

**Proposed Modification to Rule as Effective: November 16, 2020**

Crim. P. Rule 43

**Rule 43. Presence of the Defendant**

Currentness

**(a) Presence Required.** The defendant shall be present at the preliminary hearing, at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

**(b) Continued Presence Not Required.** The trial court in its discretion may complete the trial, and the defendant shall be considered to have waived his right to be present, whenever a defendant, initially present:

- (1) Voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or
- (2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

**(c) Presence Not Required.** A defendant need not be present in the following situations:

- (1) A corporation may appear by counsel for all purposes.
- (2) At a conference or argument upon a question of law.
- (3) At a reduction of sentence under Rule 35.

**(d) Waiver.** The voluntary failure of the defendant to appear at the preliminary hearing may be construed by the court as an implied waiver of his right to a preliminary hearing.

**(e) Presence of the Defendant by Interactive Audiovisual Device or Interactive Audio Device.**

(1) *Definitions.* As used in this Rule 43:

(I) "Interactive audiovisual device" means a television or computer based audiovisual system capable of two-way transmission and of sufficient audio and visual quality that persons using the system can view and converse with each other with a minimum of disruption.

"Interactive audio device" means a telephone or computer based audio system capable of two-way transmission and of sufficient audio quality that persons using the system can converse with each other with a minimum of disruption.

(2) A defendant may be present within the meaning of this Rule 43 by the use of an interactive audiovisual device or interactive audio device, in lieu of the defendant's physical presence, for ~~the following hearings:~~ any proceeding that does not involve a jury unless otherwise provided in this rule or otherwise ordered by the court.

~~(I) First appearances pursuant to Crim.P. 5, for the purpose of advisement and setting of bail, including first appearances on probation or deferred sentence revocation complaints;~~

~~(II) Further appearances for the filing of charges or for setting the preliminary hearing;~~

~~(III) Hearings to modify bail;~~

~~(IV) Entry of pleas and associated sentencing or probation violation hearings in misdemeanor, petty offense, and traffic cases where the offense charged is not included within those offenses enumerated in C.R.S. 24-4.1-302 (I).~~

- ~~(V) Waivers of preliminary hearing;~~
- ~~(VI) Restitution hearings;~~
- ~~(VII) Appeal bond hearings;~~
- ~~(VIII) Crim.P. 35(B) hearings.~~

(3) *Minimum Standards.* Every use of an interactive audiovisual device or interactive audio device must comply with the following minimum standards in addition to those set forth in Crim.P. 43(e)(1):

(I) If defense counsel appears, such appearance shall be at the same physical location as the defendant if an audiovisual or audio appearance requires a defendant's consent and if so requested by the defendant. If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be provided available to allow for private and confidential communication between the defendant and counsel. When a separate line is not available, the court may authorize the defendant and defense counsel to disconnect from the court for the period reasonably necessary to conduct a private and confidential communication.

(II) The defendant's oral or written consent is not necessary for arraignments or for the following:

(i) First appearances pursuant to Crim.P. 5, for the purpose of advisement and setting of bail, including first appearances on probation or deferred sentence revocation complaints;

(ii) Further appearances for the filing of charges or for setting the preliminary hearing;

(iii) Hearings to modify bail;

(iv) Waivers of preliminary hearing;

(v) Status hearings, including settings and continuances;

(vi) Restitution hearings;

(vii) Appeal bond hearings;

(viii) Crim.P. 35(B) hearings.

~~(II) No defendant shall be compelled to appear by interactive video device at a hearing pursuant to subsection (e)(2)(III), (VI) or (VIII) of this rule.~~

~~(III) Installation of the interactive~~ The defendant's oral or written consent is otherwise necessary to proceed by interactive audiovisual device or interactive audio device.

(III) An interactive audiovisual or interactive audio proceeding shall be conducted in the courtroom ~~shall be done~~ open to the public or in such a manner that allows members of the public ~~are reasonably able to observe, (including victims) to hear or watch~~ and, where appropriate, participate in the hearing proceeding.

~~(IV) Any hearing held pursuant to Crim.P. 43(e)(2)(IV) shall be conducted with the~~ When a defendant's oral or written consent ~~of is necessary, the defendant. The court shall advise a defendant of the following prior to obtaining a defendant's written consent and prior to any plea discussions being conducted~~ consent:

~~(a) The rights enumerated in Crim.P. 5(2).~~

~~(b)~~ (a) The defendant has the right to appear in person and will not be prejudiced if he chooses to do so.

~~(c)~~ (b) The defendant has the right to have his or her counsel appear with him or her at the same physical location.

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(~~ec~~) The defendant's decision to appear by use of an interactive audiovisual device must be voluntary on the defendant's part and must not be the result of undue influence or coercion on the part of anyone.

(~~ed~~) If the defendant is pro se, the identity and role of all individuals with whom the defendant may have contact through the interactive audiovisual device.

