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State of North Dakota

JOINT PROCEDURE COMMITTEE

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STAFF ATTORNEY
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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 31, 2016
STATE OF NORTH DAKOTA

May 31, 2016

Honorable Gerald W. VandeWalle, Chief Justice
North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: Proposed Amendments to N.D.R.Crim.P. 43 (Defendant's Presence);
N.D.R.Crim.P. Form 17 (Misdemeanor Petition to Enter Plea of Guilty); and
Proposed New N.D.R.Crim.P. Form 18 (Petition to Waive Preliminary Hearing
and Arraignment in a Felony Case)

Dear Chief Justice:

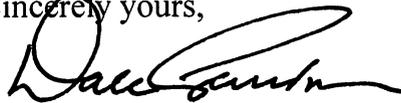
On February 8, the Joint Procedure Committee sent the Supreme Court proposed amendments to N.D.R.Crim.P. 10 and 43. The amendments were intended to clarify that a represented defendant in a felony case may waive the arraignment in writing. The Court considered the proposals and decided that anyone seeking to waive presence under Rule 43 should be required to submit a written acknowledgment that they were advised of their rights. The Court also decided that it would be advisable to create a form containing such an acknowledgment for use by defendants.

On February 25, the Court referred Rule 43 back to the committee for work on these issues. At its May 12-13 meeting, the committee reviewed the Court's recommended changes to Rule 43 and drafted a proposed new N.D.R.Crim.P. Form 18 for use by represented defendants in felony cases who seek waiver of the preliminary hearing and arraignment. The committee also drafted proposed amendments to N.D.R.Crim.P. Form 17, the misdemeanor waiver form, to insure that an up-to-date acknowledgment of rights was completely incorporated into the rule.

The committee made one change to Rule 43, deleting the reference to Rule 11(b) in Rule 43(b)(1). The rationale for this change was that Rule 11(b) lists the rights a defendant waives when making a guilty plea. Making a guilty plea is something that a defendant cannot do under Rule 43(b)(1), which only allows a waiver of presence at the preliminary hearing and arraignment and the entry of a not guilty plea. The proposed amendments to Rule 43 and Form 17 and the proposed new Form 18 are attached.

Thank you for referring this matter to the committee.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dale Sandstrom", with a large, stylized initial "D" and a long horizontal flourish extending to the right.

Dale V. Sandstrom
Chair, Joint Procedure Committee

RULE 43. DEFENDANT'S PRESENCE

1 (a) When Required.

2 (1) In General. Unless this rule provides otherwise, the defendant must be
3 present at:

4 (A) the initial appearance, the arraignment, and the plea;

5 (B) every trial stage, including jury impanelment and the return of the
6 verdict; and

7 (C) sentencing.

8 (2) Reliable Electronic Means. Presence permitted by contemporaneous
9 audio or audiovisual transmission by reliable electronic means is presence for the
10 purposes of this rule.

11 (3) Jury Question.

12 (A) In General. If, after beginning deliberations, the members of the jury
13 request information on a point of law or request to have testimony read or played
14 back to them, they must be brought into the courtroom. The court's response must
15 be provided in the presence of counsel and the defendant.

16 (B) Agreed Manner of Response. In the alternative, after consultation with
17 counsel in the presence of the defendant, the court may respond to a jury's question
18 or request for testimony in a manner other than in open court if agreed to by
19 counsel and the defendant.

20 (b) When Not Required. If the court permits, a defendant need not be
21 present under any of the following circumstances:

22 (1) Felony Offense. The offense is punishable by imprisonment for more
23 than one year, and with a represented defendant's written consent and written
24 acknowledgment that the defendant was advised of the rights listed in Rules
25 5(b)(1) and (2) and 5(c) and 11(b), the preliminary hearing, the arraignment, and
26 entry of a not guilty plea ~~and the preliminary hearing~~ may occur in the defendant's
27 absence.

28 (2) Misdemeanor Offense or Infraction. The offense is punishable by fine or
29 by imprisonment for not more than one year, or both, and with the defendant's
30 written consent and written acknowledgment that the defendant was advised of the
31 rights listed in Rules 5(b)(1) and (3) and 11(b), the arraignment, plea, trial, or
32 sentencing may occur in the defendant's absence.

