

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

**ORDER OF ADOPTION**

Supreme Court No. 20160071

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**Proposed Amendments to North Dakota Rules of Criminal Procedure 10, Regarding Arraignment, Rule 43, Regarding the Defendant's Presence, and Form 17, Misdemeanor Petition to Enter Plea of Guilty, and Proposed New Form 18, Petition to Waive Preliminary Hearing and Arraignment in Felony Case**

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[¶ 1] On February 8, 2016, the Joint Procedure Committee submitted a petition to amend North Dakota Rules of Criminal Procedure 10 regarding Arraignment and 43 regarding defendant's presence. On February 26, 2016, the Supreme Court referred the proposal back to the Committee to consider whether the requirements of N.D.R.Crim.P. 5(b)(1), (2) and (3) should be referenced in N.D.R.Crim.P. 43 and whether a form should be developed.

[¶ 2] On May 31, 2016, the Joint Procedure Committee submitted additional amendments to N.D.R.Crim.P. 43, amendments to Form 17 regarding a misdemeanor petition to enter plea of guilty, and a new Form 18 regarding a petition to waive preliminary hearing and arraignment in felony case. The proposals are available at <http://www.ndcourts.gov/Court/Notices/Notices.htm>. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal. The Court considered the matter, and

[¶ 5] **ORDERED**, that the proposed amendments to North Dakota Supreme Court North Dakota Rules of Criminal Procedure 10 and 43 are ADOPTED, effective October 1, 2016.

[¶ 5] **IT IS FURTHER ORDERED**, that, as amended by the Court, the proposed amendments to North Dakota Supreme Court North Dakota Rules of Criminal Procedure 43, Form 17 and proposed new North Dakota Supreme Court North Dakota Rules of Criminal Procedure 43 Form 18 are ADOPTED, effective October 1, 2016.

[¶ 6] The Supreme Court of the State of North Dakota convened the 10th day of August, 2016, with the Honorable Gerald W. Vandewalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Carol Ronning Kapsner, the Honorable Daniel J. Crothers, and the Honorable Lisa Fair McEvers, Justices, directing the Clerk of the Supreme Court to enter the above order.

  
Penny Miller  
Clerk  
North Dakota Supreme Court

RULE 10 ARRAIGNMENT

1 (a) In General. ~~Arraignment~~ Unless the defendant has waived presence  
2 under Rule 43, arraignment must be conducted in open court and consists of:

3 (1) ensuring the defendant has a copy of the indictment, information, or  
4 complaint;

5 (2) reading the indictment, information, or complaint to the defendant or  
6 stating to the defendant the substance of the charge; and then

7 (3) asking the defendant to plead to the indictment, information or  
8 complaint.

9 If the defendant appears at the arraignment without counsel, the defendant must be  
10 informed of the right to counsel as provided in Rule 44.

11 (b) Reliable Electronic Means. Contemporaneous audio or audiovisual  
12 transmission by reliable electronic means may be used to arraign a defendant as  
13 permitted by N.D. Sup. Ct. Admin. R 52.

14 EXPLANATORY NOTE

15 Rule 10 was amended, effective March 1, 1990; March 1, 2004; March 1,  
16 2006; March 1, 2016; October 1, 2016.

17 Rule 10 follows Fed.R.Crim.P. 10 in substance and controls with respect to  
18 all arraignments which arise within the state.

19 Rule 10 is designed both to safeguard important rights of the defendant as  
20 well as to protect proper administration of criminal law. The arraignment is an

21 appearance before the court, intended to inform the accused of the charge against  
22 the accused and to obtain an answer from the accused. It is an important step in the  
23 criminal case, since it formulates the issue to be tried.

24 Failure to comply with the requirements of a proper arraignment is an  
25 irregularity that does not warrant a reversal of a conviction if not raised before  
26 trial. Under the rule, no specific time for the arraignment is set and no precise  
27 ceremonial or verbal formality need be followed.

28 Rule 10 was amended, effective March 1, 2004. The existing text of the rule  
29 was divided into subdivisions to improve clarity.

30 Subdivision (a) was amended, effective October 1, 2016, to reference  
31 Rule 43, which contains provisions allowing waiver of presence under specified  
32 circumstances.

33 Subdivision (b) was added effective March 1, 2004, to permit the use of  
34 interactive television to conduct the arraignment. Subdivision (b) was amended,  
35 effective March 1, 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs  
36 proceedings conducted by remote means. Subdivision (b) was further amended,  
37 March 1, 2016, to allow the use of contemporaneous audio or audiovisual  
38 transmission by reliable electronic means to conduct the arraignment.

39 Rule 10 was amended, effective March 1, 2006, in response to the  
40 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The  
41 language and organization of the rule were changed to make the rule more easily  
42 understood and to make style and terminology consistent throughout the rules.

43                   SOURCES: Joint Procedure Committee Minutes of January 28-29, 2016,  
44 page 7; September 24-25, 2015, pages 23-24; April 23-24, 2015, pages 13-14;  
45 April 29-30, 2004, pages 26-28;September 26-27, 2002, page 13; April 20, 1989,  
46 page 4; December 3, 1987, page 15; March 23-25, 1972, pages 20-23; May 3-4,  
47 1968, pages 8-9; Fed.R.Crim.P. 10.

48                   STATUTES AFFECTED:

49                   SUPERSEDED: N.D.C.C. §§ 29-11-56, 29-12-01, 29-13-01, 29-13-03, 29-  
50 13-04, 29-13-05, 29-13-06, 29-13-07, 29-13-08, 29-13-09, 33-12-15.

51                   CROSS REFERENCE: N.D.R.Crim.P. 5 (Initial Appearance Before the  
52 Magistrate); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right  
53 to and Appointment of Counsel); N.D.Sup.Ct.Admin.R. 52 (Contemporaneous  
54 Transmission by Reliable Electronic Means).

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), 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; October 1, 2016.

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 October 1, 2016, 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 2-10; 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 (Arrestment); 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 Arrestment 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~~ year 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.

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

7 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.

8 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\_\_.

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Attorney for Defendant

PETITION AND PLEA OF GUILTY ACCEPTED BY

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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 year 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