

## **Rule 5. Initial Appearance**

### **(a) APPEARANCE UPON AN ARREST.**

(1) *In General.* A law enforcement officer within the District of Columbia making an arrest under a warrant issued by the Superior Court upon a complaint, making an arrest without a warrant, or receiving a person arrested by a special police officer or other authorized person must take the arrested person without unnecessary delay before the court.

(2) *Arrest Without a Warrant.* If a person arrested without a warrant is brought before the court, a complaint or information must be filed forthwith.

(3) *Preliminary Police Duties.* Before taking an arrested person before the court, a law enforcement officer may perform any recording, fingerprinting, photographing, or other preliminary police duties required in the particular case, and if such duties are performed with reasonable promptness, the period of time required for them will not constitute delay within the meaning of this rule.

(4) *18 U.S.C. § 3501.* This rule should not be construed to conflict with or otherwise supersede *18 U.S.C. § 3501*.

### **(b) ADVICE.** The court must inform the defendant of the following:

- (1) the complaint against the defendant, and any affidavit filed with it;
- (2) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;
- (3) the defendant's right to a preliminary hearing if a felony is charged;
- (4) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and
- (5) that a defendant who is not a United States citizen may request that an attorney for the government or a law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested--but that even without the defendant's request, a treaty or other international agreement may require consular notification.

(c) **CONSULTING WITH COUNSEL.** The court must allow the defendant reasonable time and opportunity to consult counsel.

(d) **DETENTION OR RELEASE.** The court must detain or release the defendant as provided by statute or these rules.

### **(e) PROBABLE CAUSE DETERMINATION FOLLOWING ARREST WITHOUT A WARRANT.**

(1) *Sworn Statement of Fact.* If a defendant is arrested without a warrant, and the court imposes upon the defendant any conditions of release which constitute a significant restraint on pretrial liberty, the court must, unless the defendant waives an initial probable cause determination, require the prosecutor to file with the clerk by the end of the next working day a copy of a sworn statement of fact offered to establish probable cause.

(2) *Probable Cause Determination.* Upon the filing of the sworn statement of fact, the court must then proceed promptly to determine if there is probable cause to believe that an offense has been committed and that the defendant committed it.

(3) *Without a Hearing.* The determination of probable cause may be made by the court without conducting a hearing.

(4) *Hearsay Evidence.* The court's finding of probable cause may be based upon

hearsay evidence in whole or in part.

(5) *Docket Entry*. The court must enter its determination as to probable cause on the docket along with the date of the determination.

(6) *Nonmoving Traffic Violation*. In nonmoving traffic violation cases, the traffic citation may be considered by the court as sufficient to establish probable cause.

(7) *No Probable Cause*. If the court determines, based on the information offered by the prosecutor, that there is no probable cause, the court must release the defendant, without significant restraints on the defendant's liberty, and must order the defendant to appear for the next court proceeding.

(f) REMINDER OF PROSECUTORIAL OBLIGATION.

(1) *In General*. In all criminal proceedings, at the defendant's initial appearance, the judge or magistrate judge must issue a written order to the attorney for the government and defense counsel that confirms the disclosure obligation of the attorney for the government under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and the possible consequences of violating such order under applicable law. At the first hearing after the defendant's initial appearance, the judge or magistrate judge must orally confirm the terms of the written order.

(2) *General Order*. The Chief Judge must issue a general order for use in accordance with Rule 5(f)(1).

(g) ARRESTS OUTSIDE THE DISTRICT OF COLUMBIA. A person arrested outside the District of Columbia on a warrant issued by the Superior Court of the District of Columbia must be taken before the court or other person enumerated in 18 U.S.C. § 3041 and must be held to answer in the court having jurisdiction to try the defendant pursuant to the Federal Rules of Criminal Procedure as if the warrant had been issued by the United States District Court for the District of Columbia.

(h) VIDEO TELECONFERENCING. Video conferencing may be used to conduct an appearance under this rule if the defendant, having been afforded the opportunity to consult with counsel, consents.

## COMMENT TO 2022 AMENDMENTS

Paragraph (f) is a new provision, drafted in response to the 2020 amendment to Federal Rule of Criminal Procedure 5. Paragraph (f), however, is not identical to Federal Rule 5(f). While Federal Rule 5(f)(1) requires that the court issue both an oral and a written order at the first hearing in the case confirming the government's *Brady* obligations, subparagraph (f)(1) requires a written order at the time of the defendant's initial appearance and an oral confirmation of the terms of the written order at the first hearing following the defendant's initial appearance. This procedure is intended to allow arraignments and presentments to proceed without undue delay and to increase the likelihood that the *Brady* admonition is directed to counsel actually assigned to the case, rather than to counsel standing in at the defendant's initial appearance. And while Federal Rule 5(f)(2) requires the promulgation of a model order by each federal judicial council, subparagraph (f)(2) requires the Chief Judge to issue a general order for use in accordance with subparagraph (f)(1). Former paragraphs (f) and (g) have been redesignated as paragraphs (g) and (h), respectively.

## COMMENT TO 2017 AMENDMENTS

The Superior Court rule continues to differ substantially from the federal rule, including omission of federal subsection (c)(4), “Procedure for Persons Extradited to the United States”—a provision that was added to the federal rule in 2012.

However, the Superior Court rule incorporates the 2014 federal amendment, which requires the court, at arraignment or presentment, to advise all defendants of the right to or requirement for consular notification if the defendant is a non-citizen. The provision appears in section (d) of the federal rule, but it has been added to section (b) of the Superior Court rule.

## COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Subparagraph (a)(1) of this rule limits its application to instances of arrest or receipt of an arrested person within the District of Columbia. *Cf.* D.C. Code § 23-563 (c) (2012 Repl.). Subparagraph (a)(4) includes a rule of construction to avoid conflicting with or superseding of 18 U.S.C. § 3501, dealing with the admissibility of confessions. *See* D.C. Code §§ 23-562 (c)(1), 5-115.01 (2012 Repl.). *Cf. Dickerson v. United States*, 530 U.S. 428 (2000).

The provisions of former Rule 5(d) have been moved to Rule 5.1 to be consistent with *Federal Rules 5 and 5.1*.<sup>12</sup>

Paragraph (e), which contains the provisions of former paragraph (c), has no federal counterpart. It sets forth the procedures for a probable cause determination that must be made whenever the court imposes significant restraints on the pretrial liberty of a person arrested without a warrant. *See Gerstein v. Pugh*, 420 U.S. 103 (1975). Subparagraph (e)(5) substitutes the term “docket” for “case jacket.”

Paragraph (f) contains the provisions of former Superior Court Rule 5-l.

Paragraph (g) is identical to paragraph (f) of the federal rule except that it makes explicit that the defendant must have been afforded the opportunity to consult with counsel before consenting to the procedure.