33 (3) Conference or Hearing on Legal Question. The proceeding involves
34 only a conference or hearing on a question of law.

35 (4) Sentence Correction. The proceeding involves the correction or
36 reduction of sentence under Rule 35.

37 (c) Waiving Continued Presence. The further progress of the trial, including
38 the return of the verdict and the imposition of sentence, may not be prevented and
39 the defendant waives the right to be present if the defendant, initially present at
40 trial or having pleaded guilty:

41 (1) is voluntarily absent after the trial has begun (whether or not the
42 defendant has been informed by the court of the obligation to remain during the
43 trial);

44 (2) is voluntarily absent at the imposition of sentence; or

45 (3) after being warned by the court that disruptive conduct will cause the
46 removal of the defendant from the courtroom, persists in conduct that justifies the
47 defendant's exclusion from the courtroom.

48 EXPLANATORY NOTE

49 Rule 43 was amended, effective January 1, 1980; March 1, 1990; March 1,
50 1998; March 1, 2004; March 1, 2006; March 1, 2008; March 1, 2010; March 1,
51 2015;_____.

52 Although Rule 43 does not require the defendant's presence in all instances,
53 the rule does not give a defendant the right to be absent. The court has discretion
54 whether to require the presence of the defendant.

55 In a non-felony case, if the defendant pleads guilty without appearing in
56 court, a written form must be used advising the defendant of his or her
57 constitutional rights and creating a record showing that the plea was made
58 voluntarily, knowingly, and understandingly.

59 Rule 37 provides for summary affirmance if the defendant does not appear
60 at a trial anew.

61 Rule 43 was amended, effective March 1, 2006, in response to the

62 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
63 language and organization of the rule were changed to make the rule more easily
64 understood and to make style and terminology consistent throughout the rules.

65 Subdivision (a) was amended, effective March 1, 2004, in response to
66 amendments to Rule 5 and Rule 10 allowing interactive television to be used for
67 the initial appearance and arraignment. ~~N.D. Sup. Ct. Admin. R. 52, which took~~
68 ~~effect June 1, 2005, governs proceedings conducted by interactive television.~~

69 Subdivision (a) was amended, effective March 1, 2010, to explain
70 requirements for the consideration of questions submitted by the jury after
71 deliberations begin.

72 Subdivision (a) was amended, effective March 1, 2015, to allow a
73 defendant to be present by contemporaneous audio or audiovisual transmission
74 using reliable electronic means. Any appearance by a defendant by electronic
75 means must be consistent with the standards set by N.D. Sup. Ct. Admin. R. 52,
76 which governs the use of contemporaneous transmission by reliable electronic
77 means in court proceedings.

78 Subdivision (b) was amended, effective March 1, 2015, to allow a
79 represented defendant in a felony case to waive presence at the preliminary hearing
80 ~~by submitting~~ and submit a not guilty plea in writing.

81 Subdivision (b) was amended, effective _____, to clarify that a
82 represented defendant in a felony case may waive presence at the arraignment in

83 writing and to require all defendants seeking waiver of presence to acknowledge in
84 writing that they were advised of their rights.

85 SOURCES: Joint Procedure Committee Minutes of May 12-13, 2016,
86 pages _____; January 28-29, 2016, page 7; September 24-25, 2015, pages 21-23;
87 April 24-25, 2014, pages 12-15; May 21-22, 2009, pages 10-11; January 29-30,
88 2009, pages 13-17; September 28-29, 2006, pages 8-10; January 27-28, 2005,
89 pages 34-36; September 26-27, 2002, pages 13-14; January 30, 1997, pages 7-8;
90 September 26-27, 1996, pages 8-10; January 26-27, 1995, pages 5-6; September
91 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12; April 20, 1989, page 4;
92 December 3, 1987, page 15; December 7-8, 1978, pages 27-28; October 12-13,
93 1978, pages 43-44; December 11-15, 1972, pages 41-43; May 15-16, 1969, pages
94 11-13.

