

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

RULE PROMULGATION ORDER 22-11

(Amending Super. Ct. Crim. R. 43)

WHEREAS, pursuant to D.C. Code § 11-946 (2012 Repl.), the Board of Judges of the Superior Court approved amendments to Superior Court Rule of Criminal Procedure 43; and

WHEREAS, pursuant to D.C. Code § 11-946 (2012 Repl.), the amendments to this rule, to the extent that they modify the federal rule, have been approved by the District of Columbia Court of Appeals; it is

ORDERED, that Superior Court Rule of Criminal Procedure 43 is hereby amended as set forth below; and it is further

ORDERED, that the amendments shall take effect immediately and shall govern all proceedings hereafter commenced and insofar is just and practicable all pending proceedings.

Rule 43. Defendant's Presence

(a) DEFINITIONS. As used in this rule:

(1) "Misdemeanor" means an offense punishable by fine only, imprisonment for not more than one year, or both.

(2) "Felony" means an offense punishable by imprisonment for more than one year.

(b) ~~WHEN PHYSICAL PRESENCE~~ REQUIRED. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be physically 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~~ PRESENCE BY VIDEO TELECONFERENCING OR TELEPHONE CONFERENCING PERMITTED. A defendant need not be physically present under ~~any of~~ the following circumstances:

(1) ~~Organizational Defendant. The defendant is an organization represented by counsel who is present. Misdemeanor Offense; any Proceeding by Video Teleconferencing or Telephone Conferencing.~~ ~~The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's consent, the court may permits~~ a defendant charged with a misdemeanor to appear arraignment, plea, trial, and sentencing to occur by video teleconferencing, by or telephone conferencing, ~~or in the defendant's absence.~~ for any proceeding, including arraignment, plea, trial, sentencing, or other hearing, if:

(A) the defendant consents after consultation with counsel;

(B) the government consents; and

(C) the court makes an inquiry on the record to ensure that:

(i) the defendant's consent is knowing, voluntary, and intelligent; and

(ii) the defendant has an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding.

(2) ~~Felony; Plea, Sentencing, or Other Nontrial Hearing by Video Teleconferencing.~~ The court may permit a defendant charged with a felony to appear for a plea, sentencing, or other nontrial hearing by video teleconferencing if:

(A) the defendant consents after consultation with counsel;

(B) the government consents; and

(C) the court makes an inquiry on the record to ensure that:

(i) the defendant's consent is knowing, voluntary, and intelligent; and

(ii) the defendant has an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding.

(d) ~~[Deleted].~~

(e) ~~PRESENCE NOT REQUIRED.~~ A defendant need not be present, physically or otherwise, under any of the following circumstances:

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

(2) ~~Defendant's Waiver; Misdemeanor Proceeding other than Plea, Trial, or Sentencing.~~ The court may permit a misdemeanor proceeding other than a plea, trial, or sentencing to occur in the defendant's absence if:

(A) the defendant, after consultation with counsel, waives the constitutional right to be present; and

(B) the government consents.

(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.

(f) WAIVING CONTINUED PRESENCE.

COMMENT TO 2022 AMENDMENTS

Rule 43 has been amended to expand the Superior Court's authority to permit a defendant to appear by video teleconferencing or telephone conferencing, i.e., remotely. The amended rule also clarifies when a defendant must be physically present, when the defendant may participate remotely, and when a proceeding may occur in a defendant's absence. The amendments largely track, and make permanent, the court's temporary emergency authority to expand the types of proceedings that could occur remotely (former section (d)). The court's experience during COVID-19 has shown that remote proceedings function well.

Subsection (c) (former section (b)(2)) has been divided into two parts. Subsection (c)(1)(A) now permits any misdemeanor proceeding to occur remotely. The former rule, like the federal rule, permitted only a misdemeanor arraignment, plea, trial, or sentencing to occur remotely. New section (c)(2)(B) permits a felony plea, sentencing, or other nontrial hearing to occur remotely, although only by video teleconferencing, unlike the federal rule which does not provide for remote felony proceedings. New section (a) defines the terms misdemeanor and felony, and the remaining sections have been redesignated accordingly.

Finally, the amended rule specifies additional conditions under which the court may permit a proceeding to occur remotely or in the defendant's absence. Minor revisions also have been made for clarity and to conform to the general restyling of the rules.

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(1) the initial appearance, arraignment, and plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(c) PRESENCE BY VIDEO TELECONFERENCING OR TELEPHONE

CONFERENCING PERMITTED. A defendant need not be physically present under the following circumstances:

(1) *Misdemeanor; any Proceeding by Video Teleconferencing or Telephone Conferencing.* The court may permit a defendant charged with a misdemeanor to appear by video teleconferencing or telephone conferencing for any proceeding, including arraignment, plea, trial, sentencing, or other hearing, if:

(A) the defendant consents after consultation with counsel;

(B) the government consents; and

(C) the court makes an inquiry on the record to ensure that:

(i) the defendant's consent is knowing, voluntary, and intelligent; and

(ii) the defendant has an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding.

(2) *Felony; Plea, Sentencing, or Other Nontrial Hearing by Video Teleconferencing.* The court may permit a defendant charged with a felony to appear for a plea, sentencing, or other nontrial hearing by video teleconferencing if:

(A) the defendant consents after consultation with counsel;

(B) the government consents; and

(C) the court makes an inquiry on the record to ensure that:

(i) the defendant's consent is knowing, voluntary, and intelligent; and

(ii) the defendant has an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding.

(d) [Deleted].

(e) PRESENCE NOT REQUIRED. A defendant need not be present, physically or otherwise, under any of the following circumstances:

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

(2) *Defendant's Waiver; Misdemeanor Proceeding other than Plea, Trial, or Sentencing.* The court may permit a misdemeanor proceeding other than a plea, trial, or sentencing to occur in the defendant's absence if:

(A) the defendant, after consultation with counsel, waives the constitutional right to be present; and

(B) the government consents.

(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.

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COMMENT TO 2022 AMENDMENTS

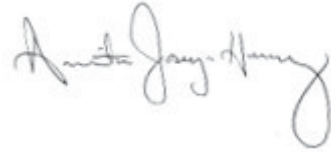
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* * *

By the Court:



Date: 11/18/2022

Anita M. Josey-Herring
Chief Judge

Copies to:

All Judges
All Magistrate Judges
All Senior Judges
Lynn Magee, Director, Civil Division
Library
Daily Washington Law Reporter
Pedro E. Briones, Associate General Counsel