

In the Matter of the Amendment

of the

HAWAII RULES OF PENAL PROCEDURE

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ORDER VACATING THE DECEMBER 17, 2007

ORDER AMENDING RULES 5(b)(1), 10(a), AND 43(c)

OF THE HAWAII RULES OF PENAL PROCEDURE AND

AMENDING RULES 5(b)(1), 10(d), AND 43(c)

OF THE HAWAII RULES OF PENAL PROCEDURE

\_\_\_\_ (By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Upon review of the December 17, 2007, Order Amending Rules 5(b)(1), 10(a), and 43(c) of the Hawaii Rules of Penal Procedure it appears the order erroneously designated an amendment for Rule 10(a) of the Hawaii Rules of Penal Procedure that should have been designated as an amendment of Rule 10(d) of the Hawaii Rules of Penal Procedure. Therefore,

IT IS HEREBY ORDERED that the December 17, 2007, Order Amending Rules 5(b)(1), 10(a), and 43(c) of the Hawaii Rules of Penal Procedure is vacated.

IT IS FURTHER ORDERED that Rules 5(b)(1), 10(d), and 43(c) of the Hawaii Rules of Penal Procedure are amended as follows, effective January 1, 2008 (deleted material is bracketed and stricken, new material is underlined):

**Rule 5. PROCEEDINGS FOLLOWING ARREST**

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**(b) Offenses other than felony.**

(1) ARRAIGNMENT. In the district court, if the offense charged against the defendant is other than a felony, the complaint shall be filed or the oral charge stated, a copy of such charge and any affidavits in support thereof, and a copy of the appropriate order, if any, shall be furnished to the defendant and proceedings shall be had in accordance with this section (b). Arraignment shall be in open court or by video conference when permitted by Rule 43 and shall consist of the reading of the complaint or the statement of the oral charge to the defendant, or stating the substance of the charge and calling on the defendant to plead thereto. The defendant may waive the reading of the complaint or the

statement of the oral charge at arraignment provided that an oral charge shall be stated at the commencement of trial or prior to entry of a guilty or no contest plea. In addition to the requirements of Rule 10(e), the court shall in appropriate cases inform the defendant of the right to jury trial in the circuit court or that the defendant may elect to be tried without a jury in the district court.

#### **Rule 10. ARRAIGNMENT IN THE CIRCUIT COURT.**

(d) Arraignment in the circuit court shall be conducted in open court ~~[and]~~ or by video conference when permitted by Rule 43. The arraignment shall consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the charge before the defendant is called upon to plead. In felony cases charged by written information, the defendant shall be furnished with a copy of the information and all attached exhibits at the initial court appearance and the custody of the materials shall be governed by Rule 16. ~~[Video teleconferencing may be used to arraign a defendant not physically present in court, if the defendant waives the right to be arraigned in open court.]~~

#### **Rule 43. PRESENCE OF THE DEFENDANT.**

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(c) **Presence not required.** A defendant need not be present ~~[in the following situations]~~ if:

(1) the defendant is a corporation [may] and appears by counsel [for all purposes]; or

(2) ~~[in prosecutions for offenses other than a felony, the court, with the written consent of the defendant or on the oral representation of defendant's counsel that the defendant consents thereto, may permit arraignment, plea of not guilty, and evidentiary pretrial hearing in the defendant's absence]~~ the proceeding is a conference or argument upon a question of law; or

(3) ~~[at a conference or argument upon a question of law;]~~

~~[(4)]~~ the proceeding is [at] a reduction of sentence under Rule 35[.];

~~[(5) when the proceeding is a pretrial session in which the defendant can participate through video teleconferencing and waives the right to be present in court; or~~

~~—————(6) in prosecutions for offenses other than a felony and where the defendant's permanent residence is out-of-state or on an island other than where the offense was committed, the court, with the written consent of the defendant, may permit a plea of guilty or nolo contendere and impose sentence in the defendant's absence. Except for the requirement of addressing the defendant personally in open court, the court shall otherwise comply with the requirements of Rule 11 and Rule 32.]~~

(d) **Presence may be waived.** In prosecutions for offenses other than a felony, the court may:

(1) conduct arraignment, accept a plea of not guilty, or conduct an evidentiary pretrial hearing in the defendant s absence, provided the defendant consents in writing or the defendant s counsel orally represents that the defendant consents.

(2) accept a plea of guilty or no contest and impose sentence in the defendant s absence when the defendant s permanent residence is out-of-state or on an island other than where the offense was committed, provided the defendant consents in writing. Except for the requirement of addressing the defendant personally in open court, the court shall otherwise comply with the requirements of Rule 11 and Rule 32.

**(e) Presence may be by video conference.**

(1) The court may conduct arraignment, a non-evidentiary pre-trial proceeding, or a non-evidentiary post-conviction proceeding by video conference, provided the defendant consents in writing or the defendant s counsel orally represents that the defendant consents.

(2) The court may conduct a pre-trial evidentiary proceeding by video conference with the defendant s written consent.

DATED: Honolulu, Hawai i, December 21, 2007.