

IN THE SUPREME COURT OF OHIO

ORIGINAL

CITY OF CLEVELAND,	:	Case No.	09-0441
	:		
Appellant,	:	Discretionary Appeal from the	
	:	Cuyahoga County Court of Appeals,	
v.	:	Eighth Appellate District	
	:	(Court of Appeals Case No. 91379)	
WASHINGTON MUTUAL BANK,	:		
	:		
Appellee.	:		

MERIT BRIEF OF APPELLEE WASHINGTON MUTUAL BANK

Nelson M. Reid (0068434)
 Vladimir P. Belo (0071334)
(Counsel of Record)
 BRICKER & ECKLER LLP
 100 South Third Street
 Columbus, Ohio 43215
 Telephone: (614) 227-2300
 Fax: (614) 227-2390
 E-mail: nreid@bricker.com
 vbelo@bricker.com

ROBERT J. TROZZI, DIRECTOR OF LAW
 Karyn J. Lynn (0065573)
(Counsel of Record)
 City of Cleveland, Dept. of Law
 601 Lakeside Avenue, Room 106
 Cleveland, Ohio 44114-1077
 Telephone: (216) 664-4304
 Fax: (216) 420-8291
 E-mail: klynn@city.cleveland.oh.us

Counsel for Appellant, City of Cleveland

and

Benjamin D. Carnahan (0079737)
 Shapiro, Van Ess, Phillips & Barragate, LLP
 4805 Montgomery Road, Suite 320
 Cincinnati, Ohio 45212
 (513) 396-8100 - Phone
 (847) 627-8805 Fax
 E-mail: bcarnahan@LOGS.com

RICHARD CORDRAY (0038034)
 OHIO ATTORNEY GENERAL
 Benjamin C. Mizer (0083089)
(Counsel of Record)
 Solicitor General of Ohio
 Alexandra T. Schimmer (0075732)
 Chief Deputy Solicitor
 30 E. Broad Street, 17th Floor
 Columbus, Ohio 43215
 Telephone: (614) 466-8980
 Fax: (614) 466-5087
 benjamin.mizer@ohioattorneygeneral.gov
 Counsel for Amicus Curiae,
 Ohio Attorney General Richard Cordray

Counsel for Appellee,
Washington Mutual Bank

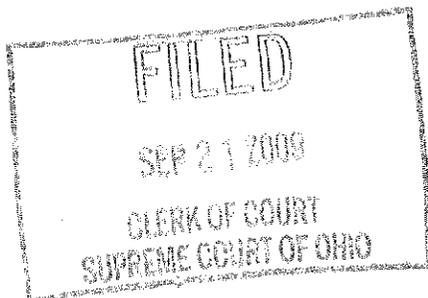


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
APPELLEE’S STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	5
I. Appellee’s Response to Proposition of Law No. II: R.C. 2941.47 Does Not Apply To Prosecutions Initiated By Complaint or Authorize a Corporate Criminal Defendant To Be Tried In Absentia.....	6
A. R.C. 2941.47 Does Not Apply To Prosecutions Initiated By Complaint.	7
B. Regardless of the Charging Instrument Used, R.C. 2941.47 Does Not Authorize a Corporation Defendant to be Tried In Absentia.....	11
C. The Service And Pleading Requirements Have Not Been Met In This Case.....	15
II. Appellee’s Response to Proposition of Law No. III: Because R.C. 2941.47 Does Not Allow a Trial In Absentia, It is Appropriate to Consider R.C. 2938.12, R.C. 2945.12, and Crim.R. 43 To Determine Whether a Corporate Defendant Can Be Tried In Absentia for a Misdemeanor.	17
A. Criminal Rule 43 Does Not Enlarge a Substantive Right and is Therefore Applicable Here.	18
B. R.C. 2941.47 is Not a “Specific” Statute That Governs The Instant Case Because It Does Not Expressly Allow a Corporation to be Criminally Tried In Absentia.	22
1. Giving Effect To Both Statutes Does Not Justify A Trial In Absentia.	23
2. R.C. 2941.47 is Not a “Specific” Statute That Controls Over R.C. 2938.12.....	24
III. The Amicus Curiae’s Separate Arguments Do Not Support Reversal of the Court of Appeals’ Judgment.	26
CONCLUSION.....	29
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Cater v. Cleveland</i> (1998), 83 Ohio St.3d 24	25
<i>Cleveland v. Ely</i> (1963), 174 Ohio St. 403	9
<i>Crosby v. United States</i> (1993), 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25	24
<i>Diaz v. United States</i> (1912), 223 U.S. 442, 32 S.Ct. 250	21, 24
<i>Henrich v. Hoffman</i> (1947), 148 Ohio St. 23	14
<i>Hughes v. Registrar, Ohio Bureau of Motor Vehicles</i> (1997), 79 Ohio St.3d 305	22
<i>In re Weiland</i> , 89 Ohio St.3d 535, 2000-Ohio-233	11
<i>Kentucky v. Stincer</i> (1987), 482 U.S. 730	5, 20, 25
<i>Lima v. Ward</i> (1966), 8 Ohio App.2d 177	9
<i>Miami Cty. v. Dayton</i> (1915), 92 Ohio St. 215	21
<i>Proctor v. Kardassilaris</i> , 115 Ohio St.3d 71, 2007-Ohio-4838	19
<i>State ex rel. Birdsall v. Stephenson</i> (1994), 68 Ohio St.3d 353	20
<i>State ex rel. Carter v. Wilkinson</i> (1994), 70 Ohio St.3d 65	15, 19
<i>State ex rel. Cleveland Elec. Illum. Co. v. Euclid</i> (1959), 169 Ohio St. 476	14
<i>State v. Conyers</i> , 87 Ohio St.3d 246, 1999-Ohio-60	14
<i>State v. Davis</i> , 116 Ohio St.3d 404, 2008-Ohio-2	5
<i>State v. Foley</i> (Dec. 22, 1982), Hamilton App. No. C-820095, 1982 WL 9260	9
<i>State v. Gundlach</i> (1960), 112 Ohio App. 471	9
<i>State v. Heyden</i> (1992), 81 Ohio App.3d 272	20
<i>State v. Hill</i> (1995), 73 Ohio St.3d 433	20
<i>State v. Meade</i> (1997), 80 Ohio St.3d 419	20, 21, 25
<i>State v. Nichols</i> (Aug. 21, 1989), 12th Dist. App. No. CA89-01-001, 1989 Ohio App. LEXIS 3234	21
<i>State v. Ross</i> (1973), 36 Ohio App.2d 185	9

<i>State v. Whitt</i> (1964), 3 Ohio App.2d 278.....	9
<i>Tokles & Son, Inc. v. Midwestern Indmn. Co.</i> (1992), 65 Ohio St.3d 621	28
<i>Toledo v. Cousino</i> (Nov. 23, 1984), Lucas App. No. L-84-103, 1984 WL 14423	9
<i>Village Condominium Owners Assn v. Montgomery Cty. Bd. of Revision</i> , 106 Ohio St.3d 223, 2005-Ohio-4631	25
<i>Walden v. State</i> (1989), 47 Ohio St.3d 47.....	13

STATUTES

R.C. 1.51	23, 24, 25, 26
R.C. 1.59	17, 28
R.C. 2935.17(B).....	10
R.C. 2938.12	passim
R.C. 2941.021	11
R.C. 2941.35	passim
R.C. 2941.47	passim
R.C. 2945.12	passim

RULES

Civ.R. 4.2(F)	15
Crim.R. 43.....	passim
Crim.R. 43(A)(1)	17, 18
Crim.R. 43(A)(3)	17, 18
Crim.R. 43(B)	17
Crim.R. 7.....	27
Crim.R. 7(A).....	27

CONSTITUTIONAL PROVISIONS

Section 10, Article I, Ohio Constitution	5, 20
Section 5(B), Article IV, Ohio Constitution	18

INTRODUCTION

This Court and the United States Supreme Court have recognized the right of a criminal defendant to be present at all critical stages of the prosecution proceedings, including the trial itself. In this case, Appellant City of Cleveland obtained a misdemeanor conviction in the Cleveland Municipal Court against Appellee Washington Mutual Bank (“Washington Mutual”) for housing code violations after a trial at which neither a representative of Washington Mutual nor its counsel was present.

Even though a trial in Washington Mutual’s absence was not authorized by Ohio Criminal Rule 43, R.C. 2938.12, or R.C. 2945.12—provisions that speak specifically to the circumstances under which a defendant may be tried in absentia—the municipal court proceeded in absentia based upon R.C. 2941.47. But even though R.C. 2941.47 speaks to criminal prosecutions of corporations, it does *not* specifically authorize a trial in absentia for a municipal court prosecution of a misdemeanor complaint. In vacating Washington Mutual’s conviction, the Eighth District Court of Appeals reached the unremarkable conclusion that the municipal court overstepped its authority by proceeding with the trial in the defendant’s absence when R.C. 2941.47 provided no authority for doing so.

In this appeal, the City and the Attorney General (as *amicus curiae*) ask this Court to interpret R.C. 2941.47 in a manner that would be nothing short of making law by judicial fiat. To boot, they ask this Court to do so in a case in which the record calls into serious question whether Washington Mutual was ever validly served with the criminal summons that started this case. While the City may find it desirable to ease its own burden of pursuing corporations criminally for housing code violations in its jurisdiction, it is not the role of this Court to help the City’s cause by rewriting a criminal statute to say something it does not say. This Court should reject the City’s propositions of law and affirm the court of appeals’ judgment.

APPELLEE'S STATEMENT OF THE CASE AND FACTS

This case arises out of Washington Mutual's criminal conviction for a Cleveland municipal housing code violation after the trial court allowed Washington Mutual to be tried in absentia.

On February 7, 2007, Cleveland Housing Inspector Lori A. Williams filed a sworn misdemeanor complaint against "Washington Mutual c/o CSC-Lawyers Inc. Ser." (Municipal Court Record ("R.") 2.) The complaint alleged a failure to comply with a 2006 notice of housing code violations. (R. 2, R. 3.) The municipal court issued a summons, commanding the named defendant to appear at the Cleveland Municipal Court, Housing Division, on May 1, 2007. (R. 2.) The summons was addressed to "Washington Mutual c/o CSC-Lawyers Inc. Serv." at "50 Broad Street, Suite # 1800, Columbus, Ohio 43215." (R. 2.) The record contains a United States Postal Service return receipt indicating that the summons was received "by Deanne Kessler" at that address on February 12, 2007. (Id.) There is no indication in the record, however, that Washington Mutual actually has a statutory agent at that address.

In a "Judgment Entry" dated November 1, 2007, the trial court noted that "the defendant failed to appear" at the May 1, 2007 hearing indicated in the summons. (R. 6.) In its Entry, which was captioned "City of Cleveland vs. Mutual Corp. Service Washington," the trial court also foreshadowed its intent to convene a trial in absentia—

When an organization, served with notice of the criminal charges, fails to appear to answer the charges, the Clerk of Court is required to enter a plea of "not guilty" on the corporation's behalf. R.C. 2941.47. According, the prosecution may try its case against the defendant in absentia. If the Court concludes that the defendant is guilty, the Court may enter such a finding, and proceed to sentencing and execution. Id.

In this case, the defendant has been served, and has failed to appear and plead. Therefore, the Clerk is required to enter a not guilty plea on the defendant's behalf.

(R. 6.)

In that same Entry, the court set a trial date for November 26, 2007. (Id.) It did not, however, serve the Entry until November 9, 2007, a mere 17 days before the noticed trial date. (Id.) The certificate of service on the Entry recites that Entry was served by regular U.S. mail on three parties purporting to be the “Defendant and its Representative(s),” one of which was the “Washington Mutual Corporation Service Co.” at the 50 West Broad Street address in Columbus. (Id.)

