

ORIGINAL

IN THE OHIO SUPREME COURT

Michael Liming,	:	Case Nos. 2011-1170
Plaintiff-Appellant,	:	2011-1985
vs.	:	On appeal from the Athens County Court of Appeals
Denday Damos,	:	Fourth Appellate District
Defendant-Appellee.	:	Case No. 10 CA 39

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REPLY BRIEF OF PLAINTIFF-APPELLANT MICHAEL LIMING

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## INTRODUCTION

In June 2010, Mr. Liming was held in contempt for failing to comply with the court's November 12, 2008 Entry Adopting Magistrate's Decision. He was ordered to serve an unconditional ten days in jail. Denday Damos did not appear at that hearing, but counsel did appear on her behalf. *See* CSEA Brief at p. 6 (stating that CSEA did not appear on behalf of the State but also claiming that CSEA was not present on behalf of Ms. Damos). Throughout the hearing, Mr. Liming pleaded for appointed counsel, but the court refused his requests, finding that he had no right to an attorney. Neither party contests that Mr. Liming was indigent.

The determination of Mr. Liming's right to counsel turns on whether the June 14 hearing was criminal. If so, Mr. Liming was entitled to counsel. But even if this Court concludes that a contempt hearing that imposes an unconditional sentence is civil, Mr. Liming was still entitled to counsel because (1) the civil hearing was converted into a criminal hearing because it was impossible for Mr. Liming to comply with the purge conditions, and/or (2) due process considerations weigh in favor of appointing Mr. Liming counsel.

## ARGUMENT

### I. Is a purge hearing to impose a suspended sentence for failing to pay child support a civil or criminal proceeding?

- A. If the court punishes the contemnor by imposing an unconditional jail sentence, it is criminal contempt, even if the court also hopes to coerce the contemnor into future compliance.

As discussed in Mr. Liming's merit brief, contempt proceedings are civil if they "seek[] only to 'coerc[e] the defendant to do' what a court previously ordered him to do." (Emphasis added.) *Turner v. Rogers*, --- U.S. ---, 131 S.Ct. 2507, 2516, 180 L.Ed.2d 452 (2011), quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911). If the court's purpose is mixed – that is to both punish and coerce – the contempt finding is both civil and criminal, and the criminal aspect demands that the contemnor be afforded all of the constitutional rights that a criminal defendant is guaranteed. *Samantha N. v. Lee A.R.*, 6th Dist. Nos. E-00-36, E-00-37, 2001 Ohio App. LEXIS 540, at \*8 (Feb. 16, 2001). *Accord Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253-55, 416 N.E.2d 610, (1980); *Lilo v. Lilo*, 6th Dist. No. H-03-044, 2004-Ohio-4848, ¶ 31; *Smith v. Smith*, 9th Dist. No. 95CA0017, 1995 Ohio App. LEXIS 5794, at \*5 (Dec. 29, 1995). And protecting a criminal defendant's constitutional rights is more important than any burden imposed because counsel was provided at a mixed proceeding. *See id.* at \*7-8.

CSEA argues that the court imposed an unconditional jail sentence so it could persuade Mr. Liming to comply with its future orders. CSEA Brief at p. 10. CSEA may

be partially right, but the court was also punishing Mr. Liming, and the right to counsel attached to that aspect.

The test for determining whether a contempt finding is civil or criminal is to look at the nature and purpose of the remedy imposed. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). If the court was only trying to coerce Mr. Liming to comply with its future orders, it could have imposed a ten-day sentence with purge conditions. It did not. It imposed an unconditional term of incarceration. The overwhelming amount of authority holds that an unconditional sentence is punishment. *See, e.g., Turner*, 131 S.Ct. at 2516; *United Mine Workers* at 828; *Oak Hill Banks v. Ison*, 4th Dist. No. 03CA5, 2003-Ohio-5547, ¶ 15.

