COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 42 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The revised rule is intended to more clearly set out the procedures for conducting a criminal contempt proceeding. The current rule implicitly recognizes that an attorney for the government may be involved in the prosecution of such cases. Revised Rule 42(a)(2) now explicitly addresses the appointment of a ''prosecutor'' and adopts language to reflect the holding in *Young v. United States ex rel. Vuitton*, 481 U.S. 787 (1987). In that case the Supreme Court indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The rule envisions that a disinterested counsel should be appointed to prosecute the contempt.

Rule 42(b) has been amended to make it clear that a court may summarily punish a person for committing contempt in the court's presence without regard to whether other rules, such as Rule 32 (sentencing procedures), might otherwise apply. *See, e.g., United States v. Martin-Trigona*, 759 F.2d 1017 (2d Cir. 1985). Further, Rule 42(b) has been amended to recognize the contempt powers of a court (other than a magistrate judge) and a magistrate judge.

TITLE IX. GENERAL PROVISIONS

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 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 or 18 U.S.C. §3582(c).

(c) WAIVING CONTINUED PRESENCE.

(1) *In General.* A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, 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) in a noncapital case, 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.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94–64, §3(35), July 31, 1975, 89 Stat. 376; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

1. The first sentence of the rule setting forth the necessity of the defendant's presence at arraignment and trial is a restatement of existing law, *Lewis v. United States*, 146 U.S. 370; *Diaz v. United States*, 223 U.S. 442, 455. This principle does not apply to hearings on motions made prior to or after trial, *United States v. Lynch*, 132 F.2d 111 (C.C.A. 3d).

2. The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence, *Diaz v. United States*, 223 U.S. 442, 455; *United States v. Noble*, 294 F. 689 (D.Mont.)—affirmed, 300 F. 689 (C.C.A. 9th); *United States v. Barracota*, 45 F.Supp. 38 (S.D.N.Y.); *United States v. Vassalo*, 52 F.2d 699 (E.D.Mich.).

3. The fourth sentence of the rule empowering the court in its discretion, with the defendant's written consent, to conduct proceedings in misdemeanor cases in defendant's absence adopts a practice prevailing in some districts comprising very large areas. In such districts appearance in court may require considerable travel, resulting in expense and hardship not commensurate with the gravity of the charge, if a minor infraction is involved and a small fine is eventually imposed. The rule, which is in the interest of defendants in such situations, leaves it discretionary with the court to permit defendants in misdemeanor cases to absent themselves and, if so, to determine in what types of misdemeanors and to what extent. Similar provisions are found in the statutes of a number of States. See A.L.I. Code of Criminal Procedure, pp. 881–882.

4. The purpose of the last sentence of the rule is to resolve a doubt that at times has arisen as to whether it is necessary to bring the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant not to require such presence, because of the delay and expense that are involved.

NOTES OF ADVISORY COMMITTEE ON RULES—1974 AMENDMENT

The revision of rule 43 is designed to reflect *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970). In *Allen*, the court held that ''there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.'' 397 U.S. at 343–344, 90 S.Ct. 1057.

Since rule 43 formerly limited trial in absentia to situations in which there is a ''voluntary absence after the trial has been commenced,'' it could be read as precluding a federal judge from exercising the third option held to be constitutionally permissible in *Allen*. The amendment is designed to make clear that the judge

does have the power to exclude the defendant from the courtroom when the circumstances warrant such action.

The decision in *Allen*, makes no attempt to spell out standards to guide a judge in selecting the appropriate method to ensure decorum in the courtroom and there is no attempt to do so in the revision of the rule.

The concurring opinion of Mr. Justice Brennan stresses that the trial judge should make a reasonable effort to enable an excluded defendant ''to communicate with his attorney and, if possible, to keep apprised of the progress of the trial.'' 397 U.S. at 351, 90 S.Ct. 1057. The Federal Judicial Center is presently engaged in experimenting with closed circuit television in courtrooms. The experience gained from these experiments may make closed circuit television readily available in federal courtrooms through which an excluded defendant would be able to hear and observe the trial.

The defendant's right to be present during the trial on a capital offense has been said to be so fundamental that it may not be waived. *Diaz v. United States*, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912) (dictum); *Near v. Cunningham*, 313 F.2d 929, 931 (4th Cir. 1963); C. Wright, Federal Practice and Procedure: Criminal §723 at 199 (1969, Supp.1971).

