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SCRU-11-0000083

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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In the Matter of the  
HAWAI‘I RULES OF PENAL PROCEDURE

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ORDER AMENDING RULES 11 and 43 OF  
THE HAWAI‘I RULES OF PENAL PROCEDURE

(By: Recktenwald, C.J., McKenna, and Eddins, JJ., and  
Intermediate Court of Appeals Chief Judge Ginoza, and  
Intermediate Court of Appeals Associate Judge Leonard,  
assigned by reason of vacancies)

IT IS HEREBY ORDERED that Rules 11 and 43 of the  
Hawai‘i Rules of Penal Procedure are amended, effective January  
1, 2024, as follows (new material is underscored):

**Rule 11. PLEAS.**

**(a) Alternatives.**

(1) IN GENERAL. A defendant may plead not guilty, guilty or no contest. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or no contest or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) CONDITIONAL PLEAS. With the approval of the court and the consent of the State, a defendant may enter a conditional plea of guilty or no contest, reserving in writing the right, on appeal from the judgment, to seek review of the adverse determination of any specific pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

**(b) No contest.** A defendant may plead no contest only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

**(c) Advice to defendant.** The court shall not accept a plea of guilty or no contest without first addressing the defendant personally in open court, or by video conference with defendant's consent and affirmation of defendant's identity on the record, and determining that the defendant understands the following:

- (1) the nature of the charge to which the plea is offered; and
- (2) the maximum penalty provided by law, and the maximum sentence of extended term of imprisonment, which may be imposed for the offense to which the plea is offered; and
- (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and
- (4) that if the defendant pleads guilty or no contest there will not be a further trial of any kind, so that by pleading guilty or no contest the right to a trial is waived.

**(d) Advisement Concerning Alien Status.** Prior to entry of a plea of guilty or no contest, or admission of guilt or sufficient facts to any offense punishable as a crime under state law, except those offenses designated as infractions, the court shall read the advisement in § 802E-2, Hawai'i Revised Statutes, on the record to the defendant.

**(e) Insuring that the plea is voluntary.** The court shall not accept a plea of guilty or no contest without first addressing the defendant personally in open court, or by video conference after defendant's consent and affirmation of defendant's identity on the record, and determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or no contest results from any plea agreement.

**(f) Plea agreement.**

(1) **IN GENERAL.** The prosecutor and counsel for the defendant, or the defendant when acting pro se, may enter into plea agreements that, upon the entering of a plea of guilty or no contest to a charged offense or to an included or related offense, the prosecutor will take certain actions or adopt certain positions, including the dismissal of other charges and the recommending or not opposing of specific sentences or dispositions on the charge to which a plea was entered. The court may participate in discussions leading to such plea agreements and may agree to be bound thereby.

(2) **NOTICE OF PLEA AGREEMENT.** Any plea agreement shall be disclosed by the parties to the court at the time the defendant tenders the defendant's plea. Failure by the prosecutor to comply with such agreement shall be grounds for withdrawal of the plea.

(3) **WARNING TO DEFENDANT.** Upon disclosure of any plea agreement, the court shall not accept the tendered plea unless the defendant is informed that the court is not bound by such agreement, unless the court agreed otherwise.

(4) **INADMISSIBILITY OF PLEA DISCUSSIONS.** Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or of a plea of no contest, or of an offer to plead guilty or no contest to the offense charged or any other offense, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or penal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of no contest, or an offer to plead guilty or no contest to the offense charged or any other offense is admissible in a penal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(g) **Determining accuracy of plea.** Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

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

(a) **Presence required.** The defendant shall be present at the arraignment, at the time of the plea, at evidentiary pretrial hearings, 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 further progress of a pretrial evidentiary hearing or of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

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

(2) engages in conduct which is such as to justify exclusion from the courtroom.

(c) **Presence not required.** A defendant need not be present either physically or by video conference if:

(1) the defendant is a corporation and appears by counsel; or

(2) the proceeding is a conference or argument upon a question of law; or

(3) the proceeding is a reduction of sentence under Rule 35.

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

(1) conduct an arraignment, wherein a plea of not guilty is accepted, 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) conduct an arraignment in the defendant's absence, if the defendant's residence is out-of-state or on another island, the defendant consents in writing, and a plea of guilty or no contest is

(A) accepted and sentence is imposed; or

(B) offered and acceptance is deferred. 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 of these Rules.

(3) in the case of a violation, conduct an arraignment, accept a plea of guilty or no contest, and impose a sentence in the defendant's absence, provided the defendant consents in writing.

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

(1) The court may conduct by video conference, without the consent of the defendant, an arraignment wherein it accepts a plea of not guilty;

(2) The court may conduct by video conference, with the oral or written consent of the defendant,

(A) an arraignment or hearing wherein it accepts, or takes under advisement, a plea of guilty or no contest,

(B) a pre-trial evidentiary or non-evidentiary proceeding, or

(C) a post-conviction evidentiary or non-evidentiary proceeding, other than a sentencing hearing.

(3) The court may conduct a sentencing hearing and impose sentence by video conference with the oral or written consent of both the prosecution and the defendant.

DATED: Honolulu, Hawai'i, September 28, 2023.

/s/ Mark E. Recktenwald

/s/ Sabrina S. McKenna

/s/ Todd W. Eddins

/s/ Lisa M. Ginoza

/s/ Katherine G. Leonard