Further, whenever a court imposes a prison sentence in any criminal matter, that sentence is being imposed, in part, to deter the offender from future offenses. *United Mine Workers* at 828. But the alternative purpose does not make the sentence a result of a civil matter anymore than it does here. Mr. Liming could not purge the ten-day sentence, and he did not hold the keys to his cell. *See id.* Because the court was punishing Mr. Liming for failing to purge the contempt finding, the June 2010 hearing was criminal.

There is a practical concern about the appointment of counsel. A court cannot know if it is going to impose a sentence prior to a hearing. This Court could adopt a

rule that counsel should be appointed whenever a child support enforcement agency asks that a suspended sentence for contempt be imposed.

**B. A suspended sentence is not the same thing as being paroled.**

CSEA argues that a civil contemnor, who is subject to purge conditions, has the same diminished liberty interest in his freedom as a prisoner who has been paroled; and therefore, the contemnor should be afforded only those rights granted to a parolee. CSEA's Brief at pp. 7-8. CSEA is arguing that Mr. Liming lacked a liberty interest in the thirty days of his life that were (and are) the subject of the suspended sentence. *See* Nov. 12, 2008 Entry Adopting Magistrate's Decision. For support, CSEA relies exclusively on *Segovia v. Likens*, 179 Ohio App.3d 256, 2008-Ohio-5896. CSEA's argument is offensive, and its legal reasoning is unsound.

*Segovia* fails to recognize several fundamental differences between a civil finding of contempt and the imposition of a prison sentence. A parolee is sentenced to a term of imprisonment following a trial conducted in accordance with all the rights guaranteed to a criminal defendant and set forth in the Bill of Rights, which include:

- The right to an attorney;<sup>1</sup>
- The right to a jury trial;
- The right to remain silent; and

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<sup>1</sup> The criminal defendant is entitled to the presence of an attorney at every stage of the criminal proceedings, which includes trial and sentencing. Crim.R. 43(A). *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967).

- The right to confront the witnesses against him or her.

A parolee is released from imprisonment prior to the expiration of his or her stated prison sentence.<sup>2</sup> Not only is a prisoner not entitled to be released on parole, but it may be revoked at any time without a court's involvement. *See Gagnon v. Scarpelli*, 411 U.S. 778, 784, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). It is only after the defendant has begun serving his or her properly imposed sentence that the defendant becomes parole eligible. Further, whether to revoke a person's parole is a determination made by a parole board, which is part of the executive branch of the government.

Parole is not used to coerce or punish: "parole is an established variation on imprisonment of convicted criminals." *Morrissey v. Brewer* 408 U.S. 471, 477, 92 S.Ct. 2593, 2598, 33 L.Ed.2d 484, 492 (1972). Its purpose is to help individuals reintegrate into society after having served a portion of his or her prison term. *Id.*

A finding of civil contempt is unlike parole. The contemnor is held in contempt on a mere preponderance of the evidence. The only rights that attach are those protected by due process. Because there is less process due at a contempt proceeding, a suspended sentence resulting from that hearing should not diminish a contemnor's liberty interest to the same degree as parole.

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<sup>2</sup> *Segovia* also involved a less complicated contempt proceeding. In that case, the father was held in contempt for failing to comply with the court's phone visitation schedule. *Id.* at ¶ 39.

Further, once a finding of contempt has been made, a suspended sentence may not simply be imposed: there must be additional court action. First, a complainant must move for the imposition of the sentence. The court must determine that the contemnor did not comply with the court's order, that no defenses apply, that there has not been a change in circumstances sufficient to warrant relief from the finding of contempt, and that the contemnor was capable of complying with the court order. *See Turner*, 131 S.Ct. at 2513-14. Only, then, after these additional findings have been made, may the suspended sentence be imposed by the court. If comparable to anything, the imposition of a suspended sentence that is the result of a civil contempt finding is more like the imposition of a deferred sentence. And the United States Supreme Court has already determined that a defendant has a right to counsel in that circumstance. *Mempa v. Rhay*, 389 U.S. 128, 137, 88 S.Ct. 254, 258, 19 L.Ed.2d 336, 342 (1967).