However, in *Illinois v. Allen, supra* the court's opinion suggests that sanctions such as contempt may be least effective where the defendant is ultimately facing a far more serious sanction such as the death penalty. 397 U.S. at 345, 90 S.Ct. 1057. The ultimate determination of when a defendant can waive his right to be present in a capital case (assuming a death penalty provision is held constitutional, see *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)) is left for further clarification by the courts.

Subdivision (b)(1) makes clear that voluntary absence may constitute a waiver even if the defendant has not been informed by the court of his obligation to remain during the trial. Of course, proof of voluntary absence will require a showing that the defendant knew of the fact that the trial or other proceeding was going on. C. Wright, Federal Practice and Procedure: Criminal §723 n. 35 (1969). But it is unnecessary to show that he was specifically warned of his obligation to be present; a warning seldom is thought necessary in current practice. [See *Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973).]

Subdivision (c)(3) makes clear that the defendant need not be present at a conference held by the court and counsel where the subject of the conference is an issue of law.

The other changes in the rule are editorial in nature. In the last phrase of the first sentence, ''these rules'' is changed to read ''this rule,'' because there are no references in any of the other rules to situations where the defendant is not required to be present. The phrase ''at the time of the plea,'' is added to subdivision (a) to make perfectly clear that defendant must be present at the time of the plea. See rule 11(c)(5) which provides that the judge may set a time, other than arraignment, for the holding of a plea agreement procedure.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247; 1975 AMENDMENT

A. Amendments Proposed by the Supreme Court. Rule 43 of the Federal Rules of Criminal Procedure deals with the presence of the defendant during the proceedings against him. It presently permits a defendant to be tried in absentia only in non-capital cases where the defendant has voluntarily absented himself after the trial has begun.

The Supreme Court amendments provide that a defendant has waived his right to be present at the trial of a capital or noncapital case in two circumstances: (1) when he voluntarily absents himself after the trial has begun; and (2) where he ''engages in conduct which is such as to justify his being excluded from the courtroom.''

B. Committee Action. The Committee added language to subdivision (b)(2), which deals with excluding a disruptive defendant from the courtroom. The Advisory Committee Note indicates that the rule proposed by the Supreme Court was drafted to reflect the decision in *Illinois v. Allen*, 397 U.S. 337 (1970). The Committee found that subdivision (b)(2) as proposed did not full track the *Allen* decision. Consequently, language was added to that subsection to require the court to warn a disruptive defendant before excluding him from the courtroom.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

The revisions to Rule 43 focus on two areas. First, the amendments make clear that a defendant who, initially present at trial or who has entered a plea of guilty or nolo contendere, but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the rule is amended to extend to organizational defendants. In addition, some stylistic changes have been made.

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive change in the operation of that provision.

Subdivision (b). The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulate a guideline sentence.

The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. See *generally Crosby v. United States*, 113 S.Ct. 748, 506 U.S. 255 (1993). The amendment extends only to noncapital cases and applies only where the defendant is voluntarily absent after the trial has commenced or where the defendant has entered a plea of guilty or nolo contendere. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words ''at trial, or having pleaded guilty or nolo contendere'' have been added at the end of the first sentence to make clear that the trial of an absent defendant is possible only if the defendant was previously present at the trial or has entered a plea of guilty or nolo contendere. See *Crosby v. United States, supra*.

Subdivision (c). The change to subdivision (c) is technical in nature and replaces the word ''corporation'' with a reference to ''organization,'' as that term is defined in 18 U.S.C. §18 to include entities other than corporations.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The amendment to Rule 43(c)(4) is intended to address two issues. First, the rule is rewritten to clarify whether a defendant is entitled to be present at resentencing proceedings conducted under Rule 35. As a result of amendments over the last several years to Rule 35, implementation of the Sentencing Reform Act, and caselaw interpretations of Rules 35 and 43, questions had been raised whether the defendant had to be present at those proceedings. Under the present version of the rule, it could be possible to require the defendant's presence at a ''reduction'' of sentence hearing conducted under Rule 35(b), but not a ''correction'' of sentence hearing conducted under Rule 35(a). That potential result seemed at odds with sound practice. As amended, Rule 43(c)(4) would permit a court to reduce or correct a sentence under Rule 35(b) or (c), respec-

tively, without the defendant being present. But a sentencing proceeding being conducted on remand by an appellate court under Rule 35(a) would continue to require the defendant's presence. *See, e.g., United States v. Moree*, 928 F.2d 654, 655–656 (5th Cir. 1991) (noting distinction between presence of defendant at modification of sentencing proceedings and those hearings that impose new sentence after original sentence has been set aside).