(V) ~~An interactive audiovisual system used for hearings pursuant to Crim.P. 43(e)(2)(IV) shall include~~ When the ability to electronically transfer of documents between the defendant and the court is necessary, documents may be electronically transferred and such transferred documents shall be considered the same as originals.

(4) Nothing in this rule shall require a court to use an interactive audiovisual device ~~or an interactive audio device.~~

(5) In the event of inclement weather or other exceptional circumstances, which would otherwise prevent a hearing from occurring under Crim.P. 5, the court may conduct the hearing by use of an interactive audiovisual or interactive audio procedure which does not comply with the minimum standards set forth in subsection (3).

~~(f) **Public Health Crisis Exception.** If the court finds that a public health crisis exists, it may, in its discretion and with the defendant's oral or written consent, allow the defendant and counsel to appear by an interactive audiovisual device or by audio device for any proceeding that does not involve a jury. The defendant's oral or written consent is not necessary for arraignments or for proceedings listed in subsections (e)(2)(I), (II), (III), (V), (VI), (VII), and (VIII) of this rule. During any interactive audiovisual or audio proceeding under this subsection (f), the court must allow counsel the opportunity to confer with the defendant confidentially when necessary. An interactive audiovisual or audio proceeding under this subsection (f) shall be conducted in a courtroom open to the public or in a manner that allows members of the public (including victims) to hear or watch and, where appropriate, participate in the proceeding. Use of an interactive audiovisual device under this subsection (f) must comply with subsection (e)(1) of this rule.~~

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**(b) Continued Presence Not Required.** The trial court in its discretion may complete the trial, and the defendant shall be considered to have waived his right to be present, whenever a defendant, initially present:

- (1) Voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or
- (2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

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- (1) A corporation may appear by counsel for all purposes.
- (2) At a conference or argument upon a question of law.
- (3) At a reduction of sentence under Rule 35.

**(d) Waiver.** The voluntary failure of the defendant to appear at the preliminary hearing may be construed by the court as an implied waiver of his right to a preliminary hearing.

### **(e) Presence of the Defendant by Interactive Audiovisual Device or Interactive Audio Device.**

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"Interactive audio device" means a telephone or computer based audio system capable of two-way transmission and of sufficient audio quality that persons using the system can converse with each other with a minimum of disruption.

(2) A defendant may be present within the meaning of this Rule 43 by the use of an interactive audiovisual device or interactive audio device, in lieu of the defendant's physical presence, for any proceeding that does not involve a jury unless otherwise provided in this rule or otherwise ordered by the court.

(3) *Minimum Standards.* Every use of an interactive audiovisual device or interactive audio device must comply with the following minimum standards in addition to those set forth in Crim.P. 43(e)(1):

(l) If defense counsel appears, such appearance shall be at the same physical location as the defendant if an audiovisual or audio appearance requires a defendant's consent and if so requested by the defendant. If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be available to allow for private and confidential communication between the

defendant and counsel. When a separate line is not available, the court may authorize the defendant and defense counsel to disconnect from the court for the period reasonably necessary to conduct a private and confidential communication.

(II) The defendant's oral or written consent is not necessary for arraignments or for the following:

- (i) First appearances pursuant to Crim.P. 5, for the purpose of advisement and setting of bail, including first appearances on probation or deferred sentence revocation complaints;
- (ii) Further appearances for the filing of charges or for setting the preliminary hearing;
- (iii) Hearings to modify bail;
- (iv) Waivers of preliminary hearing;
- (v) Status hearings, including settings and continuances;
- (vi) Restitution hearings;
- (vii) Appeal bond hearings;
- (viii) Crim.P. 35(B) hearings.

The defendant's oral or written consent is otherwise necessary to proceed by interactive audiovisual device or interactive audio device.

(III) An interactive audiovisual or interactive audio proceeding shall be conducted in a courtroom open to the public or in a manner that allows members of the public (including victims) to hear or watch and, where appropriate, participate in the proceeding.

(IV) When a defendant's oral or written consent is necessary, the court shall advise a defendant of the following prior to obtaining a defendant's consent:

(a) The defendant has the right to appear in person and will not be prejudiced if he chooses to do so.

(b) The defendant has the right to have his or her counsel appear with him or her at the same physical location.

(c) The defendant's decision to appear by use of an interactive audiovisual device must be voluntary on the defendant's part and must not be the result of undue influence or coercion on the part of anyone.

(d) If the defendant is pro se, the identity and role of all individuals with whom the defendant may have contact through the interactive audiovisual device.

(V) When the transfer of documents is necessary, documents may be electronically transferred and such transferred documents shall be considered the same as originals.

(4) Nothing in this rule shall require a court to use an interactive audiovisual device or an interactive audio device.

(5) In the event of inclement weather or other exceptional circumstances, which would otherwise prevent a hearing from occurring under Crim.P. 5, the court may conduct the hearing by use of an interactive audiovisual or interactive audio procedure which does not comply with the minimum standards set forth in subsection (3).