In *Mempa*, the Court ruled that a probationer is entitled to counsel at a probation revocation hearing where a deferred or suspended sentence will be imposed. *Id.* at 137. Thus, the Court implicitly recognized that a person does not have a diminished liberty interest in a suspended sentence. *Id.* at 136 (stating that a person is entitled to counsel before the imposition of a deferred sentence). And Ohio has approved of and adopted *Mempa* and its reasoning. *State v. Miller*, 19 Ohio St.2d 180, 180-81, 249 N.E.2d 920 (1969). *See State v. McConnell*, 143 Ohio App.3d 219, 2001-Ohio-2129, 757 N.E.2d 1167 (recognizing the right to appointed-counsel at a hearing to impose a suspended

sentence resulting from judicial release); *State v. Frost*, 86 Ohio App.3d 772, 777, 621 N.E.2d 1259 (1993); Crim.R. 32.3(B) (stating that an indigent person on community control has a right to appointed-counsel at a revocation hearing).<sup>3</sup> Just like in contempt proceedings, before the suspended sentence may be imposed, certain findings must be made by a court: there must be a determination that the probationer is in violation of an existing rule; that he or she violated the rule; and that no defenses apply. *Mempa* at 135. Consequently, if a probationer with a suspended sentence does not have a diminished liberty interest in the time associated with the suspended sentence, a civil contemnor cannot have a diminished liberty interest in his or her suspended sentence.

Mr. Liming does not have a diminished liberty interest in the ten days that represent the suspended sentence. The trial court ruled that Mr. Liming was not entitled to counsel because Mr. Liming did not face the possibility of a new jail sentence. It reasoned that Mr. Liming had already been held in contempt of court and had already been sentenced to thirty days in jail. But, if that were the case, a second hearing to impose the sentence would not have been needed. Until June 2010, there was merely a threat that Mr. Liming may have to serve thirty days in jail. At the June 2010 hearing, the court could have found that Mr. Liming was in compliance with the court's prior order, that he had a valid defense to CSEA's claims, or that it was impossible for

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<sup>3</sup> Moreover, there are cases in which a parolee is entitled to counsel at a parole revocation hearing. See *Anderson v. McMillian* 44 Ohio App.2d 50, 53, 335 N.E.2d 719, 721 (1975), citing *Gagnon*, 411 U.S. at 788.

him to comply with the order. Thus, prior to the hearing, jail was not certain, and Mr. Liming maintained an interest in his liberty. *Burton v. Hooten*, 5th Dist. No. 06-COA-016, 2007-Ohio-521, ¶ 34.

**C. It is the court's duty to determine if a contemnor has the ability to comply with a support order. If the contemnor cannot comply, the hearing is criminal, and the contemnor is entitled to court-appointed counsel.**

If it is impossible for a defendant to comply with a support order, any sentence that is the result of non-compliance is a criminal punishment, even if there are purge conditions attached to the sentence imposed. *Turner*, 131 S.Ct. at 2518-19. CSEA claims that the June 14, 2010 hearing was a civil proceeding. CSEA also argues that the trial court did not need to determine if Mr. Liming was capable of complying with the November 12, 2008 Entry Adopting Magistrate's Decision (also referred to as "purge order") because: (1) once CSEA established that Mr. Liming was in non-compliance with the purge order, the burden shifted to Mr. Liming to prove that he could not comply, and he did not meet his burden; (2) that the court determined on prior occasions that Mr. Liming was capable of complying with the purge order, and that those findings should be incorporated into the July 28, 2010 entry, imposing the sentence; and (3) Mr. Liming admitted at the June 2010 hearing that he was capable of complying with the purge order. CSEA's Brief at p. 13. CSEA's arguments are wrong.

*Turner* explicitly states that it is the court's obligation to inquire into and determine if a contemnor is capable of complying with a support order. *Turner*, 131

S.Ct. at 2513-14. There was no finding at the June 14 hearing or contained in the July 28, 2010 entry that Mr. Liming was capable of complying with the November 12, 2008 purge order. *Liming*, 4th Dist. No. 10CA39, 2011-Ohio-2726, at ¶ 14 (stating that the trial court did not determine if Mr. Liming was capable of complying with the purge order at the June 2010 hearing). And CSEA does not claim that the court made that inquiry or finding at the time of hearing.<sup>4</sup>

CSEA argues that the court determined that Mr. Liming was capable of complying with the November 12, 2008 purge order when it held a hearing to modify his support obligations; that, that finding was adopted by the court on June 3, 2010; and that finding should be read into the court's July 28, 2010 entry, imposing the sentence. CSEA's Brief, pp. 13-14. CSEA argument makes little sense.