The second issue addressed by the amendment is the applicability of Rule 43 to resentencing hearings conducted under 18 U.S.C. §3582(c). Under that provision, a resentencing may be conducted as a result of retroactive changes to the Sentencing Guidelines by the United States Sentencing Commission or as a result of a motion by the Bureau of Prisons to reduce a sentence based on ''extraordinary and compelling reasons.'' The amendment provides that a defendant's presence is not required at such proceedings. In the Committee's view, those proceedings are analogous to Rule 35(b) as it read before the Sentencing Reform Act of 1984, where the defendant's presence was not required. Further, the court may only reduce the original sentence under these proceedings.

Changes Made to Rule 43 After Publication (''GAP Report''). The Committee made no changes to the draft amendment as published.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 43 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first substantive change is reflected in Rule 43(a), which recognizes several exceptions to the requirement that a defendant must be present in court for all proceedings. In addition to referring to exceptions that might exist in Rule 43 itself, the amendment recognizes that a defendant need not be present when the court has permitted video teleconferencing procedures under Rules 5 and 10 or when the defendant has waived the right to be present for the arraignment under Rule 10. Second, by inserting the word ''initial'' before ''arraignment,'' revised Rule 43(a)(1) reflects the view that a defendant need not be present for subsequent arraignments based upon a superseding indictment.

The Rule has been reorganized to make it easier to read and apply; revised Rule 43(b) is former Rule 43(c).

COMMITTEE NOTES ON RULES—2011 AMENDMENT

Subdivision (b). This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment allows participation through video teleconference as an alternative to appearing in person or not appearing. Participation by video teleconference is permitted only when the defendant has consented in writing and received the court's permission.

The Committee reiterates the concerns expressed in the 2002 Committee Notes to Rules 5 and 10, when those rules were amended to permit video teleconferencing. The Committee recognized the intangible benefits and impact of requiring a defendant to appear before a federal judicial officer in a federal courtroom, and what is lost when virtual presence is substituted for actual presence. These concerns are particularly heightened when a defendant is not present for the determination of guilt and sentencing. However, the Committee concluded that the use of video teleconferencing may be valuable in circumstances where the defendant would otherwise be unable to attend and the rule now authorizes proceedings in absentia.

Changes Made to Proposed Amendment Released for Public Comment. Because the Advisory Committee withdrew its proposal to amend Rule 32.1 to allow for video teleconferencing, the cross reference to Rule 32.1 in Rule 43(a) was deleted.

AMENDMENT BY PUBLIC LAW

1975—Pub. L. 94–64 amended subd. (b)(2) generally.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APRIL 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974 and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

Rule 44. Right to and Appointment of Counsel

(a) RIGHT TO APPOINTED COUNSEL. A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.

(b) APPOINTMENT PROCEDURE. Federal law and local court rules govern the procedure for implementing the right to counsel.

(c) INQUIRY INTO JOINT REPRESENTATION.

(1) *Joint Representation.* Joint representation occurs when:

(A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and

(B) the defendants are represented by the same counsel, or counsel who are associated in law practice.

(2) *Court's Responsibilities in Cases of Joint Representation.* The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Dec. 1, 1980; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

1. This rule is a restatement of existing law in regard to the defendant's constitutional right of counsel as defined in recent judicial decisions. The Sixth Amendment provides:

''In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.''

28 U.S.C. former §394 (now §1654) provides:

''In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.''

18 U.S.C. former §563 (now §3005), which is derived from the act of April 30, 1790 (1 Stat. 118), provides:

''Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours.''

The present extent of the right of counsel has been defined recently in *Johnson v. Zerbst*, 304 U.S. 458; *Walker v. Johnston*, 312 U.S. 275; and *Glasser v. United States*, 315 U.S. 60. The rule is a restatement of the principles