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1 THE COURT: Good morning, Counsel. We are
2 here on *United States v. Azibo Aquart*, and our
3 purpose is to give the government the opportunity to
4 provide the Court with a status report with the
5 consent of all counsel. And the purpose today is to
6 give Mr. Markle the opportunity to do just that.
7 This is Aquart 6-CR-160.

8 May I have appearances, please.

9 MR. MARKLE: Yes, Your Honor. Good morning.
10 On behalf of the government, Peter Markle.

11 THE COURT: Thank you. Good morning. Anyone
12 else?

13 MS. FOSTER: Yes, Your Honor. Good morning.
14 On behalf of Mr. Azibo Aquart, Monica Foster, Marc
15 Bookman, and David Moraghan.

16 THE COURT: All right. This matter has
17 been -- we've had a number of status conferences to
18 provide the Court with an update on how the
19 government will proceed following remand for a new
20 sentencing hearing in this case.

21 So, Mr. Markle, would you proceed.

22 MR. MARKLE: Yes, Your Honor. And I
23 apologize for building up any suspense by making some
24 calls yesterday. I just knew that I was trying -- I
25 was attempting to do this quickly because I know

1 there is -- the new year is approaching, and
2 prioritizing cases is obviously on every Court's mind
3 everywhere. I know that.

4 So just to cut to the chase, Your Honor, we
5 were advised on December 17, 2020, by a directive
6 from the attorney general that we redo, are
7 authorized and directed to withdraw the notice of
8 intention to seek the death penalty against Azibo
9 Aquart. So I obviously needed to apprise the Court
10 of that fact, and I have informed counsel for
11 Mr. Aquart by telephone yesterday of that fact. And
12 that authorization or deauthorization means that
13 there will be no death penalty phase proceeding, and
14 in the government's opinion we can proceed to a
15 resentencing at the Court's -- as soon as the Court
16 wants to schedule such a proceeding.

17 THE COURT: All right. Thank you.

18 And let me ask defense counsel whether the
19 resentencing, which is what this would be, and since
20 it is mandatory life, I would assume it is a somewhat
21 pro forma proceeding. But (a) is that correct; and
22 (b) can it be done remotely in which case we can
23 schedule it soon?

24 MS. FOSTER: Your Honor, this is Monica
25 Foster.

1 Mr. Markle's call to us yesterday came
2 completely out of the blue. We were not expecting
3 it. We did not participate in the deauthorization
4 process, and we had no knowledge that the government
5 obtained deauthorization. We appreciate Mr. Markle's
6 efforts in that, being part of that. But as a
7 consequence, we really have not had time to look into
8 whether this matter needs to be done in person or
9 whether it can be done via videoconferencing. I know
10 that the United States penitentiary in Terre Haute
11 does have videoconferencing capabilities. I have had
12 a chance to look at Rule 43(c) this morning which
13 seems to suggest that a defendant can waive presence
14 in a noncapital case.

15 I've also had the opportunity to look at one
16 case, *United States v. Salim*, a Second Circuit case,
17 690 F.3d, page 115. And that Court seemed to say
18 that it was error -- well, didn't seem to say. It
19 did say that it was error there to permit
20 videoconferencing sentencing but that the error was
21 harmless. And that was in the face of counsel's
22 representations that the defendant wished to waive
23 presence and the defendant's statements on the record
24 at the videoconferencing. Defendant's statements in
25 that regard were somewhat unusual in that they seemed

1 to suggest that his waiver was involuntary.

2 But we would, if the Court -- and also let me
3 say this: We have not conveyed this information to
4 our client yet, so we don't know what our client's
5 position is. We are speaking with him this afternoon
6 at 3 o'clock.

7 I would also inform the Court that if we
8 were to do this via videoconferencing, I would expect
9 that I would be present at the penitentiary with
10 Mr. Aquart for that proceeding. Right now there are,
11 at least as reported by the *New York Times* this
12 morning, 17 people on death row who have tested
13 positive in the last couple days for COVID. I am
14 very reluctant to go out there while that's going on.

15 So if we could get some time from the Court
16 to do a little more research regarding (a) what our
17 client's position is on a videoconference
18 resentencing and certainly (b) what the law is. I
19 feel like I've only touched the surface here.

20 As I said, Mr. Markle was kind enough to call
21 us yesterday. And in between other obligations,
22 we've tried to do what we can with regard to
23 researching this matter. But I don't have -- I don't
24 have really clear -- a clear understanding of what
25 the law is in this regard to let the Court know what

1 our position is at this point.

2 THE COURT: All right. And I certainly
3 understand the reasonableness of your reluctance to
4 go to the facility while the pandemic is spiking
5 there, as everywhere.