95 STATUTES AFFECTED:

96 SUPERSEDED: N.D.C.C. §§ 29-12-12, 29-13-02, 29-14-21, 29-16-03,
97 29-16-04, 29-16-06, 29-22-05, 29-22-11, 29-26-04, 33-12-23.

98 CONSIDERED: N.D.C.C. §§ 29-16-05, 29-26-11.

99 CROSS REFERENCE: N.D.R.Crim.P. 5 (Initial Appearance Before the
100 Magistrate); N.D.R.Crim.P. 10 (Arrest); N.D.R.Crim.P. 11 (Pleas);
101 N.D.R.Crim.P. 35 (Correcting or Reducing a Sentence); N.D.R.Crim.P. 37
102 (Appeal as of Right to District Court; How Taken); N.D.R.Crim.P. Appendix Form
103 17 (Misdemeanor Petition to Enter Plea of Guilty); N.D.R.Crim.P. Appendix

104 Form 18 (Petition to Waive Preliminary Hearing and Arraignment in a Felony
105 Case); N.D. Sup. Ct. Admin. R. 52 (Contemporaneous Transmission by Reliable
106 Electronic Means).

FORM 17. (RULES 5, 11 & 43, N.D.R.Crim.P.)

STATE OF NORTH DAKOTA
COUNTY OF _____

IN DISTRICT COURT
CRIMINAL NO. _____

THE STATE OF NORTH DAKOTA,
PLAINTIFF
vs.

MISDEMEANOR PETITION
TO ENTER
PLEA OF GUILTY

_____,
DEFENDANT

TO: THE ABOVE-NAMED COURT:

I wish to plead guilty in this case and I state to the Court the following:

1. I am the Defendant in this case, my full name is _____ and my date of birth is _____.

2. I am charged with _____ (name of offense) _____ in violation of _____ (statute or ordinance) _____.

3. I plead guilty to the offense of _____ (name of offense) _____ in violation of _____ (statute or ordinance) _____.

4. I am pleading guilty because on _____ (date) _____ in the City of _____, County of _____, and State of North Dakota I committed the following acts: _____ (state sufficient facts to establish a factual basis for all elements of the offense to which the defendant is pleading guilty) _____.

5. I understand ~~that~~ the maximum possible sentence for the ~~misdemeanor~~ offense to which I am pleading guilty is _____ days imprisonment of _____ or and a fine of ____ (amount) ____ or both, and that the Court may impose a sentence of imprisonment of not less than _____ days imprisonment or a fine of _____ or both (if a minimum sentence is required by statute). I understand the mandatory minimum sentence for the offense with which I am charged is imprisonment of _____ and a fine of _____ and the following requirements: _____.

6. I understand that a person convicted of a crime who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

7. I understand that I may be ordered to pay restitution.

8. I understand that I have the right to be admitted to reasonable bail.

9. RIGHT TO AN ATTORNEY. I understand that I have the right to be represented by an attorney and that an attorney will be appointed to represent me to the extent that I am unable to pay for my own defense without undue hardship.

10. I have fully discussed the charge(s), my constitutional rights, and this petition with my attorney, ____ (name of attorney) ____.

[or]

8a 10a. WAIVER OF ATTORNEY. I give up my right to be represented by an attorney and any right I might have to request that an attorney be appointed to represent me.

9 11. I understand that I also have the following constitutional rights which I knowingly and voluntarily give up:

a. The right to a trial by jury in which I am presumed innocent until proven guilty beyond a reasonable doubt, and all jurors must agree.

b. The right to confront and cross-examine all witnesses against me.

c. The right to remain silent, or to testify for myself.

d. The right to subpoena and present witnesses to testify for me in my defense.

e. The right to a pretrial hearing to contest the admissibility at trial of any confessions or admissions, or of any evidence obtained from a search and seizure.

10 12. I am pleading guilty freely and voluntarily and without any promises except as indicated in number 11 13 below.

11 13. I am pleading guilty based on the following plea agreement with the prosecutor:

_____ (if none, so state) _____.

12 14. I understand that if the Court does not approve this agreement I have the right to withdraw my plea of guilty and have a trial.

