, 320 F.3d 355 (2003), the appeals court vacated a sentence and ordered the district court "1) [to] withdraw its order requiring [the defendant] to make restitution, or 2) [to] allow [the defendant] to withdraw his plea of guilty and proceed to trial." Id. at 357. Again, that case is distinguishable from the instant one for the same reasons that Moree is inapposite. As the appeals court in Arrous pointed out, the subsequent sentencing proceeding before the district court required the

defendant's presence, because it involved an "exercise of sentencing discretion." Id. at 360, quoting United States v. Rivers, 50 F.3d 1126, 1132-1133 (2d Cir. 1995). As noted, however, here this Court lacks any discretion regarding the sentence to be imposed, but rather is obliged to reinstate the original life sentence.

In sum, when carrying out the mandate of the Court of Appeals to reinstate the defendant's original sentence, neither the Constitution nor Rule 43 requires this Court to convene a sentencing hearing at which the defendant is present and is permitted to allocute. Should the Court determine, nonetheless, to grant the defendant's motion and hold such a hearing, the government will be obliged to notify the victims of their right to appear and once again present victim impact statements.

### **III. CONCLUSION**

For all of the foregoing reasons, the United States respectfully requests that the Court deny the defendant's motion. A sample order is attached for the Court's convenience.

Respectfully submitted,

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By: /s/ James F. Lang  
JAMES F. LANG  
MAXIM GRINBERG  
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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on October 24, 2008.

This 24th day of October 2008.

/s/ James F. Lang  
James F. Lang  
Assistant United States Attorney  
District of Massachusetts