At the November 26, 2007 hearing, the trial was continued after Attorney Romi T. Fox purported to enter an appearance on behalf of Washington Mutual when she appeared for the court’s “in absentia docket.” (R. 10.) Though the record contains no written notice of appearance, Attorney Fox later filed a “Motion To Withdraw As Counsel,” which indicated that Ms. Fox was not authorized to enter an appearance on Washington Mutual’s behalf. (R. 10.) Ms. Fox’s motion did not indicate whether Washington Mutual had been formally served with the criminal complaint. (Id.) The motion did, however, attach exhibits establishing that Washington Mutual no longer owned the property that was the subject of the housing code violations alleged in the criminal complaint. (See Exhibits attached to R. 10.) In fact, Washington Mutual owned the subject property for less than one year. (See id.)

The municipal court did not formally grant Attorney Fox’s motion to withdraw until the day of trial, when it orally granted the motion from the bench. (Tr. 2.) There is no indication in the record, however, that Attorney Fox appeared in the case following the filing of her motion to withdraw. Consistent with the conclusion that Attorney Fox did not appear again (and that she was deemed to have withdrawn from the case), the municipal court filed a judgment entry on January 18, 2008, ordering that the case was “to be placed on absentia [sic] docket.” (R. 11.)

Eventually, on February 11, 2008, the municipal court filed an entry ordering the clerk of court to re-issue a summons on the criminal complaint. (R. 14.) The re-issued summons was again sent to “Washington Mutual Corp. Service, 50 Broad Street, Suite 1800, Columbus, Ohio 43215” and ordered Defendant “Washington Mutual Corp. Service” to appear for trial on March 3, 2008. (R. 15.) There is no indication in the record that Washington Mutual *Bank* was served with this summons. Indeed, at the court of appeals, Washington Mutual represented that it did *not* have a statutory agent at that address. (See Reply Brief of Defendant-Appellant, filed in court of appeals on Aug. 21, 2008, at p. 3.) A search of the Ohio Secretary of State’s website showed that the address on the summons was the address of the statutory agent for “Washington Mutual Finance, Inc.,” which merged out of existence in 2004 and, in any event, was not the same entity as Appellee Washington Mutual Bank. (Id.)

When Washington Mutual failed to appear on the court-ordered hearing date of March 3, 2008, the trial court issued a *capias* and set the matter for trial on April 7, 2008. (R. 17, 18.) This time, the court’s Judgment Entry listed the defendant as “Washington Mutual Corporation” in the caption. (R. 18.) In its Judgment Entry, the municipal court again ordered a representative of the Clerk of Court to appear for the trial for the purpose of entering a plea of “not guilty” on behalf of the defendant. (Id.)

When Washington Mutual did not appear on April 7, 2008, the trial court ordered the City Clerk to enter a “not guilty” plea on its behalf and proceeded with a trial in absentia. (Tr. 2.) Washington Mutual was convicted of the alleged housing code violations and was fined \$100,000. (Tr. 12; R. 19, 20.) At the time of its conviction in absentia, Washington Mutual was

not the owner of the subject property and the property was not in violation of the City's housing code. (See Tr. 10-12.)¹

On appeal, the Eighth District Court of Appeals unanimously vacated the conviction, finding that there was no statutory authority for the trial court to enter a plea on Washington Mutual's behalf or to proceed with a trial in absentia. *Id.* at ¶¶ 7-11. The City sought a discretionary appeal in this Court. This Court granted review on the City's Propositions of law II and III, both of which relate to the question of whether there was statutory authority for the trial court to conduct a criminal trial in absentia.

ARGUMENT

It is well settled that a criminal defendant has a fundamental right to be present at all critical stages of his criminal trial. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶ 90, citing Section 10, Article I, Ohio Constitution; *Kentucky v. Stincer* (1987), 482 U.S. 730, 745. The Appellant City and the Attorney General, as Amicus Curiae, ask this Court to decide that there is a different rule if the criminal defendant is a corporation. They ask this Court to find that the General Assembly, in R.C. 2941.47, has authorized corporations to be tried in absentia if the corporation has not responded to a criminal summons. (App. Br., at 8-9; Amicus Br., at 5.)

In their zeal to use the trial in absentia as a tool in the prosecutorial toolbox of municipalities trying to enforce criminal code provisions against corporations, the City and the Attorney General have glossed over the language of the very statute upon which they rely. The arguments made by the City and the Attorney General rest on the premise that R.C. 2941.47 authorizes corporations to be tried in absentia; relying on this assumption, they attack the court

¹ Interestingly, just four months after it filed the criminal complaint in this case, the City of Cleveland had certified that *no code violations* had existed on the subject property *within two years* prior to June 6, 2007. (See Certificate of Disclosure Application for Transferring Residential Property, copy attached to Reply Brief of Washington Mutual Bank filed in Court of Appeals.)

of appeals' decision as imposing an improper limitation upon that statutory authorization. But R.C. 2941.47 contains no language that would allow a corporation to be criminally tried without being present, at least through its counsel. And because the City's (and Attorney General's) arguments rely on a faulty premise about what R.C. 2941.47 allows, neither of the City's propositions of law can be a correct statement of Ohio law.

Simply put, the court of appeals' central holding was correct—R.C. 2941.47 did not authorize Washington Mutual to be criminally tried in absentia. In imploring this Court to find otherwise, the City is asking for nothing less than this Court to rewrite the statutory language. This Court should reject the City's propositions of law and affirm the judgment of the court of appeals.

I. Appellee's Response to Proposition of Law No. II: R.C. 2941.47 Does Not Apply To Prosecutions Initiated By Complaint or Authorize a Corporate Criminal Defendant To Be Tried In Absentia.

The City contends that R.C. 2941.35 “and the rules of statutory construction” compel a conclusion that trying a corporate criminal defendant in absentia for a misdemeanor is permitted by operation of R.C. 2941.47. (Appellant's Brief, at 1.) The court of appeals found no such authority in the criminal statutes or Ohio's criminal rules and further found that R.C. 2941.47 does not apply anyway because the City prosecuted Washington Mutual by complaint and the statute plainly applied only to prosecutions initiated by indictment or information.

In reversing Washington Mutual's conviction in this case, the court of appeals observed that R.C. 2941.47 did not apply to misdemeanor offenses prosecuted by complaint because the statute only referenced prosecutions by “indictment or information.” 2008-Ohio-6956, at ¶ 8. Accordingly, the court of appeals found that R.C. 2941.47 did not provide statutory authority for trying a corporation in absentia for a criminal offense. And finding no other criminal statute or

rule that allowed a trial in absentia, the court of appeals had no choice but to vacate Washington Mutual's conviction. Id. at ¶ 11.

The City contends that the court of appeals erred when it "failed to consider O.R.C. § 2941.35 and its affect [sic] on O.R.C. § 2941.47." (Appellant's Brief, at 4.) The City contends that R.C. 2941.47 should be read "in pari materia" with R.C. 2941.35, which generally provides that laws as to the "form, sufficiency, amendments, objections, and exceptions to indictments and as to the service thereof" apply equally to misdemeanor prosecutions commenced by affidavit or otherwise. The City's argument lacks firm legal foundation, however, as it rests on the flawed premise that R.C. 2941.35 is relevant to the issue before the Court, as well as the equally flawed premise that R.C. 2941.47 allows for a trial in absentia in the first place.

A. R.C. 2941.47 Does Not Apply To Prosecutions Initiated By Complaint.

The starting point for any analysis of the City's propositions of law begins with R.C. 2941.47, which the City relies upon as the paramount authority for having tried Washington Mutual in absentia. R.C. 2941.47 states:

When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of "not guilty." Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information.

(Emphasis added.)

As evidenced by the language emphasized above, R.C. 2941.47 applies only to prosecutions commenced by indictment or information. Based on this textual limitation, the court of appeals found R.C. 2941.47 inapplicable because Washington Mutual was charged by *complaint* and not by indictment or information. 2008-Ohio-6956, at ¶ 8. Accordingly, the court of appeals concluded that R.C. 2941.47 did not vest the trial court with authority to enter a plea on behalf of Washington Mutual or to allow Washington Mutual to be tried in its absence.

Undaunted by this textually sound statutory interpretation by the court of appeals, the City crafts an “in pari materia” argument based upon R.C. 2941.35. The City argues that R.C. 2941.35 extends “statutes that on their face apply only to prosecutions by indictment or information” to misdemeanor prosecutions. (Appellant’s Brief, at 2.) R.C. 2941.35, which applies to misdemeanor prosecutions, provides—

Prosecutions for misdemeanors may be instituted by a prosecuting attorney by affidavit or such other method as is provided by law in such courts as have original jurisdiction in misdemeanors. Laws as to *form, sufficiency, amendments, objections, and exceptions to indictments and as to the service thereof* apply to such affidavits and warrants issued thereon.

(Emphasis added.)

The City emphasizes the last sentence of R.C. 2941.35 as the key to its proposition of law, citing numerous decisions in which Ohio courts applied R.C. 2941.35 to test the sufficiency of, amendments to, or objections to charging instruments such as complaints or affidavits using the same rules applicable to indictments. (Appellant’s Brief, at 2-3.) Because R.C. 2941.35 applies these laws to misdemeanor prosecutions, the City jumps to the conclusion that R.C. 2941.47 must apply to the misdemeanor prosecution of a corporation initiated by complaint.

The City's reliance on R.C. 2941.35 is misplaced. If the issue in this case were merely the sufficiency or validity of the City's complaint against Washington Mutual, then R.C. 2941.35 might have some relevance to this Court's analysis. Indeed, all of the cases cited by the City in support of its argument for R.C. 2941.35's applicability deal with either (1) the sufficiency of a charging affidavit or complaint,² (2) the timeliness of a defendant's objections to a charging affidavit,³ (3) the validity of an amendment to a criminal complaint,⁴ or (4) the effect of a variance between the name of a person specified in a complaint and the evidence at trial.⁵ (See Appellant's Brief, at 2-3 and fns. 4-10.) Thus, on the issue of how to test the "form, sufficiency, amendments, objections, and exceptions" to misdemeanor complaints, statutes applicable to indictments and informations apply.

The issue before this Court is not, however, related to the matters described in R.C. 2941.35. It is one thing to apply the test applicable to an indictment to test the sufficiency of a misdemeanor affidavit or complaint. But it is an entirely different matter to say that a statute prescribing the court's authority in prosecutions by indictment or information applies equally to prosecutions initiated by complaint when the statute does not specify such equal application. In other words, though R.C. 2941.35 would presumably be applicable if this Court were testing the validity of the criminal complaint against Washington Mutual, the statute does not inform the very different issue of the court's authority to enter a plea on behalf of a defendant or to proceed to trial in absentia upon a defendant's non-appearance for trial.

² *Lima v. Ward* (1966), 8 Ohio App.2d 177, 178; *State v. Whitt* (1964), 3 Ohio App.2d 278, 282; *State v. Gundlach* (1960), 112 Ohio App. 471, 474; *State v. Foley* (Dec. 22, 1982), Hamilton App. No. C-820095, 1982 WL 9260.

³ *Cleveland v. Ely* (1963), 174 Ohio St. 403, 404.

⁴ *Toledo v. Cousino* (Nov. 23, 1984), Lucas App. No. L-84-103, 1984 WL 14423; *State v. Ross* (1973), 36 Ohio App.2d 185, 206.

⁵ *Id.*

Thus, even if the Court accepts the premise that the City validly commenced the criminal action against Washington Mutual by complaint, Washington Mutual's conviction in this case cannot be valid unless there was some statute or rule that authorized a trial in Washington Mutual's absence. And by its very terms, R.C. 2941.47 does not provide such authority in misdemeanor prosecutions commenced by complaint. Simply stated, R.C. 2941.35 does not inform the issue of whether Washington Mutual was properly tried in absentia.

