

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

**Notice of Proposed Temporary Amendments to Superior Court Rule of Criminal Procedure 43 and Superior Court Rule Governing Juvenile Proceedings 43**

The District of Columbia Superior Court Rules Committee recently completed review of proposed temporary amendments to Superior Court Rule of Criminal Procedure 43 and Superior Court Rule Governing Juvenile Proceedings 43. The Rules Committee will recommend to the Superior Court Board of Judges that the amendments be approved and temporarily adopted unless, after consideration of comments from the Bar and the general public, the proposed amendments are withdrawn or modified.

Written comments must be submitted by June 8, 2020. Comments may be emailed to Laura M.L. Wait, Associate General Counsel, at [Laura.Wait@dcsc.gov](mailto:Laura.Wait@dcsc.gov)

All comments submitted in response to this notice will be available to the general public. New language is underlined and deleted language is stricken through.

### **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 teleconferencing, 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 teleconferencing 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 teleconferencing 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.

### **Juvenile Rule 43. Presence of the Respondent**

(a) IN GENERAL. The respondent ~~shall~~must be present at the initial hearing, at the factfinding hearing, and at the entry of a dispositional order, except as otherwise provided by D.C. Code § 16-2316(f). (2012 Repl.)

#### (b) WAIVING PRESENCE.

(1) Voluntary Absence. A respondent who was initially present at the factfinding hearing waives the right to be present when ~~the respondent's~~ is voluntary absentee after the factfinding hearing has begun, regardless of whether the court informed the respondent of an obligation to remain during trial~~been commenced in the respondent's presence shall not prevent.~~

(2) Waiver's Effect. If the respondent waives the right to be present, ~~continuing~~ the factfinding hearing may proceed to completion and, including the adjudication ~~by the Family Court,~~ during the respondent's absence.

#### (c) EMERGENCY AUTHORITY FOR VIDEO TELECONFERENCING OR TELEPHONE CONFERENCING.

(1) In General. Subject to Rule 43(c)(2)-(3), the court may permit an initial, emergency, status, plea, factfinding, or disposition hearing 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 hearing in that case cannot be further delayed without serious harm to the interests of justice.

(2) Consent. Video conferencing or telephone conferencing authorized under Rule 43(c)(1) may take place only with the consent of the respondent after consultation with counsel.

(3) Termination of Emergency Authority. The authority under Rule 43(c)(1) terminates on the earlier of:

(A) 30 days after an order referenced in Rule 43(c)(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(c)(1).

### COMMENT TO 2020 TEMPORARY AMENDMENTS

New section (c) provides explicit authority for the court to conduct proceedings 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 and there is 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.