6 How much time, Ms. Foster, do you need to
7 give the Court a complete picture of what is
8 necessary to be done to complete the proceedings on
9 remand?

10 MS. FOSTER: Well, I think that, you know,
11 with the holidays and everything, although the
12 holidays are obviously grimmer and less festive this
13 year than normal, I think I would ask the Court for,
14 I don't know, two or three weeks to get something to
15 you with regard to our position.

16 Mr. Markle and I have also spoken this
17 morning about trying to come up with an agreement as
18 to how this should all proceed, and we're
19 certainly -- I think that that would be helpful to
20 the Court as well. But I think we could get
21 something to you in the next couple weeks.

22 MR. MARKLE: Yes, Your Honor. One suggestion
23 that I would have, or perhaps that we discussed very
24 briefly just by e-mail, was I could file a motion to
25 schedule sentencing hearing, and then -- I was

1 waiting because Attorney Foster had asked that her
2 client -- before anything is publicly filed or put
3 out there, that she has an opportunity to talk to
4 Mr. Aquart. So I held off. But I could file that
5 first thing tomorrow. And then if counsel by then
6 have -- counsel could respond -- so we have a record,
7 that counsel could respond and see how much time --
8 maybe by then, after talking to Mr. Aquart, they
9 would have some idea of how much time they would
10 need.

11 THE COURT: Does the government know its
12 position on how now to proceed in what is now a
13 noncapital case?

14 MR. MARKLE: I had not researched it, Your
15 Honor. But I thought that the CARES Act does provide
16 for it to be done by a Zoom proceeding, as we've done
17 in many sentencings, now that Mr. Aquart doesn't face
18 the death penalty, obviously. So I had not
19 researched it though. So I'll take a look at that
20 case and ...

21 THE COURT: Well, I guess what I'm wondering
22 is whether it makes sense for you to hold off filing
23 your motion to reschedule the sentencing hearing
24 until you're prepared to detail in that motion the
25 procedures that you believe would be appropriate for

1 the sentencing hearing. And then -- so that you take
2 your time to figure that out. And in the meanwhile,
3 and in response to that, Ms. Foster can present her
4 position on behalf of Mr. Aquart, and we sort of have
5 it in a more methodical fashion.

6 MR. MARKLE: Yes. That make sense, Your
7 Honor.

8 THE COURT: Okay. So why don't we do this.
9 Without setting a time limit for the government to
10 file this motion, why don't we anticipate that the
11 defense will have 14 days to respond to the motion.
12 Does that make sense as an orderly way to do this and
13 make sure we have captured all the nuances of what
14 will need to be done? We need to do that in order to
15 make sure we have the technology available to do
16 this. If in fact it is to be done remotely, I --
17 needless to say, I too have not researched it. But
18 the CARES Act has certainly authorized remote
19 proceedings in everything else that we have done
20 that's noncapital. But I leave that to the wisdom of
21 Ms. Foster.

22 If this were required by Mr. Aquart to be in
23 person, that is, he will not waive his right to
24 personal presence, this is not going to be scheduled
25 for months. So that's the trade-off. We can

1 schedule the hearing remotely, you know, with
2 relative dispatch after the beginning of the year.
3 We cannot do the same for an in-person hearing.

4 MS. FOSTER: Your Honor, let me just -- let
5 me just bring one matter to the Court's attention,
6 and that is this: We've been videoconferencing with
7 Mr. Aquart. We talk to him regularly via phone, but
8 we've also been videoconferencing with him about once
9 a month at the prison through the prison's program
10 which is Webex, which you don't need to have the
11 software for. You can just -- if they send you the
12 invite, you can just get on it. But that said, it's
13 pretty terrible. It cuts in and out all the time.
14 And that may -- if Mr. Aquart doesn't want to waive,
15 my guess is that it would have to do with that. And
16 I would also want to alert the Court and Mr. Markle
17 to the fact that I don't know what the problem is out
18 there but it's not a great situation. It's not like
19 Zoom calling with different law offices where, you
20 know, that seems to be conducted pretty flawlessly.
21 It's not like that at all.

22 THE COURT: And I take it that we can't set
23 up a Zoom remote proceeding which the facility would
24 join? They don't have that capability?

25 MS. FOSTER: Well, I think anybody has the

1 capability to Zoom. Why they're not using that
2 program, I don't know. I think that, in all
3 fairness, a request from the Court would be met more
4 seriously than the request from the local federal
5 defender. I could reach out to counsel and find out
6 why it is they're not using Zoom. I'm not sure if
7 it's a software issue or if it is the fact that, you
8 know, the prison is a lot of cement and a lot -- you
9 know, big, heavy cement walls and a lot of metal.
10 You know, if that problem with the Webex would be the
11 same problem we would have with Zoom, I don't know.
12 But I'm happy to reach out to counsel at Terre Haute
13 and get her thoughts on that.