The City's brief also goes to great lengths to establish that a misdemeanor "complaint" is substantively equivalent to a charging "affidavit" and that there is no valid reason to distinguish between the two for purposes of applying R.C. 2941.35. (See Appellant's Brief, at 3-4.) The City might be raising this issue in recognition of the fact that the Complaint in this case did not technically comply with R.C. 2935.17(B), which describes the form of a complaint that would be sufficient under Ohio law. R.C. 2935.17(B) prescribes that a complaint be signed by the prosecuting attorney or city director of law, something that was *not* done in this case. (See R. 2.) Regardless of the City's reason for raising this issue, the argument is of no relevance to the instant case.

The dispute in this case does not center upon whether the complaint in this case was equivalent to a charging "affidavit." Rather, the dispute focuses on (among other issues) whether R.C. 2941.47 applies to a prosecution commenced by complaint when the statute, by its express terms, applies only to the procedure and authority of the court in criminal prosecutions commenced by indictment or information against a corporation. Whether commenced by "complaint" or "affidavit," R.C. 2941.47 does not apply.

The more relevant issue would be whether a complaint is the functional equivalent of an indictment or information; if it were, the City *might* have an argument that R.C. 2941.47 could

apply to misdemeanor prosecutions commenced by complaint. But even this argument fails. The General Assembly has made the policy choice to limit the procedure described in R.C. 2941.47 to prosecutions that have the imprimatur of a grand jury (i.e., indictment) or the prosecuting attorney (i.e., information).⁶ If the General Assembly had meant to include prosecutions initiated by complaint in a municipal court to be within the scope of R.C. 2941.47, it could have easily done so by enacting the appropriate language. Yet, the General Assembly enacted no such language in R.C. 2941.47, which provides a strong indication that the legislature did *not* intend to allow municipalities generally to prosecute corporations for violations of local criminal ordinances.

The City offers no reason why this Court should ignore the plain statutory language and substitute an alternative public policy view under the guise of statutory interpretation. See *In re Weiland*, 89 Ohio St.3d 535, 538, 2000-Ohio-233 (refusing to engage in the “subterfuge” of judicially crafting public policy “under the guise of statutory interpretation”). The court of appeals correctly found R.C. 2941.47 inapplicable in this case.

B. Regardless of the Charging Instrument Used, R.C. 2941.47 Does Not Authorize a Corporation Defendant to be Tried In Absentia.

R.C. 2941.47’s limitation to prosecutions by indictment or information is not the only reason that the City’s proposition of law is flawed. Regardless of the charging instrument used to initiate prosecution of a corporation, a reading of R.C. 2941.47 belies the meaning that the City gives it. In other words, *even if* this Court were to agree with the City that R.C. 2941.47 applies to a prosecution initiated by complaint (and not just to prosecutions by indictment or

⁶ See R.C. 2941.021 (stating that “[a]ny criminal offense not punishable by death or life imprisonment may be prosecuted by information filed in the common pleas court by the prosecuting attorney”).

information), Washington Mutual's conviction in absentia remains legally infirm and properly vacated by the court of appeals.

The City's arguments rest on the premise that R.C. 2941.47 allows a corporation to be tried in absentia. The Amicus Brief of the Attorney General likewise posits that the "plain language of R.C. 2941.47 authorizes corporate trials in absentia" for misdemeanors. (Amicus Brief, at 3.) Nowhere in R.C. 2941.47's text, however, does it state that a corporation may be tried in absentia. The statute only states that a "clerk of the common pleas court" shall enter a plea of "not guilty" upon a corporation's failure to appear and that, upon that plea, the corporation is "before the court until the case is finally disposed of."

Without explanation, much less authority, the City (as well as the Attorney General) interprets "finally disposed of" to be synonymous with an authorization of a trial in absentia. But if the legislature had truly intended to authorize corporations to be tried in absentia under R.C. 2941.47, it could have easily enacted language that said so expressly. There is no doubt that the General Assembly knew how to specify that intent. Indeed, in other statutes, the General Assembly has specifically detailed the circumstances and process under which an accused may be tried in his absence. See R.C. 2945.12 (stating that an accused "may be tried in his absence" upon request in writing or when accused escapes or forfeits recognizance); R.C. 2938.12 (describing similar circumstances under which an accused may be tried "in his absence" for a misdemeanor in courts inferior to the common pleas court). It makes no logical sense for the General Assembly to have intended that a corporation be tried in absentia *without* including express language to that effect in R.C. 2941.47 when the General Assembly has demonstrated elsewhere in the Revised Code that it knows how to enact appropriate language to reflect that intent. Cf. *Walden v. State* (1989), 47 Ohio St.3d 47, 53 (declining to infer a "clear and

convincing” standard of proof in a statute absent express language to that effect when the legislature knew how to specify that standard, as evidenced by other statutes expressly providing that standard).

The predecessor statutory enactments that became R.C. 2941.47 and R.C. 2945.12 further undermine the City’s assumption that R.C. 2941.47 allows a trial in absentia. Both statutes have their roots in the General Code and were, in fact, enacted as part of the same legislative act to revise and codify the Code of Criminal Procedure in 1929. See Am. S.B. 8, 113 v. 123 (1929). Specifically, R.C. 2941.47 and R.C. 2945.12 were previously codified as Sections 13438-12 and 13442-10, respectively, of the General Code. *Id.* at 172, 181. The General Assembly later reenacted both statutes when the Revised Code replaced the General Code in 1953.

Significantly, the 1953 enactment of R.C. 2941.47 *changed* the language of GC 13438-12, which had previously covered the topic of criminal summons on indictments against corporations. Though GC 13438-12 was similar to R.C. 2941.47, it had stated expressly that after a court clerk entered a plea of “not guilty” on behalf of a corporation that had failed to appear in response to a summons to answer to an indictment of information, “the corporation shall be deemed thenceforth *continuously present* in court until the case is finally disposed of.” (Emphasis added.) Am. S.B. 8, 113 v 123, at 173. In R.C. 2941.47, however, the General Assembly did *not* carry over the “continuously present” language. Even *assuming* that a corporation could be tried in absentia under the old General Code provision (a question that this Court need not answer), the change in language to R.C. 2941.47’s current form is strong evidence that R.C. 2941.47 does not allow a trial in absentia.

It is a basic presumption in statutory construction that the General Assembly is not presumed to do a vain or useless thing. *State ex rel. Cleveland Elec. Illum. Co. v. Euclid* (1959),

169 Ohio St. 476, 479. Thus, when statutory language is amended, the legislature has made the amendment to accomplish some definite purpose. See *id.* The legislature has twice enacted R.C. 2941.47 and 2945.12 at the same time, with the second enactments of each resulting in noticeably different language from one another—R.C. 2945.12 expressly provides for a trial in absentia under certain circumstances while R.C. 2941.47 does not. The conspicuous removal of the “continuously present” language from R.C. 2941.47 must have had purpose and must be given effect. Given the legislature’s awareness of R.C. 2945.12, the *omission* of language in R.C. 2941.47 to specifically allow a court to hold a criminal trial in the accused corporation’s absence is conclusive evidence that R.C. 2941.47 provides no such authority.

The later enactment of R.C. 2938.12 also informs the analysis and cuts against the City’s argument. For purposes of statutory construction, the General Assembly is presumed to be aware of previously enacted statutes. See *State v. Conyers* (1999), 87 Ohio St.3d 246, 250, 1999-Ohio-60, citing *Henrich v. Hoffman* (1947), 148 Ohio St. 23, 27. Thus, when the General Assembly enacted R.C. 2938.12 in 1960, it is presumed to have been aware of the language contained in both R.C. 2945.12, which includes express language allowing a trial in the defendant’s absence, and R.C. 2941.47, which does not. The General Assembly included language similar to R.C. 2945.12 when it enacted R.C. 2938.12, stating expressly the circumstances under which a criminal defendant could be “tried in his absence.” Compare R.C. 2945.12 with R.C. 2938.12. That the General Assembly would enact R.C. 2938.12 with trial-in-absentia language similar to R.C. 2945.12, *without* amending R.C. 2941.47 to contain similar language, further solidifies that notion that the General Assembly did not contemplate R.C. 2941.47 to allow a corporation to be criminally tried in its absence.

The City's arguments in this appeal rest on the premise that R.C. 2941.47 allows for a trial without a corporation's counsel or representative being present. But the only way this premise is true is if this Court interprets the phrase "the corporation is before the court until the case is finally disposed of" to include the authority to try a corporation in absentia. When interpreting statutes, however, it is the duty of the court to give effect to the words used and not to insert words not used. See, e.g., *State ex rel. Carter v. Wilkinson* (1994), 70 Ohio St.3d 65, 66. Accepting the City's proposed interpretation requires this Court to insert words into R.C. 2941.47 that the General Assembly could have easily enacted itself. This Court should therefore reject the City's interpretation.

C. The Service And Pleading Requirements Have Not Been Met In This Case.

The City's proposition of law also suffers from its reliance on the flawed premise that "the service and pleading requirements of R.C. 2941.47 have been met" in this case. (Appellant's Brief, at 1.) Notably, the City's Statement of Facts omits any discussion of the procedural history of this case, which was wrought with peculiarities surrounding the City's attempt to serve summons on Washington Mutual.

The record before the Court reflects some lingering doubt as to whether Washington Mutual was properly served with a criminal summons to initiate the prosecution in the trial court. In this case, the City attempted to serve the criminal complaint upon Washington Mutual by certified mail upon the entity it believed to be Washington Mutual's statutory agent. See R.C. 2941.47 (providing that "a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil action") and Civ.R. 4.2(F) (specifying manner in which a corporation may be served). But it was not established in the proceedings below that the City actually perfected service upon Washington Mutual. To the

contrary, the record reveals a serious due process problem, as the record fails to support the conclusion that Washington Mutual was validly served with the City's criminal summons.

Notwithstanding the trial court's apparent finding that Washington Mutual was served with summons (Tr. 9-10), the record belies that claim as the two summonses purportedly issued to Washington Mutual were served on "Washington Mutual c/o CSC-Lawyers Inc. Ser." and "Washington Mutual Corp. Service" (R. 2, 15), at an address that was never established to be that of Washington Mutual's statutory agent. Moreover, the record is replete with instances in which notices from the court, which were presumably sent to the same dubious statutory agent address, showed "Mutual Corp. Service, Washington" or some variation thereof—*not* Appellee Washington Mutual Bank—as the defendant in the case. (See R. 2, 4, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20.) Accordingly, a major premise upon which the City achieved its conviction of Washington Mutual—valid service of criminal summons—is flawed at best.

Finally, a close examination of R.C. 2941.47 reveals that the trial court lacked the authority to enter a plea on behalf of Washington Mutual. R.C. 2941.47 authorizes *only* the "clerk of the *court of common pleas*" to enter a plea on an accused corporation's behalf. (Emphasis added.) In this case, however, the municipal court instructed the *city clerk's office* to enter a plea on Washington Mutual's behalf. (Tr. 2.) Accordingly, the "pleading requirements" of R.C. 2941.47 were not met in this case. The statute does not contemplate a municipal court, as in this case, instructing the city clerk to enter a plea on a corporation's behalf, much less convening a misdemeanor trial in the corporation's absence after the entry of that plea.

For all of these reasons, Washington Mutual's conviction was infirm and properly vacated by the court of appeals. Absent proper service of the criminal summons or a valid plea entered on its behalf, Washington Mutual was not properly before the trial court. Thus, even if

R.C. 2941.47 could conceivably be interpreted to allow a corporation to be criminally tried in its absence, the City failed to satisfy the procedural prerequisites necessary to bring Washington Mutual before the court. Washington Mutual's conviction was therefore invalid.