On April 26, 2010, a hearing was held to determine if the child support award of \$376.99 should be modified to a lesser amount. The magistrate determined that Mr. Liming was not capable of making that payment. On May 18, 2010, the magistrate recommended lowering Mr. Liming's child support obligation. The magistrate's decision was adopted on June 3, 2010, without any objections. The modification was made retroactive to January 2010. Crucially, the November 12, 2008 entry that contained the purge conditions (which is the foundation for the June 14, 2010 hearing)

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<sup>4</sup> Moreover, CSEA's argument that Mr. Liming's compliance with the purge order is subject to a burden shifting analysis, further establishes the complexity of this matter, and Mr. Liming's need for counsel.

was based on Mr. Liming's original support award amount of \$376.99 plus \$75.40 in arrears, and it identifies those precise amounts. The modification cannot be used as basis for determining that Mr. Liming was capable of complying with the November 2008 purge order. Further, the fact that Mr. Liming's support obligation was modified to a lesser amount establishes that he was not capable of complying with the purge order. Finally, even if the trial court found that Mr. Liming was capable of complying with the purge order or child support order prior to June 14, it does not mean that he was capable of complying on June 14, 2010, which is the crucial period in time. Indeed, a person's financial circumstances are always subject to change. Between the time of the original contempt hearing and the purge hearing, the contemnor could lose his or her job, sustain an injury, or suffer from some other event that makes it impossible for him or her to comply with the court's purge order.

Next, CSEA claims that Mr. Liming said he could comply with the court's order and that admission is enough to substitute for the court's needed findings. CSEA's Brief at p. 13. To reach this conclusion, CSEA misreads the testimony. Mr. Liming testified that the amount of the child support award was reasonable:

MR. LIMING: Now I am willing, I think it's reasonable, I think it's fair, I am willing to make a very reasonable attempt to pay the \$280.64 plus the \$56.13 which you, you have ordered me to pay as the arrearages. I think that is a fair and reasonable amount.

June 14, 2010 Hearing, p. 9.

MR. LIMING: Uh, I agree that that is a reasonable amount to pay. Your honor I have made every possible reasonable amount [sic] to pay the payments to the best of my ability. I think to punish me further does not serve any purpose. Uh, I am willing to pay the \$56.13 in arrearages. I am willing to pay the \$280.64.

June 14, 2010 Hearing, p. 47.

Mr. Liming did not say that he was capable of making the payments, only that the amount was reasonable. But even if his statements could be read as a concession, a contemnor's purported admissions cannot alleviate a court from its obligation or substitute for its finding that the contemnor was capable of complying with the purge order.

**II. Due process entitles an indigent contemnor to be represented by court-appointed counsel at a "purge" hearing, if, at the conclusion of that hearing, the trial court imposes a term of incarceration.**

**A. Mr. Liming has a per se right to counsel; *Turner* is about civil contempt and does not apply to Mr. Liming's case.**

In *Turner*, the Court ruled that an obligor does not have a per se right to counsel in a civil contempt proceeding when the custodial parent is not represented by counsel. *Turner*, 131 S.Ct. at 2512. Instead, the Due Process Clause demands that lower courts weigh the *Eldridge*<sup>5</sup> factors and then decide if fundamental fairness necessitates counsel under the circumstances. *Id.* at 2518-19. *Turner* does not apply to Mr. Liming's case, as

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<sup>5</sup> The *Eldridge* factors were identified by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

explained above, Mr. Liming's June 14, 2010 hearing was criminal, and he had a Sixth Amendment right to counsel.