14 THE COURT: So what if I were to ask my
15 courtroom deputy to be in touch with the penitentiary
16 at Terre Haute along with our IT people who have been
17 setting up these remote proceedings in all the other
18 criminal matters. Does that make sense?

19 MS. FOSTER: I think that's a terrific idea.
20 And I'm happy to send the Court the information I
21 have for the lawyer out there who has been my point
22 of contact.

23 THE COURT: Okay. If you would do that. And
24 is the Terre Haute facility just one facility or are
25 there separate sections? Well, you're going to send

1 us the contact information.

2 MS. FOSTER: Yes. But the answer to your
3 question is there's separate sections. So there's an
4 FCI right across the street which is where the USP
5 used to be. It's all in the same, sort of, compound.
6 I don't know if they have better receptivity over
7 there, but I think that's certainly something that
8 your people could inquire about.

9 THE COURT: Okay. Mr. Markle, does the
10 government have any input to this problem?

11 And I am acutely sensitive to how much of a
12 problem this can be. I have already had a sentencing
13 hearing that failed. We had to stop it because of
14 the inadequacies of the technology. It involved an
15 interpreter and so multiple points of contact, but
16 it -- we could not be assured that the defendant was
17 meaningfully able to be heard and to hear the
18 proceedings. So I'd like to get as much ironed out
19 as possible.

20 Mr. Markle, do you have anything to add?

21 MR. MARKLE: Unfortunately not, Your Honor.
22 Usually we defer to the Court's IT people to set
23 these up and we just join. I'm happy to put
24 anyone -- if there's a need, our IT people will
25 certainly work with the court staff to do whatever we

1 can to make this work.

2 THE COURT: Okay. All right. Then Donna
3 Barry will be my point person on this to start
4 facilitating or to start investigating whether we can
5 in fact proceed by Zoom if in fact Mr. Aquart is
6 willing to waive his right to personal presence.
7 Does that sound right?

8 MR. MARKLE: Yes, Your Honor.

9 MS. FOSTER: Yes, Your Honor.

10 THE COURT: All right. I'm not going to set
11 any dates then. I will simply await the government's
12 motion to schedule the sentencing hearing and then
13 the defendant's response within 14 days after.
14 And -- okay. Then in the meanwhile, in anticipation
15 that Mr. Aquart may elect to waive, we will get all
16 of the IT particulars straightened out.

17 MS. FOSTER: Thank you, Your Honor.

18 THE COURT: All right. Anything further?

19 MS. FOSTER: Not from the defense.

20 MR. MARKLE: The only -- I guess the other
21 matter in terms of the remote proceeding is -- and I
22 guess I should state for the record, we have notified
23 the victim's family of this decision by the attorney
24 general, and I would anticipate that there may be
25 some family members who would want to participate

1 either in person or remotely. So that just should be
2 factored into whatever way we decide to do this.
3 Remotely, there may be more than just the people on
4 this phone call.

5 THE COURT: That's fine. And we will
6 certainly -- we are certainly able to accommodate
7 them and hear them at the appropriate time. They
8 will not, however, be in the courtroom in person.

9 MR. MARKLE: Understood. Thank you, Your
10 Honor. I have nothing further. Thank you.

11 THE COURT: And that's even if Mr. Aquart
12 doesn't waive and he is here, he requires coming to
13 the courtroom. Well, I think we'll cross that bridge
14 when we get to it. But the fewer people in our
15 courtrooms when we have this very useful and
16 functional remote alternative is the safest for
17 everyone. Okay.

18 All right then. I will anticipate receiving
19 the defendant's -- excuse me, the government's motion
20 when it is ready to file it and the defendant's
21 response. And in the meanwhile, you all can do all
22 of your background work that will inform the motion
23 and the response and we will do ours.

24 MS. FOSTER: Thank you, Your Honor.

25 THE COURT: All right. Thank you,

1 Mr. Markle, for advising so promptly of what the --
2 of the deauthorization decision by DOJ. And we will
3 likely see you or hear you next year.

4 To the extent one can have a happy holiday,
5 have a happy holiday. In any event, I hope it is a
6 safe and masked holiday.

7 All right. If there is nothing further then,
8 thank you very much.

9 (Proceedings concluded, 11:22 a.m.)

10

11 C E R T I F I C A T E

12

13 RE: UNITED STATES OF AMERICA v. AZIBO AQUART
14 No. 3:06-CR-00160-JBA-3

15 I hereby certify that the within and
16 foregoing is a true and accurate transcript taken in
17 the aforementioned matter to the best of my skill and
18 ability.

19

20 /s/ Melissa J. Cianciullo_____

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