II. Appellee's Response to Proposition of Law No. III: Because R.C. 2941.47 Does Not Allow a Trial In Absentia, It is Appropriate to Consider R.C. 2938.12, R.C. 2945.12, and Crim.R. 43 To Determine Whether a Corporate Defendant Can Be Tried In Absentia for a Misdemeanor.

Finding R.C. 2941.47 inapplicable by its express terms, the court of appeals turned to other criminal statutes and rules to determine whether the municipal court properly convicted Washington Mutual in absentia. The court first looked at R.C. 2938.12, which allows misdemeanor trials in absentia in only two circumstances—(1) upon request of the “person being tried for a misdemeanor” or (2) when the “person being tried escapes or departs without leave” after trial begins. See, also, R.C. 1.59 (defining the term “person” to include a corporation). The court of appeals also cited to R.C. 2945.12, which prescribes similar terms for misdemeanors prosecuted by indictment.

In addition to these statutes, the court of appeals also found that Crim.R. 43 informed the result in this case. Crim.R. 43 requires a defendant's physical presence (which, for a corporation, may be through counsel for all purposes) “at every stage of the criminal proceeding” unless (1) the defendant waives the right to be present or (2) the defendant engaged in disruptive conduct at the trial. See Crim.R. 43(A)(1), (A)(3), and (B); see, also, 2008-Ohio-6956, at ¶¶ 9-11.

Based on the statutory and rule language, the court of appeals reached the unremarkable conclusion that these provisions “do not allow the court clerk to enter a plea on the defendant's behalf, nor do they allow for a trial of a corporate defendant in absentia when the defendant has never appeared in the case.” *Id.* at ¶ 11. The City does not dispute that neither Crim.R. 43 nor

R.C. 2938.12 provides a valid basis for the municipal court to have tried Washington Mutual in absentia. Rather, the City contends that R.C. 2941.47 controls the issue of whether and when a corporation may be criminally tried in absentia as a “specific” statute on this subject. The Attorney General’s *amicus curiae* brief joins the fray on this point, imploring this Court to find Crim.R. 43 and R.C. 2938.12 inapplicable. In reality, the principles espoused by the City and the Attorney General are inapplicable to the question before this Court.

A. Criminal Rule 43 Does Not Enlarge a Substantive Right and is Therefore Applicable Here.

In deciding that the municipal court lacked authority to hold a criminal trial in Washington Mutual’s absence, the court of appeals found Crim.R. 43 informative. Crim.R. 43 commands that a criminal defendant “must be physically present at *every stage of the criminal proceeding and trial*,” providing exceptions for “the defendant’s voluntary absence after the trial has been commenced” or the defendant’s express waiver. (Emphasis added.) Crim.R. 43(A)(1) and (3). A corporation may appear, for all purposes, through counsel. Crim.R. 43(A)(1).

It is undisputed that Washington Mutual was not present, through a corporate representative or counsel, at the trial resulting in its conviction. And there is no exception stated in Crim.R. 43 that would render Washington Mutual’s absence acceptable under the rule: Washington Mutual did not voluntarily absent itself after trial commenced, nor did it expressly waive its right to be physically present. Nonetheless, the City contends that Crim.R. 43 should be ignored in this case. Relying on Section 5(B), Article IV of the Ohio Constitution, the City says that Crim.R. 43 is “inapplicable” because it enlarges a substantive right (*i.e.*, the right to be present at a criminal trial) that a corporation does not enjoy. (App. Br., at 8.) The Attorney General likewise contends, as *Amicus Curiae*, that Crim.R. 43 cannot apply because a

corporation has “no substantive right to be present if it fails to appear at the outset of a [criminal] case.” (Amicus Br., at 6.) The City and Attorney General have it wrong.

Both the City and the Attorney General rest their argument on the text of R.C. 2941.47, arguing that a corporation “does not have a substantive right under Ohio law to be present at trial.” (App. Br., at 7; see, also, Amicus Br., at 6.) In support of this conclusion, the City emphasizes the passage in R.C. 2941.47 that states—

Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of “not guilty.” Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of.

R.C. 2941.47, quoted in App. Br., at 7. This passage, however, provides no textual support for the position espoused by the City and the Attorney General. Nothing in the statute expresses the legislative intent to allow a corporation to be tried in absentia. The City and the Attorney General are asking this Court to equate the phrase “until the case is finally disposed of” as authority for trying a corporation in absentia. But as noted previously, this is a flawed reading of the statute, as it requires this Court to add words to the statute that the legislature did not enact. *State ex rel. Carter*, 70 Ohio St.3d at 65.

Where a procedural rule conflicts with a statute on a matter of substantive law, the statute will take precedence over the rule. *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, at ¶ 17. But because R.C. 2941.47 does not provide specifically for a corporation to be criminally tried in absentia, there is no conflict between the statute and Crim.R. 43. Absent a conflict between them, both the statute and rule must be given effect. See *State ex rel. Birdsall v. Stephenson* (1994), 68 Ohio St.3d 353, 356; see, also, *State v. Heyden* (1992), 81 Ohio App.3d 272, 276. Thus, the court of appeals was correct to heed Crim.R. 43’s provisions concerning the

limited circumstances under which a criminal defendant (including a corporation) may be tried in absentia. The City's and Attorney General's argument to the contrary is incorrect as a matter of law.

The lack of a genuine conflict between R.C. 2941.47 and Crim.R. 43 is not the only reason to reject the City's and Attorney General's position with respect to the applicability of Crim.R. 43. Both the City and the Attorney General take the position that R.C. 2941.47 removes any right of a corporation to be present for its criminal trial when it fails to appear in response to a summons. (See App. Br. at 7; Amicus Brief, at 6.) Even if this Court indulges this dubious reading of R.C. 2941.47, it must reject the notion that the statute could validly nullify a corporate defendant's right to be present at trial. Such a right exists as a matter of *constitutional* law and therefore cannot be emasculated by operation of statute.

The United States Supreme Court has held that a criminal defendant has a due process right to be present at all critical stages of a criminal proceeding against him if his presence would contribute to the fairness of the procedure. See *Kentucky v. Stincer* (1987), 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L. Ed. 2d 631. And as a matter of Ohio constitutional law, this Court has recognized the "fundamental right" of a defendant to be present "at all critical stages of his criminal trial." *State v. Hill* (1995), 73 Ohio St.3d 433, 444, citing Section 10, Article I, Ohio Constitution; see, also, *State v. Meade* (1997), 80 Ohio St.3d 419, 421 (recognizing a criminal defendant's right to be present at trial, subject to waiver provisions set forth in Crim.R. 43). The right to be present is "a fundamental component of due process and has been viewed as 'scarcely less important to the accused than the right of trial itself.'" *State v. Nichols* (Aug. 21, 1989), 12th Dist. App. No. CA89-01-001, 1989 Ohio App. LEXIS 3234, at *4, quoting *Diaz v. United States* (1912), 223 U.S. 442, 455, 32 S.Ct. 250, 254.

The City's argument that Crim.R. 43 is inapplicable rests on the incorrect premise that R.C. 2941.47 solely governs the substantive rights of corporate defendants to be present at trial. But the "fundamental right" of a criminal defendant to be present at trial, regardless of whether the defendant is an individual or corporation, is rooted in *constitutional* law. Thus, Crim.R. 43 does not "enlarge" a corporate defendant's substantive rights by guaranteeing a right to be present absent a waiver of the right. Rather, Crim.R. 43 is consistent with substantive rights that both this Court and the United States Supreme Court have recognized to be of constitutional dimension. Cf. *State v. Meade*, 80 Ohio St.3d at 424 (applying "plain language" of Crim.R. 43 to hold that trial in absentia was not authorized by the rule and therefore violated defendant's rights).

Moreover, even if R.C. 2941.47 were capable of being read the way that the City and the Attorney General ask this Court to read it (*i.e.*, by removing a corporation's substantive right to be present at its criminal trial), it could not be given effect. Since the federal and Ohio constitutions provide the substantive right to be present at trial, R.C. 2941.47 cannot take it away. See *Miami Cty. v. Dayton* (1915), 92 Ohio St. 215, 223 (explaining that a statute is unconstitutional when it "permits something which the constitution prohibits or prohibits something which the constitution permits"). Thus, this Court should opt for a construction of R.C. 2941.47 that does *not* allow a municipal court to try a corporate defendant in absentia. Not only is this construction a straightforward application of the statute's language, it is consistent with the rule that courts should construe statutes, wherever possible, to be *constitutional*. See, e.g., *Hughes v. Registrar, Ohio Bureau of Motor Vehicles* (1997), 79 Ohio St.3d 305, 307.

For all of these reasons, Crim.R. 43 was applicable to the proceedings below and the court of appeals did not "enlarge" Washington Mutual's substantive rights by applying it. And

because Crim.R. 43 did not authorize a trial in Washington Mutual's absence, the court of appeals correctly vacated the conviction in this case.

B. R.C. 2941.47 is Not a "Specific" Statute That Governs The Instant Case Because It Does Not Expressly Allow a Corporation to be Criminally Tried In Absentia.

In addition to finding Crim.R. 43 informative in this case, the court of appeals also looked to other criminal statutes to determine whether there was any basis for the municipal court to have tried (and convicted) Washington Mutual in absentia. The court of appeals looked first to R.C. 2938.12, which states:

A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, but no right shall exist in the defendant to be so tried. If after trial commences a person being tried escapes or departs without leave, the trial shall proceed and verdict or finding be received and sentence passed as if he were personally present.

See, also, 2008-Ohio-6956, at ¶ 9. The court of appeals also cited R.C. 2945.12, which similarly prescribes the circumstances under which a person indicted for a misdemeanor may be tried in absentia. *Id.*⁷

Focusing exclusively on R.C. 2938.12, the City says that the court of appeals erred in considering this statute *at all*. (See App. Br., at 8.) The City contends that R.C. 2941.47 is a "specific" statute dealing with corporate defendants who fail to appear, while R.C. 2938.12 is a "general" statute that details the methods under which any defendant may waive presence at trial.

⁷ R.C. 2945.12 states: "A person indicted for a misdemeanor, upon request in writing subscribed by him and entered in the journal, may be tried in his absence by a jury or by the court. No other person shall be tried unless personally present, but if a person indicted escapes or forfeits his recognizance after the jury is sworn, the trial shall proceed and the verdict be received and recorded. If the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present. If the offense charged is a felony, the case shall be continued until the accused appears in court, or is retaken."

(Id.) From that premise, the City posits two theories as to why R.C. 2941.47 controls and R.C. 2938.12 is inapplicable. (Id. at 8-9.) Neither of the City's theories is correct.

1. Giving Effect To Both Statutes Does Not Justify A Trial In Absentia.

In its first argument for why R.C. 2941.47 controls over R.C. 2938.12 on the issue of when a corporation may be tried in absentia, the City invokes the presumption that the legislature intended to give effect to both statutes. (App. Br., at 8.) See R.C. 1.51. The City argues that R.C. 2938.12 “simply creates a method by which a defendant . . . may waive” the right to be present at trial, but does not *create* a substantive right to be present. (Id.) The City then contrasts R.C. 2941.47, which it characterizes as a statute that “deals solely with the situation when a corporation fails to appear.” (Id. at 8-9.) Thus, the City says the statutes do not conflict, leaving “no further analysis necessary under statutory construction.” (Id.)