13 15. I understand that if this plea of guilty is accepted I have the right to be present at the time of sentencing and to speak and to present evidence on my behalf.

14 16. I request to be present at the time of sentencing.

[or]

14a 16a. I knowingly and voluntarily give up my right to be present upon (entry of my plea and) sentencing and request that the court sentence me in my absence, but according to any plea agreement that might be contained in this petition.

Dated this ____ day of _____, 19__.

Signature of Defendant

Printed Name of Defendant

Subscribed and sworn to before me this

____ day of _____, 19__.

NOTARY PUBLIC

I, ___(name of attorney)___ state that I am the attorney for the defendant in this criminal action; that I personally explained the contents of the above petition to the defendant; ~~and that I personally observed the defendant date and sign the above petition.~~

Dated this _____ day of _____, 19__.

Attorney for Defendant

PETITION AND PLEA OF GUILTY ACCEPTED BY

Judge of (District Court) ~~Date~~

FORM 18. (RULE 43, N.D.R.Crim.P.)

STATE OF NORTH DAKOTA
COUNTY OF _____

IN DISTRICT COURT
CRIMINAL NO. _____

THE STATE OF NORTH DAKOTA,
PLAINTIFF

vs.

DEFENDANT

PETITION TO WAIVE
PRELIMINARY HEARING
AND ARRAIGNMENT
IN A FELONY CASE

TO THE ABOVE-NAMED COURT:

I wish to waive the preliminary hearing and arraignment in this case and I state to the Court the following:

1. I am the Defendant in this case, my full name is _____ and my date of birth is _____.

2. I am charged with _____ (name of offense) in violation of _____ (statute or ordinance)_____.

3. I understand the maximum possible sentence for the offense with which I am charged is imprisonment of _____ and a fine of _____. I understand the mandatory minimum sentence for the offense with which I am charged is imprisonment of _____ and a fine of _____.

4. I am represented by _____.

5. I have been advised by my attorney that:

a. I have a right to remain silent and that any statement I make may later be used against me;

b. I have a right to the assistance of counsel before making any statement or answering any questions;

c. I have a right to be represented by counsel at each and every stage of the proceedings;

d. I have a right to have legal services provided at public expense to the extent that I am unable to pay for my defense without undue hardship; and

e. I have the right to be admitted to reasonable bail under Rule 46.

6. I understand that a defendant who is not a United States citizen may request that an attorney for the state or a law enforcement officer notify a consular officer from the defendant's country of nationality that the defendant has been arrested. I understand that a person convicted of a crime who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

7. I have been advised by my attorney that:

a. I have the right to plead not guilty and to persist in that plea;

b. I have the right to a jury trial;

c. I have the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses.

8. I understand that I am presumed to be not guilty. At trial, the burden of proof will be on the State to prove beyond a reasonable doubt that I committed the offense. I understand that I will waive my right to a trial if I later choose to plead guilty

9. I understand I have the right to a preliminary hearing under Rule 5.1. The purpose of the preliminary hearing would not be to determine guilt or innocence, but for the Court to determine whether there is probable cause to believe that an offense has been committed and I committed the offense.

10. I understand that under Rule 10 I have a right to an arraignment in open court and to have the indictment, information, or complaint read before entering a plea.

11. I have fully discussed the charge(s), all my rights, and this petition with my attorney, _____ (name of attorney) _____. I knowingly and voluntarily give up my right to be present at the preliminary hearing and arraignment. I request that the preliminary hearing and arraignment in open court be waived and the Court enter a plea of NOT GUILTY to the charge(s) in the indictment, information or complaint on my behalf.

Dated this _____ day of _____, _____.

Signature of Defendant

Printed Name of Defendant

Subscribed and sworn to before me this

 day of , .

NOTARY PUBLIC

I, ___ (name of attorney) ___ state that I am the attorney for the defendant in this criminal action and that I personally explained the contents of the above petition to the defendant.

Dated this ___ day of ___.

Attorney for Defendant

PETITION TO WAIVE PRELIMINARY HEARING AND ARRAIGNMENT ACCEPTED
BY

Judge of (District Court)Date