

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

**RULE PROMULGATION ORDER 20-08**

(Extending temporary amendments to Super. Ct. Crim. R. 43)

**WHEREAS**, pursuant to D.C. Code § 11-946, on July 6, 2020, the Superior Court temporarily amended Superior Court Rule of Criminal Procedure 43;

**WHEREAS**, pursuant to D.C. Code § 11-946, the Board of Judges of the Superior Court approved extending the effective date of the temporary amendments to Superior Court Rule of Criminal Procedure 43; and

**WHEREAS**, pursuant to D.C. Code § 11-946, to the extent that the temporary amendments modify the corresponding federal rule, the District of Columbia Court of Appeals approved extending the effective date of the temporary amendments to Superior Court Rule of Criminal Procedure 43; it is

**ORDERED**, that the temporary amendments to Superior Court Rule of Criminal Procedure 43 that are set forth below shall remain in effect until May 31, 2021.

### **Criminal Rule 43. Defendant's Presence**

(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.

(b) **WHEN NOT REQUIRED.** A defendant need not be present under any of the following circumstances:

(1) *Organizational Defendant.* The defendant is an organization represented by counsel who is present.

(2) *Misdemeanor Offense.* The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's ~~written~~ consent, the court permits arraignment, plea, trial, and sentencing to occur by video conferencing, by telephone conferencing, or in the defendant's absence.

(3) *Conference or Hearing on a Legal Question.* The proceeding involves only a conference or hearing on a question of law.

(4) *Sentence Correction.* The proceeding involves the correction or reduction of sentence under Rule 35.

(c) **WAIVING CONTINUED PRESENCE.**

(1) *In General.* A defendant who was initially present at trial 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) 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.

(d) EMERGENCY AUTHORITY FOR VIDEO TELECONFERENCING OR TELEPHONE CONFERENCING.

(1) In General. Subject to Rule 43(d)(3)-(4), the court may permit a preliminary hearing under Rule 5.1, a felony plea under Rule 11, or a felony sentencing under Rule 32 to occur by video conferencing or by telephone conferencing, if:

(A) the Chief Judge, with the consent of the Joint Committee on Judicial Administration, has issued an order under D.C. Code § 11-947 (2019 Supp.) to delay, toll, or otherwise grant relief from deadlines imposed by law or rules, based on the Coronavirus Disease 2019 (COVID-19); and

(B) in a particular case, the court finds for specific reasons that the preliminary hearing, plea, or sentencing in that case cannot be further delayed without serious harm to the interests of justice.

(2) Telephone Conferencing for Initial Appearance and Arraignment. Subject to Rule 43(d)(3)-(4), the court may permit an initial appearance under Rule 5 or an arraignment under Rule 10 to occur by telephone conferencing if the Chief Judge issues an order referenced in Rule 43(d)(1)(A). The authority to conduct these proceedings by telephone conference is in addition to the existing authority to conduct video conferencing under Rule 5(g) and Rule 10(c).

(3) Consent. Video teleconferencing or telephone conferencing authorized under Rule 43(d)(1) and (2) may take place only with the consent of the defendant after consultation with counsel.

(4) Termination of Emergency Authority. The authority under Rule 43(d)(1) and (2) terminates on the earlier of:

(A) 30 days after an order referenced in Rule 43(d)(1)(A) expires without issuance of a further order; or

(B) the date on which the Chief Judge issues an order terminating the authority granted by Rule 43(d)(1) and (2).

#### COMMENT TO 2020 TEMPORARY AMENDMENTS

New section (d) expands the list of proceedings that may be conducted by video teleconference or telephone conference if the Chief Judge has issued an order under D.C. Code § 11-947 (2019 Supp.) based on COVID-19. For preliminary hearings, felony pleas, and felony sentencings, there must also be a case specific finding. The section is modeled after provisions in the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (CARES Act), § 15002 (2020), and resulting district court orders. The CARES Act permitted the Judicial Conference of the United States to find that emergency conditions materially affected the functioning of the federal courts or a particular district court of the United States. The Chief Judge of a covered district court could then authorize the use of video teleconferencing or telephone conferencing for additional proceedings with certain conditions.

#### COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2011 amendment to *Federal Rule of Criminal Procedure 43*. Subsection (b)(2) has been amended to permit proceedings in misdemeanor cases to occur by video teleconference, if the defendant consents in writing and the court approves.

#### COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It is identical to the federal rule except that subparagraph (c)(1)(B) omits the phrase “in a noncapital case” since there are no such cases in Superior Court.

The former Superior Court rule did not permit the court to impose sentence on a defendant who was voluntarily absent. As amended, this rule does permit it, and so conforms to the changes made in the federal rule in 1995.

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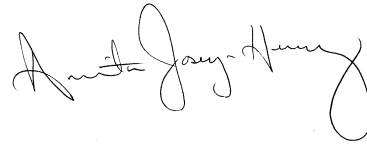
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By the Court:



Date: December 29, 2020

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Anita M. Josey-Herring  
Chief Judge

Copies to:

All Judges  
All Magistrate Judges  
All Senior Judges  
William Agosto, Director, Criminal Division  
Library  
Daily Washington Law Reporter  
Laura Wait, Associate General Counsel