The City's argument is dubious, to say the least. Totally absent from the City's argument is an explanation of how R.C. 2941.47's language allows a municipal court to hold a trial in the corporate defendant's absence. As noted above, R.C. 2941.47 says only that the clerk of court may enter a plea of not guilty on behalf of a corporation that fails to appear in response to a summons for a criminal offense and that the corporation is “before the court until the case is finally disposed of”; it does *not* state that the court can try the corporation in its absence if the corporation does not appear. Absent language in R.C. 2941.47 that allows a corporation to be tried in absentia, the statutory presumption that the legislature intended to give effect to both R.C. 2941.47 and R.C. 2938.12 actually cuts against the City's position.

R.C. 2938.12 presumes a defendant's right to be present at a criminal trial for a misdemeanor offense. Indeed, the statute's language contemplates the defendant's required presence at the trial, allowing the defendant to be tried in absentia only (1) with the court's

consent following the defendant's written request to be absent or (2) when the defendant "escapes or departs without leave" after trial has commenced, thereby waiving the right to be present. See R.C. 2938.12; see, also, *Crosby v. United States* (1993), 506 U.S. 255, 260, 113 S.Ct. 748, 122 L.Ed.2d 25 (explaining that the defendant's voluntarily absenting himself after trial has commenced is a waiver of the right to be present), quoting *Diaz v. United States* (1912), 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500. Since R.C. 2941.47 does not detail the procedure that the court must follow when the corporation does not appear (except for authorizing the clerk of court to enter a "not guilty" plea for the corporation), it becomes appropriate to look to R.C. 2938.12, which (like Crim.R. 43) states the circumstances under which a trial in absentia is appropriate, to answer the question of whether the corporation may be tried in absentia.

Simply put, giving effect to both statutes means that R.C. 2938.12 applies. And because none of the circumstances in R.C. 2938.12 applies to the case at bar, that statute provided no statutory authority for the municipal court to hold a trial in Washington Mutual's absence. The court of appeals was therefore correct to apply R.C. 2938.12 to vacate the conviction in this case.

2. R.C. 2941.47 is Not a "Specific" Statute That Controls Over R.C. 2938.12.

The City's second argument under the "specific" versus "general" formula fares no better. The City contends that if R.C. 2941.47 and R.C. 2938.12 are deemed to conflict, R.C. 1.51 commands that the more specific statute must prevail. (App. Br., at 9.) The Attorney General's Amicus Brief makes a similar argument, contending that R.C. 2941.47 is the specific statute that applies to the trial of corporations in absentia and should therefore prevail over R.C. 2938.12. (Amicus Br., at 4.) And while both the City and the Attorney General recognize that R.C. 2938.12 was enacted *after* R.C. 2941.47, they also note that a subsequent general provision

prevails over a “special provision” only if there is a “manifest intent” on the part of the General Assembly to have the general provision prevail. (App. Br., at 9; Amicus Br., at 4.)

R.C. 1.51 provides:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

The argument posited by the City and the Attorney General fails because it relies on the false premise that R.C. 2941.47 and R.C. 2938.12 actually conflict. It is a well-established rule of construction that specific statutory provisions prevail over general provisions when there is a conflict between them. *Village Condominium Owners Assn v. Montgomery Cty. Bd. of Revision*, 106 Ohio St.3d 223, 2005-Ohio-4631, at ¶ 10. But when there is no conflict between the statutes being compared, R.C. 1.51 does not apply and the court can apply both statutes. See *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 29.

As noted previously, while R.C. 2941.47 speaks to certain procedures that are applicable when a corporation is prosecuted for a crime. It does not, however, provide specific authority for trying the corporation in absentia, which would otherwise be in derogation of a criminal defendant’s substantive right to be present during trial. See *State v. Meade*, supra; *Kentucky v. Stincer*, supra. Moreover, the statute applies, by its plain terms, only to a prosecution initiated by indictment or information and, even then, only to actions prosecuted in a court of common pleas—circumstances that are decidedly absent in the present case. R.C. 2941.47 is therefore *not* a so-called “special provision” dealing with the issue of whether a corporation can be tried in absentia, much less for a misdemeanor violation prosecuted in a municipal court. Thus, R.C. 2938.12 is the more applicable statute and controls the question of whether (and when) a

corporate defendant can be tried in its absence. The “specific” versus “general” analysis in R.C. 1.51 is simply inapplicable in this case.

Ironically, the City’s third proposition of law attempts to have it both ways. On the one hand, the City contends that R.C. 2938.12 and Crim.R. 43 are not relevant to the trial-in-absentia issue because neither provision specifically speaks to the prosecution of corporate defendants in misdemeanor cases, whereas R.C. 2941.47 does. Yet it contends on the other hand that R.C. 2941.47 should apply in this case, even though its language does *not* specifically cover prosecutions of corporations initiated via a complaint in municipal court, much less authorize a corporation to be tried in absentia.

The court of appeals correctly rejected R.C. 2941.47 as a statutory basis for trying Washington Mutual in absentia. And because R.C. 2941.47 provided no such authority, it was entirely appropriate for the court of appeals to look to R.C. 2938.12 and Crim.R. 43 (as well as R.C. 2945.12) as the applicable authorities. Since none of those provisions allowed the municipal court to hold a criminal trial in Washington Mutual’s absence, the conviction was properly vacated.

III. The Amicus Curiae’s Separate Arguments Do Not Support Reversal of the Court of Appeals’ Judgment.

Urging reversal of the judgment below, the Amicus Curiae Brief of the Attorney General generally tracks the arguments of the Appellant City. In addition, the Attorney General raises additional points in an effort to convince this Court that R.C. 2941.47 authorized the municipal court to hold a criminal trial in Washington Mutual’s absence. Like the arguments discussed above, however, the additional points raised by the Attorney General have no merit.

The Attorney General purports to focus his amicus brief on the “broader question” of “whether R.C. 2941.47 is restricted to felony prosecutions.” (Amicus Br., at 3.) Contrary to the

Attorney General's brief (*id.* at 1), Washington Mutual has never contended that R.C. 2941.47 applies only to felony prosecutions. The court of appeals, however, stated that R.C. 2941.47 did not apply in this case because Washington Mutual "was not charged by indictment or information (a procedure reserved for felony prosecutions, see Crim.R. 7). It was charged by complaint." 2008-Ohio-6956, at ¶ 8.

The Attorney General's amicus brief attacks the court of appeals' rationale by locking in on the reference to "felony prosecutions" in the above-quoted parenthetical citation to Crim.R. 7. (Amicus Br., at 3.) The Attorney General characterizes this parenthetical as a misstatement of the law because Crim.R. 7 expressly says that *misdemeanors* may also be prosecuted by indictment or information. See Crim.R. 7(A).

Even if the court of appeals overlooked Crim.R. 7(A)'s recognition of misdemeanor prosecutions by indictment or information, this oversight does not undermine its basic holding. The court of appeals did not base its decision on a belief that only felonies may be prosecuted by indictment or information. Rather, the court of appeals correctly observed that R.C. 2941.47 could not apply in this case because the prosecution was initiated by complaint and not by indictment or information. At best, the court of appeals' parenthetical reference to "felony prosecutions" was dicta that formed no part of the ruling below. Accordingly, the "broader question" honed in on by the Attorney General provides no basis upon which to reverse the court of appeals' judgment.

The Attorney General also posits the argument, not raised specifically in the City's merit brief, that R.C. 2938.12 simply does not apply to corporations. Because R.C. 2938.12 contains provisions regarding a person who "escapes" or "departs without leave," the amicus brief argues

that the statute must apply only to individuals because these provisions “make no sense” as applied to corporations. This Court should reject this argument as well.

Contrary to the Attorney General’s view, there is nothing “absurd” or “unreasonable” about applying R.C. 2938.12 to corporations. For one thing, even though R.C. 2938.12 expressly refers to a “person being tried for a misdemeanor,” as well as a situation in which a “person being tried escapes or departs without leave,” the term “person” in Ohio law specifically includes corporations. See R.C. 1.59. Thus, R.C. 2938.12, by definition, includes corporate criminal defendants.

What’s more, there is nothing “absurd” or “unreasonable” about R.C. 2938.12’s application to corporations. Though a corporation is an artificial entity, it acts through individual *persons*—namely, “through the authorized acts of its agents or alter egos, the officers charged with its management.” *Tokles & Son, Inc. v. Midwestern Indmn. Co.* (1992), 65 Ohio St.3d 621, 627. Accordingly, if a corporation’s agent or counsel “departs without leave” during trial, that action would presumably fall within the coverage of R.C. 2938.12. Accordingly, the statute makes reasonable sense even if a corporation is the criminal defendant.

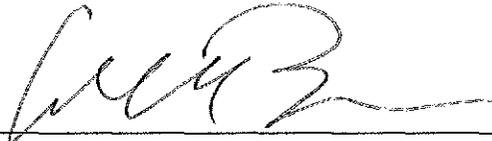
The arguments of the Attorney General as Amicus Curiae do nothing to undermine the conclusion and central holding of the court of appeals. R.C. 2941.47 did not authorize the municipal court to hold a criminal trial of a corporation in absentia. Washington Mutual’s conviction was therefore properly vacated.

CONCLUSION

The City of Cleveland is asking this Court to construe R.C. 2941.47 in a manner that would allow corporations to be criminally tried in absentia, even though the statutory language does not reflect the General Assembly's intent to allow such a procedure. This case presents an especially cogent example of why such a reading of R.C. 2941.47 is not desirable. In a case in which it is questionable, at best, as to whether a corporation was properly served with a criminal summons, the City's (and the Attorney General's) proposed rule would uphold convictions of corporate entities that were given no reasonable opportunity to defend themselves against criminal charges.

There is no statutory reason why a corporation should be able to be so easily convicted in its absence. The court of appeals was correct to find as it did—R.C. 2941.47 is simply inapplicable to a corporation charged by complaint and, in any event, does not authorize a trial in absentia. This Court should therefore reject the City's propositions of law and affirm the judgment of the court of appeals.

Respectfully submitted,



Nelson M. Reid (0068434)
Vladimir P. Belo (0071334)
(*Counsel of Record*)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
Fax: (614) 227-2390
E-mail: nreid@bricker.com
vbelo@bricker.com

and

Benjamin D. Carnahan (0079737)
Shapiro, Van Ess, Phillips & Barragate, LLP
4805 Montgomery Road, Suite 320
Cincinnati, Ohio 45212
(513) 396-8100 - Phone
(847) 627-8805 Fax
E-mail: bcarnahan@LOGS.com

Counsel for Appellee, Washington Mutual Bank

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, *Appellee Brief of Washington Mutual Bank*, was served by regular United States Mail, postage prepaid, on September 21, 2009, upon the following:

Karyn Lynn, Esq.
Assistant Director of Law
601 Lakeside Avenue E, Room 106
City Hall, Room 106
Cleveland, Ohio 44114-1077
(Counsel for Appellant)

Richard Cordray, Esq. (Ohio Attorney General)
Benjamin C. Mizer (Solicitor General)
Alexandra T. Schimmer (Chief Deputy Solicitor General)
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(Counsel for Amicus Curiae, Ohio Attorney General)



Vladimir P. Belo (0071334)
One of the Attorneys for Appellee

APPENDIX

CONTENTS

1. Relevant Sections of Amended Senate Bill No. 8, 113 v 123 (1929)
2. General Code 13438-12
3. General Code 13442-10
4. R.C. 2941.47
5. R.C. 2945.12
6. R.C. 2938.12
7. Ohio Criminal Rule 43
(<http://www.sconet.state.oh.us/LegalResources/Rules/criminal/CriminalProcedure.pdf>)

AN ACT

(Amended Senate Bill No. 8)

To revise and codify the Code of Criminal Procedure of Ohio, and to repeal sections 13422 to 13764, both inclusive, and sections 2919, 12374, 12375, 12376, 12377, 12378, 12382, 12383, 12384, 12384-1, 12385, 12386, 12387, 12388, 12389, 12390 and 12391 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

Sec. 13422-1. Definition of magistrate.

SECTION 1. For the purposes of this title, the word "magistrate" shall be held to include justices of the peace, police judges or justices, mayors of municipal corporations and judges of other courts inferior to the court of common pleas.

Sec. 13422-2. General jurisdiction of justices of the peace.

SEC. 2. A justice of the peace shall be a conservator of the peace and have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view or on sworn complaint, to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before himself or another justice of the peace, and, if such person is brought before him, to inquire into the complaint and either discharge or recognize him to be and appear before the proper court at the time named in such recognizance or otherwise dispose of the complaint as provided by law. He also may hear complaints of the peace and issue search warrants.

Sec. 13422-3. Special jurisdiction of magistrates.

SEC. 3. Magistrates shall have jurisdiction within their respective counties, in all cases of violation of any law relating to:

1. Adulteration or deception in the sale of dairy products and other food, drink, drugs and medicines;
2. The prevention of cruelty to animals and children;
3. The abandonment, non-support or ill treatment of a child by its parents;
4. The abandonment or ill treatment of a child under sixteen years of age by its guardian;
5. The employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life, morals, or which will cause or permit it to suffer unnecessary physical or mental pain;
6. The regulation, restriction or prohibition of the employment of minors;
7. The torturing, unlawfully punishing, ill treating, or depriving anyone of necessary food, clothing or shelter;
8. The selling, giving away or furnishing of intoxicating liquors as a beverage, or keeping a place where such liquor is sold, given away or furnished in violation of any law prohibiting such acts within the limits of a township and without the limits of a municipal corporation;

Sec. 13438-8. To be returned to the penitentiary or executed.

SEC. 8. If such convict is acquitted, he shall be forthwith returned by the sheriff to the penitentiary to serve out the remainder of his sentence, but if he is sentenced to imprisonment in the penitentiary, he shall be returned thereto by the sheriff and the term of his imprisonment shall begin at the expiration of the term for which he was in prison at the time of his removal. If he is sentenced to death, such sentence shall be executed as if he were not under sentence of imprisonment in the penitentiary.

Sec. 13438-9. Escaped convict to be arrested and returned.

SEC. 9. Sheriffs, coroners and all peace officers are authorized to arrest a convict escaping from the penitentiary, and forthwith convey him to the penitentiary and deliver him to the warden thereof. They shall be allowed eight cents per mile going to and returning from such penitentiary, and such additional compensation as the warden deems reasonable for the necessary expense incurred.

Sec. 13438-10. Trial of persons serving sentence in the workhouse.

SEC. 10. Any person serving a sentence in jail or the workhouse, who is indicted for or informed against for another offense, may be brought before the court upon warrant for that purpose, for arraignment and trial. Such person shall remain in the custody of the jailer or keeper of the workhouse, but may be temporarily confined in the jail, if a prisoner in the workhouse. In case such prisoner is convicted and sentenced upon trial, he shall be returned to the jail or workhouse to serve out the former sentence before the subsequent sentence shall be executed.

Sec. 13438-11. Duty of certain officers when prisoner violates parole.

SEC. 11. When a prisoner is released on parole or probation from the Ohio penitentiary, or either of the Ohio state reformatories, and violates any of the conditions of his parole or release, it is the duty of any sheriff or other peace officer, upon being advised or knowing that such convict is in his bailiwick and has violated the conditions of his parole or release, to forthwith arrest such person and report the same to the warden or superintendent of the penitentiary or reformatory, as the case may be, from which said person was so released.

Sec. 13438-12. Summons on indictments against corporations.

SEC. 12. When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon such corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent or other chief officer thereof, or by a copy left at a general or branch office or

usual place of doing business of such corporation, with the person having charge thereof. Such corporation on or before the return day of the summons duly served, shall appear by one of its officers or by counsel, and answer to the indictment or information by motion, demurrer or plea, and upon failure to make such appearance and answer, the clerk shall enter a plea of "not guilty"; and upon such appearance being made or plea entered, the corporation shall be deemed thenceforth continuously present in court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information.

Sec. 13438-13. Recognizance of witnesses.

SEC. 13. In any case pending in the court of common pleas, the court, either before or after indictment, may require any witness designated by the prosecuting attorney to enter into a recognizance, with or without surety, in such sum as the court deems proper for his appearance to testify in such cause. A witness failing or refusing to comply with such order shall be committed to the county jail until he gives his testimony in such case or is ordered discharged by the court. If a witness be committed to jail upon order of court for want of such recognizance, he shall be paid like fees while so confined as are allowed witnesses by law in state cases. The trial of such case shall have precedence over other cases and the court shall designate any early day for such trial.

CHAPTER 18

SERVICE OF INDICTMENT AND EXCEPTIONS

Sec. 13439-1. Copy of indictment to be served on accused.

SEC. 1. Within three days after the filing of an indictment for felony and in every other case when requested, the clerk shall make and deliver to the sheriff or to the defendant or his counsel, a copy of such indictment. The sheriff, on receiving such copy, shall serve it on the defendant. A defendant, without his assent, shall not be arraigned or called on to answer to an indictment until one day has elapsed after receiving or having an opportunity to receive in person or by counsel, a copy of such indictment.

Sec. 13439-2. Court to assign counsel to defend indigent prisoner.

SEC. 2. After a copy of the indictment has been served or opportunity had for receiving it, as provided in the next preceding section, the accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel, not exceeding two, who shall have access to such accused at all reasonable hours. Such counsel shall not be a partner in the practice of law of the attorney having charge of the prosecution; and a partner of such attorney shall not be employed by or conduct the defense of a person so prosecuted.

Sec. 13439-3. Payment of counsel assigned in cases of felony.

SEC. 3. Counsel so assigned in a case of felony shall be paid for their services by the county, and shall receive therefor, in a case of murder in the

the argument to the jury is commenced. Such charge or charges, or other charge or instruction provided for in this section when so written and given, shall not be orally qualified, modified or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court has authority to deviate from the foregoing order of proceedings when in its discretion it is deemed proper.

Sec. 13442-9. Charge to jury as to law and fact.

SEC. 9. In charging the jury, the court must state to it all matters of law which the court deems necessary for the information of the jury in giving its verdict; and must in addition thereto inform the jury that it is the exclusive judge of all questions of fact. The court must state to the jury that in determining the question of guilt, it must not consider the punishment but that punishment rests with the judge, as may be provided by law, except in cases of murder in the first degree or burglary of an inhabited dwelling.

Sec. 13442-10. When accused may be tried in his absence.

SEC. 10. A person indicted for a misdemeanor, upon request in writing subscribed by him and entered in the journal, may be tried in his absence or by the court. No other person shall be tried unless personally present, but if a person indicted escape or forfeit his recognizance after the jury is sworn, the trial shall proceed and the verdict be received and recorded. If the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present, and if a felony, the case shall be continued until the accused appears in court, or is retaken.

Sec. 13442-11. Joint trials in felony cases; exceptions.

SEC. 11. When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly unless the court for good cause shown on application therefor by the prosecuting attorney or one or more of said defendants, order that one or more of said defendants be tried separately.

Sec. 13442-12. Mistake in charging offense.

SEC. 12. If it appear during the trial and before submission to the jury or court, that a mistake has been made in charging the proper offense in the indictment or information the court may order a discontinuance of trial without prejudice to the prosecution, and the accused, if there is good cause to detain him may be recognized to appear at the same or next succeeding term of court, or in default thereof committed to jail. In such case the court shall recognize the witnesses for the state to appear at the same time and testify.

Sec. 13442-13. When court shall order discharge of defendant.

SEC. 13. When two or more persons are tried jointly, before any of the accused has gone into his defense the court may direct one or more of such accused to be discharged that he may be a witness for the state.

been for a violation of a municipal ordinance, such proceedings in error may be brought by the solicitor of the municipality. Like proceedings shall be had in such higher court at the hearing of the petition in error as in the review of other criminal cases. The clerk of the court rendering the judgment sought to be reversed, on application of the prosecuting attorney, attorney general or solicitor, shall make a transcript of the docket and journal entries in such case, and transmit it with all bills of exceptions, papers and files in the case, to such higher court.

CHAPTER 39

SAVING CLAUSE--REPEALS

Sec. 13460-1. Effect of invalidity or illegality of a section or part thereof.

SEC. 1. If any section or sections, paragraph or paragraphs, provision or provisions, or part or parts of this act shall be held or declared to be illegal, invalid or unconstitutional, such holding shall not affect any other section, paragraph, provision, part or parts of the same.

Repeals.

SEC. 2. That sections 13422 to 13764, both inclusive, and sections 2919, 12374, 12375, 12376, 12377, 12378, 12382, 12383, 12384, 12384-1, 12385, 12386, 12387, 12388, 12389, 12390 and 12391 of the General Code be, and the same are hereby repealed.

ARTHUR HAMILTON,
Speaker pro tem. of the House of Representatives.

JOHN T. BROWN,
President of the Senate.

Passed April 1, 1929.

Approved April 17, 1929.

MYERS Y. COOPER,
Governor.

The sectional numbers on the margin hereof are designated as provided by law.

GILBERT BETTMAN,
Attorney General.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 22nd day of April, A. D. 1929.

CLARENCE J. BROWN,
Secretary of State.

File No. 63

In case such prisoner is convicted and sentenced upon trial, he shall be returned to the jail or workhouse to serve out the former sentence before the subsequent sentence shall be executed.

HISTORY.—113 v. 123 (172), ch. 17, § 10.

SEC. 13438-11. [When prisoner violates parole.] When a prisoner is released on parole or probation from the Ohio penitentiary, or either of the Ohio state reformatories, and violates any of the conditions of his parole or release, it is the duty of any sheriff or other peace officer, upon being advised or knowing that such convict is in his bailiwick and has violated the conditions of his parole or release, to forthwith arrest such person and report the same to the warden or superintendent of the penitentiary or reformatory, as the case may be, from which said person was so released.

HISTORY.—113 v. 123 (172), ch. 17, § 11. For an analogous section, see former G. C. § 13306-1; 103 v. 404, § 1.

Particular instances of arrest by officer: O-JUR Arrest 9 S.

SEC. 13438-12. Summons on indictments against corporations. When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon such corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent or other chief officer thereof, or by a copy left at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation on or before the return day of the summons duly served, shall appear by one of its officers or by counsel, and answer to the indictment or information by motion, demurrer or plea, and upon failure to make such appearance an answer, the clerk shall enter a plea of "not guilty"; and upon such appearance being made or plea entered, the corporation shall be deemed thenceforth continuously present in court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information.

HISTORY.—113 v. 123 (172), ch. 17, § 12. For an analogous section, see former G. C. § 13307; R. S. § 7231; 87 v. 351.

This section differs from former G.C. § 13607 in that it forbids the arrest of any individual.

Comparative legislation

Appearance and plea by corporation:

A.L.L. Code of Crim. Proc., § 197.
Ala. Code 1928, § 3729.
Ariz. Rev. Code 1928, § 5209.
Cal. Deering's Penal Code 1931, § 1396.
Ga. Code 1928, Penal Code, § 963.
Idaho Code 1932, § 19-3607.
Ill. Smith-Hurd Rev. Stat. 1933, ch. 38, § 697.
Md. Bagby's Code 1924, art. 27, § 728.
Minn. Mason's Gen. Stat. 1927, § 10633.
Miss. Hemingway's Code 1927, § 1257.
Mont. Rev. Codes 1921, §§ 12236, 12239.
Nebr. Comp. Stat. 1929, § 29-1608.
Nev. Comp. Laws 1929, § 11207.
N.J. Comp. Stat. 1910, Cr. Pr., § 62.
N.Dak. Comp. Laws 1913, § 11084.
Okla. Stat. 1931, § 2745.
S.Dak. Comp. Laws 1929, § 4644.
Utah Rev. Stat. 1933, § 105-52-7.
Wash. Remington's Comp. Stat. 1922, § 2011-1.

Process against corporation:

Ala. Code 1928, § 3727.
Ariz. Rev. Code 1928, § 5208.
Ill. Smith-Hurd Rev. Stat. 1933, ch. 38, § 696.
Ind. Burns' Stat. 1933, § 9-1013.
Iowa Code 1931, § 13765.
Kans. Rev. Stat. 1928, § 62-1104.
Md. Bagby's Code 1924, art. 27, § 727.
Minn. Mason's Gen. Stat. 1927, § 10632.
Miss. Hemingway's Code 1927, § 1257.
Mont. Rev. Codes 1921, §§ 12230, 12232.
Nebr. Comp. Stat. 1929, § 29-1608.
Nev. Comp. Laws 1929, § 11207.
N.J. Comp. Stat. 1910, Cr. Pr., § 61.
N.Y. Gilbert's Cr. Code 1935, § 631.
N.Dak. Comp. Laws 1913, § 11078.
Okla. Stat. 1931, § 2745.
S.Dak. Comp. Laws 1929, § 4633.
Utah Rev. Stat. 1933, § 105-52-7.
Va. Code 1930, § 4892.
Wash. Remington's Comp. Stat. 1922, § 2011-1.
W.Va. Code 1937, § 6187.

References to Page's Digest and Ohio Jurisprudence

Arrest of corporations: PAGE Arrest §§ 2, 23, Corp. § 104; O-JUR Corp. §§ 683, 685, Crim. Law § 215, Statutes § 316.

Process against corporations: PAGE Corp. § 255; O-JUR Process § 123 et seq.

Crimes for which a corporation may be indicted, see general note preceding G. C. § 12368.

There is no statutory authority in Ohio for the arrest of a corporation: Reinhart & Newton Co. v. State, 15 O. N. P. (N.S.) 92, 23 O. D. (N.P.) 500 [affirmed, Reinhart & Newton Co. v. State, 24 O. C. (N.S.) 429, 35 O. C. D. 329].

In a criminal or quasi-criminal proceeding the only way service can be obtained upon a corporation is by issuing and serving a summons on one of its officers as provided in cases of indictment, former G. C. § 13607; Reinhart & Newton Co. v. State, 15 O. N. P. (N.S.) 92, 23 O. D. (N.P.) 500 [affirmed, Reinhart & Newton Co. v. State, 24 O. C. (N.S.) 429, 35 O. C. D. 329].

If the president of a corporation is arrested on a complaint against the corporation for violation of a penal statute, and if the corporation thereafter files a motion to quash on grounds other than that of a lack of jurisdiction of the person, this is a voluntary appearance of the corporation and the justice has jurisdiction. A motion to quash because the justice has no jurisdiction of the person of the defendant and of the subject matter is an appearance, though the defendant states it appears solely for the purpose of the motion: Reinhart & Newton Co. v. State, 15 O. N. P. (N.S.) 92, 23 O. D. (N.P.) 500 [affirmed, Reinhart & Newton Co. v. State, 24 O. C. (N.S.) 429, 35 O. C. D. 329].

SEC. 13438-13. Recognizance of witnesses. In any case pending in the court of com-

of the fact that the court sustained such objection and discharged the jury: *Stewart v. State*, 15 O. S. 155.

A suggestion that the jury may be obliged to remain in the jury room all night does not amount to improper coercion if the jury were eventually provided with suitable accommodations; and if they did not render a verdict until an hour after they had resumed deliberations on the following morning: *Bandy v. State*, 13 O. App. 461, 32 O. C. A. 360 [affirming *State v. Bandy*, 22 O. N. P. (N.S.) 65, 30 O. D. (N.P.) 161, and affirmed, without considering this point, *Bandy v. State*, 102 O. S. 384].

It is not an abuse of discretion for a trial judge to keep a jury out for forty hours in an important case and then send them back to their room with an admonition as to the importance to all concerned that they should agree upon a verdict: *Andrews v. State*, 15 O. C. C. (N.S.) 241, 23 O. C. D. 564, 57 Bull. 505 (Ed.) [leave to file petition in error refused, *Andrews v. State*, 57 Bull. 520].

Refusal to discharge a jury on the ground that a publication has been circulated in the courthouse during trial, which would tend to influence the jury is not error if it is not shown that any juror read such article: *Ryan v. State*, 10 O. C. C. (N.S.) 497, 26 O. C. D. 308 [affirmed, without opinion, *Ryan v. State*, 79 O. S. 452].

SEC. 13442-9. Charge to the jury as to law and fact. In charging the jury, the court must state to it all matters of law which the court deems necessary for the information of the jury in giving its verdict; and must in addition thereto inform the jury that it is the exclusive judge of all questions of fact. The court must state to the jury that in determining the question of guilt, it must not consider the punishment but that punishment rests with the judge, as may be provided by law, except in cases of murder in the first degree or burglary of an inhabited dwelling.

HISTORY.—113 v. 123 (181), ch. 21, § 9.

Comparative legislation

Charging jury as to law and fact:

A.L.I.	Code of Crim. Proc., § 325.
Conn.	Gen. Stat. 1930, § 6486.
Ind.	Burns' Stat. 1933, § 9-1805.
Kans.	Rev. Stat. 1923, § 62-1447.
Ky.	Carroll's Stat. 1936, § 225.
Minn.	Mason's Gen. Stat. 1927, § 10712.
N.Y.	Gilbert's Cr. Code 1935, § 420.
Ore.	Code 1930, § 2-308.

References to Page's Digest and Ohio Jurisprudence

Requisites of charge: *PAGE* Crim. Law § 344 et seq.; *O-JUR* Crim. Law § 547 et seq.
Particular instructions: *PAGE* Burglary § 20, Crim. Law § 347 et seq., Homicide § 85 et seq.; *O-JUR* Burglary § 42, Crim. Law § 552 et seq., Homicide § 59.
Review: *PAGE* Crim. Law § 382; *O-JUR* Crim. Law §§ 757, 927 et seq.

ANNOTATIONS

Omission of instruction not to consider punishment held not prejudicial error as to accused: *State v. Moon*, 124 O.S. 465, 179 N.E. 350.

Statutory provisions requiring instruction not to consider punishment are no more mandatory than provisions respecting harmless error: *State v. Moon*, 124 O.S. 465, 179 N.E. 350.

Charge given in prosecution for murder in first degree is not to remove presumption of innocence nor establish burden of proof contrary to rule of

reasonable doubt: *Dull v. State*, 36 O.App. 195, 173 N.E. 26.

Failure of court in prosecution for murder in first degree to charge jury that it must not consider punishment, is not error: *Dull v. State*, 36 O.App. 195, 173 N.E. 26.

It is mandatory that court charge that jury in the determination of guilt, must not consider the punishment provided by the statute, and counsel need not call court's attention to such omission: *Moon v. State*, 34 O.L.R. 352.

This section and G.C. § 12441 are in pari materia and effect will be given to both by construing latter section as an additional exception to former: *Balshiser v. State*, 35 O.L.R. 120.

The provisions of G.C. § 13442-9, requiring the court to state to the jury that it must not consider the punishment, but that punishment rests with the judge, are no more mandatory than are the provisions of G.C. § 13449-5, requiring that a judgment of conviction shall not be reversed unless it shall affirmatively appear from the record that the accused was prejudiced thereby or was prevented from having a fair trial: *Dallison v. State*, 11 O.L.A. 96.

The omission of an instruction, that the jury must not consider the punishment, may be prejudicial to the rights of the state, but is not to the detriment or disadvantage of a defendant charged with an offense to which such provision applies, and he is therefore not prejudiced thereby or prevented from having a fair trial: *Dallison v. State*, 11 O.L.A. 96.

The provisions of G.C. § 13442-9, requiring the court to state to the jury that it must not consider the punishment, but that punishment rests with the judge, are no more mandatory than are the provisions of G.C. § 13449-5, requiring that a judgment of conviction shall not be reversed unless it shall affirmatively appear from the record that the accused was prejudiced thereby or was prevented from having a fair trial: *Blake v. State*, 11 O.L.A. 96.

A charge in criminal prosecution that defendant must "establish" an affirmative defense by greater weight of evidence is not prejudicial where, later in the charge, the word is qualified or defined to be the preponderance of the evidence: *Boronji v. State*, 13 O.L.A. 123.

It is not prejudicial error for the trial court, in a first degree murder prosecution, to state in his charge the punishment for second degree murder where he also charges the jury not to consider the punishment in determining guilt, as required by G.C. § 13442-9: *Neff v. State*, 16 O.L.A. 512.

The court's urging the jury to try to reach a verdict, after the jury has reported they can not agree is not an additional charge in violation of G.C. § 13442-9: *Burnett v. State*, 19 O.L.A. 100.

SEC. 13442-10. When accused may be tried in his absence. A person indicted for a misdemeanor, upon request in writing subscribed by him and entered in the journal, may be tried in his absence or by the court. No other person shall be tried unless personally present, but if a person indicted escape or forfeit his recognizance after the jury is sworn, the trial shall proceed and the verdict be received and recorded. If the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present, and if a felony, the case shall be continued until the accused appears in court, or is retaken.

HISTORY.—113 v. 123 (181), ch. 21, § 10. For an analogous section, see former G. C. § 13376; H. & S. § 7301; 66 v. 310, § 152.

This section is the same as former G.C. § 13676. General Code § 13448-2 provides that when the accused is convicted of murder by confession in open court, the court may examine witnesses and determine the degree of the crime.

Comparative legislation

When presence of defendant required:

- ALI. Code of Crim. Proc., § 287 et seq.
- Ariz. Rev. Code 1928, § 5028.
- Cal. Deering's Penal Code 1931, § 1043.
- Fla. Comp. Gen. Laws 1927, § 8383.
- Idaho Code 1932, § 19-1803.
- Ind. Burns' Stat. 1932, § 9-1301.
- Iowa Code 1931, § 13306.
- Kans. Rev. Stat. 1923, § 62-1411.
- Ky. Carroll's Cr. Code 1932, § 183.
- Maine Rev. Stat. 1930, ch. 146, § 22.
- Mass. Gen. Laws 1932, ch. 278, § 6.
- Mich. Comp. Laws 1929, § 17296.
- Minn. Mason's Gen. Stat. 1927, § 10705.
- Mo. Rev. Stat. 1929, § 3665.
- Nebr. Comp. Stat. 1929, § 23-2001.
- N.Y. Gilbert's Cr. Code 1935, § 356.
- Okla. Stat. 1931, § 3053.
- Ore. Code 1930, § 18-904.
- S.Dak. Comp. Laws 1929, § 4821.
- Tex. Vernon Comp. Stat. 1928, Cr. Pr., art. 580.
- Utah Rev. Stat. 1932, § 105-28-3.
- Va. Code 1930, § 4894.
- W.Va. Code 1937, § 6191.
- Wis. Stat. 1933, § 357.07.

FORM: Entry. Patterson § 13442-10.

ENTRY: Leave to be tried when absent, or by the court. Wild No. 1309.

Presence of accused and counsel: ~~BASE~~ Crim. Law § 321; O-JUR Crim. Law §§ 110, 112, 119, 604, 678, 912.

ANNOTATIONS

1. Trial by court
2. Absence of accused
3. —When judge communicates with jury
4. —When verdict received
5. —When motion argued

1. Trial by court

This section does not make it obligatory upon the court to try the accused without a jury: *Ickes v. State*, 63 O. S. 549, 59 N. E. 233.

By force of G. C. § 4523, a mayor of a city in which there is no police court has final jurisdiction to hear and determine any prosecution for a misdemeanor where the accused is not entitled to a trial by jury: *State v. Borham*, 72 O. S. 358, 74 N. E. 220.

A plea of guilty is a waiver of a trial by jury, and a plea of guilty entered before a mayor having complete jurisdiction in misdemeanors is to be given the same effect as in courts of higher jurisdiction: *Hillier v. State*, 5 O. C. C. (N.S.) 245, 15 O. C. D. 777.

The hearing of a motion for a new trial is not a part of the trial. The presence at the hearing of such motion of one convicted of a crime is not necessary and it is error for the trial judge to refuse to hear and determine same on account of the convict's absence: *Armstrong v. State*, 15 O. C. C. (N.S.) 368, 24 O. C. D. 384.

2. Absence of accused

For presence of accused at the view of the premises by the jury, see notes to G. C. § 13442-14.

Where, pending a trial upon a criminal prosecution, the accused, being on bail, absconds, it is legal to proceed with the case and to receive a verdict of guilty in his absence: *Fight v. State*, 7 O. (pt. 1) 180.

Where the defendant is on bail, it is not error to receive a verdict in his voluntary absence: *Wilson v. State*, 2 O. S. 319.

Where a person arrested for violating a village ordinance, is brought before the mayor and the case adjourned for trial to a certain hour of a future day, and the accused, being out on bail, fails to appear at the hour fixed for his trial, such mayor, in the absence of the accused can not try to convict and sentence him: *Truman v. Walton*, 59 O. S. 517, 53 N. E. 57.

If, after the trial of a felony case has been begun and before it is finished, the accused absent himself, the trial may continue, after forfeiture of the recognizance, and the verdict be received and recorded, but sentence can not be pronounced until the accused is in court, or is retaken: *Lieblang v. State*, 18 O. C. C. (N.S.) 179, 32 O. C. D. 673, sub nomine, *Lieblang v. State*, 21 O. C. C. (N.S.) 539, 33 O. C. D. 412.

3. —When judge communicates with jury

Where the jury have retired to consider their verdict, it is error for the court, on the return of jury into court, to again instruct them as to the law of the case in the absence of the accused, who is then in jail, even though the defendant's counsel is present at the giving of such instructions: *Jones v. State*, 26 O. S. 208.

During the enforced absence of the accused, it is error for the judge to hold a conversation with the jury which might influence their verdict: *Bennett v. State*, 10 O. C. C. 84, 4 O. C. D. 129.

The accused must be present when the jury is called out to report its progress: *Bennett v. State*, 10 O. C. C. 84, 4 O. C. D. 129.

A court has no right to communicate with the jury respecting the charge after the jury has retired, except publicly and in the presence of the accused: *Kirk v. State*, 14 O. S. 511; *Campbell v. Beckett*, 8 O. S. 210.

A judge may state his recollection of the evidence of a material witness when the jury returns into court and asks him to do so: *Hulse v. State*, 35 O. S. 421.

4. —When verdict received

It is the right of the accused to be present at the return of the verdict: *Sargent v. State*, 11 O. 472; *Rose v. State*, 20 O. 31.

The counsel of the accused are entitled to a reasonable opportunity to be present at the receiving of the verdict. But where the court, after the jury agreed, had the courthouse bell rung in pursuance of an announcement made at the time the jury retired, and also counsel called, and a reasonable time had elapsed for counsel to appear, all was done by the court that the defendant or his counsel had a right to expect: *Weaver v. State*, 24 O. S. 584.

See, also, *Crusen v. State*, 10 O. S. 259.

It is not error to omit giving notice to the prisoner's counsel that he may be present when the verdict is to be delivered by the jury: *Sutcliffe v. State*, 18 O. 469.

5. —When motion argued

It is no ground for the reversal of a judgment, that a motion for a new trial was made, argued, and overruled in the absence of the prisoner, where no objection was made till after sentence: *Griffin v. State*, 34 O. S. 299.

SEC. 13442-11. Joint trials in felony cases; exceptions. When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly unless the court for good cause shown on application therefor by the prosecuting attorney or one or more of said defendants, order that one or more of said defendants be tried separately.

HISTORY.—113 v. 123 (181), ch. 21, § 11. For an analogous section, see former G. C. § 13677; R. S. § 7302; 60 v. 310, § 153; 110 v. 300 (301).



LEXSTAT ORC 2941.47

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JULY 16, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2941. INDICTMENT
PROCESS ON INDICTMENTS

Go to the Ohio Code Archive Directory

ORC Ann. 2941.47 (2009)

§ 2941.47. Summons on indictments against corporations

When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of "not guilty." Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information.

HISTORY:

GC § 13438-12; 113 v 123(172), ch 17, § 12; Bureau of Code Revision. Eff 10-1-53.

NOTES:

Related Statutes & Rules

Ohio Rules

Process: who may be served, *CivR 4.2(F)*.

Service, how made, *CrimR 49(B)*.

Warrant or summons upon indictment or information, *CrimR 9*.

Case Notes & OAGs

OFFICER NOT NAMED AS DEFENDANT.

Where the city files a criminal complaint against a corporation for violation of the municipal tax code and does not name the corporation's president as a defendant, the subsequent conviction of its president absent formal accusation violates due process and is consequently void: *Cleveland v. Technisort, Inc.*, 20 Ohio App. 3d 139, 485 N.E.2d 294 (1985).



LEXSTAT ORC ANN. 2945.12

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JULY 16, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
TRIAL PROCEEDINGS

Go to the Ohio Code Archive Directory

ORC Ann. 2945.12 (2009)

§ 2945.12. When accused may be tried in his absence

A person indicted for a misdemeanor, upon request in writing subscribed by him and entered in the journal, may be tried in his absence by a jury or by the court. No other person shall be tried unless personally present, but if a person indicted escapes or forfeits his recognizance after the jury is sworn, the trial shall proceed and the verdict be received and recorded. If the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present. If the offense charged is a felony, the case shall be continued until the accused appears in court, or is retaken.

HISTORY:

GC § 13442-10; 113 v 123(181), ch 21, § 10; Bureau of Code Revision. Eff 10-1-53.

NOTES:

Related Statutes & Rules

Ohio Rules

Presence of defendant, *CrimR 43*.

Comparative Legislation

ABSENCE OF ACCUSED; CA--*Cal Pen Code § 1043*

FL--*Fla. R. Crim. P. 3.180*

IL--*725 ILCS § 5/115-4.1*

IN--*Burns Ind. Code Ann. § 35-38-1-4*

KY--*Ky RCr 8.28*

MI--*MCLS § 768.3*

NY--*NY CLS CPL § 110.10*

PA--*Pa. R. Crim. P. 113*

Practice Forms

Request for Trial in Absentia 1, 16 Ohio Forms of Pleading and Practice Form 23:3

ALR

Absence of accused at return of verdict in felony case. *23 ALR2d 456.*

Power to try, in his absence, one charged with misdemeanor. *68 ALR2d 638.*

Case Notes & OAGs

ANALYSIS Generally Commencement of trial Felonies Misdemeanors

GENERALLY.

Defendant presented no evidence that his absence when the jury venire was first sworn in thwarted a fair and just hearing. Defendant was present for every other stage of the proceedings and his conjecture that perhaps he or his counsel would have noticed a gesture or an expression on a juror's face to indicate that the juror intended to falsify the oath was not sufficient to show plain error. *State v. Hawkins, 2004 Ohio App. LEXIS 790, 2004 Ohio 855, (2004), reversed without opinion at 104 Ohio St. 3d 582, 2004 Ohio 7124, 820 N.E.2d 931, 2004 Ohio LEXIS 3074 (2004).*

Where defendant left the proceedings against him before the jury had been impanelled, the court erred in trying defendant in absentia: *State v. Meade, 1996 Ohio App. LEXIS 1962 (8th Dist. 1996).*

A defendant can waive his right to be present at his trial; the waiver is conditioned upon whether the trial has already commenced at the time of defendant's absence from trial: *State v. Meade, 1996 Ohio App. LEXIS 1962 (8th Dist. 1996).*

COMMENCEMENT OF TRIAL.

A jury trial commences after the jury is impaneled and sworn in the presence of the defendant: *State v. Meade, 80 Ohio St. 3d 419, 687 N.E.2d 278, 1997 Ohio LEXIS 3129, 1997 Ohio 332, (1997).*

FELONIES.

Revised Code § 2945.12 does not prohibit the trial by the court of one accused of a felony where such accused voluntarily absents himself so that he cannot be found: *State v. Phillips, 34 Ohio App. 2d 217, 299 N.E.2d 286 (1972)*.

MISDEMEANORS.

A person charged on affidavit with a misdemeanor under penalty of imprisonment is entitled by the provisions of this section to be personally present at the trial, and trial and conviction in his absence are reversible error: *State v. Walker, 108 Ohio App. 333, 161 N.E.2d 521 (1959)*.



LEXSTAT ORC ANN. 2938.12

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JULY 16, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2938. TRIAL -- MAGISTRATE COURTS

Go to the Ohio Code Archive Directory

ORC Ann. 2938.12 (2009)

§ 2938.12. When accused may be tried in his absence

A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, but no right shall exist in the defendant to be so tried. If after trial commences a person being tried escapes or departs without leave, the trial shall proceed and verdict or finding be received and sentence passed as if he were personally present.

HISTORY:

128 v 97(115). Eff 1-1-60.

NOTES:

Related Statutes & Rules

Ohio Rules

Presence of defendant, *CrimR 43*.

ALR

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law. *85 ALR2d 1111*.

Power to try, in his absence, one charged with misdemeanor. *68 ALR2d 638*.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. *23 ALR4th 955*.

RULE 43. Presence of the defendant

(A) Defendant's presence.

(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

(2) Notwithstanding the provisions of division (A)(1) of this rule, in misdemeanor cases or in felony cases where a waiver has been obtained in accordance with division (A)(3) of this rule, the court may permit the presence and participation of a defendant by remote contemporaneous video for any proceeding if all of the following apply:

(a) The court gives appropriate notice to all the parties;

(b) The video arrangements allow the defendant to hear and see the proceeding;

(c) The video arrangements allow the defendant to speak, and to be seen and heard by the court and all parties;

(d) The court makes provision to allow for private communication between the defendant and counsel. The court shall inform the defendant on the record how to, at any time, communicate privately with counsel. Counsel shall be afforded the opportunity to speak to defendant privately and in person. Counsel shall be permitted to appear with defendant at the remote location if requested.

(e) The proceeding may involve sworn testimony that is subject to cross examination, if counsel is present, participates and consents.

(3) The defendant may waive, in writing or on the record, the defendant's right to be physically present under these rules with leave of court.

(B) Defendant excluded because of disruptive conduct. Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may proceed in the defendant's absence or by remote contemporaneous video, and judgment and sentence may be pronounced as if the defendant were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

[Effective: July 1, 1973; amended effective July 1, 2008.]

Staff Note (July 1, 2008 amendments)

Rule 43 is amended so that in misdemeanor cases and in felony cases where the defendant has waived the right to be present, the "presence" requirement can be satisfied either by physical presence or presence by video conferencing. Advances in video conferencing technology have enabled courts to save considerable expense by conducting proceedings by video conferencing while still preserving the rights of the defendant.

In order to ensure that the defendant's rights are protected, any proceeding conducted through video conferencing must meet certain requirements: the defendant must be able to see and hear the judge, the judge must be able to see and hear the defendant, and the defendant must have the ability to communicate confidentially with his or her attorney. Furthermore, presence by video conferencing is permitted under limited circumstances involving sworn testimony. Counsel must be present and must consent to the use of video conferencing. Contemplated in this type of hearing is a miscellaneous criminal proceeding such as probation revocation, protection order hearing or bond motion.