*Turner* was a civil contempt proceeding because the order imposing the contemnor's sentence had a purge condition. *Id.* at 2513. That is the contemnor could be released before the expiration of his stated term of incarceration if he fulfilled certain obligations: the contemnor had the keys to his cell. *Id.* Mr. Liming's sentence was unconditional; he did not have the keys to his cell. Further, the *Turner* holding only applies to cases where the custodial parent is not represented by counsel. *Id.* at 2512. Denday Damos was represented by counsel at the June 14, 2010 hearing. CSEA's Brief at p. 6 (stating that the CSEA was not present on behalf of the State but also claiming that CSEA was not representing Ms. Damos's interests).

**B. Even if *Turner* applies, there were no alternative safeguards in place. As a result, Mr. Liming was entitled to counsel.**

*Turner* held that a State need not provide counsel to a child support obligor in a civil contempt proceeding if there are alternate procedures in place "that assure a fundamentally fair determination of the critical incarceration related question, whether the supporting parent is able to comply with the support order." *Turner*, 131 S.Ct. at 2512. Thus, if a contempt proceeding is civil, and the alternative safeguards are not in place, a civil contemnor is entitled to counsel. *Id.*

The *Turner* Court discussed four possible alternative safeguards that were presented by the Attorney General's Office. *Id.* at 2519. The list is not exhaustive or exclusive. *Id.* at 2520. They are:

- (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding;
- (2) the use of a form (or the equivalent) to elicit relevant financial information;
- (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g. those triggered by his responses on the form), and
- (4) an express finding by the court that the defendant has the ability to pay.

*Id.* at 2519.

None of those safeguards were in place at the June 14, 2010 hearing. As already stated, there were no express findings by the court that Mr. Liming had the ability to pay. In fact, the Fourth District Court of Appeals determined that the only issue considered by the trial court at the purge hearing was whether Mr. Liming had satisfied the purge order. *Liming*, 2011-Ohio-2726, at ¶ 14.

At the hearing, Mr. Liming did not complete an indigency form or any form detailing his ability to pay. He was not asked questions about his ability to pay. *See* June 14, 2010 Hearing Transcript. He was not asked how much money he made or what his expenses were. He was only asked about his noncompliance with the November 2008 purge order. *Id.*

Finally, he was not given notice by the court that his ability to pay would be a critical factor at the hearing. CSEA argues that it told Mr. Liming that his ability to pay would be important. CSEA's Brief at pp. 5-6. But assuming that is true, CSEA represented the adverse party. Mr. Liming cannot and should not be expected to rely on the adverse party for legal advice.

Even if the June 2010 hearing were civil, there were no alternative safeguards in place. Consequently, Mr. Liming was entitled to counsel under the Due Process Clause.

**C. If the June 2010 hearing was civil, fundamental fairness necessitates to the appointment of counsel.**

As set forth in Mr. Liming's merit brief, a contemnor is entitled to counsel at a civil contempt proceeding, where the *Eldridge* factors weigh in favor of appointing counsel. The *Eldridge* factors are:

- (1) "the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
- (3) the "[g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 334.

The contemnor's private interests weigh in favor of appointing counsel. As discussed in Mr. Liming's Merit Brief, the risk of incarceration is "at the core of the

liberty protected by the Due Process Clause." See *Turner*, 131 S.Ct. at 2518, quoting *Focha v. Louisiana* 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437, 448 (1992).

Because there are no safeguards in place, the risk of an erroneous deprivation is high. The court never inquired into whether Mr. Liming was capable of complying with the order. This matter was extremely complicated; it involved multiple contempt filings and bankruptcy filings, and a near contemporaneous modification hearing. Thus, this factor weighs in favor of appointing Mr. Liming counsel.

The government does have interest in the swift enforcement of child support orders, CSEA Brief at p. 12, but Mr. Liming is not advocating for a delay in child support proceedings. He is advocating for counsel. CSEA argues that appointing counsel will cause further delays. *Id.* If counsel had been appointed to represent Mr. Liming, the hearing and this matter would have been settled months ago. Moreover, counsel could have assisted in framing the legal issues and insured that the court considered relevant and necessary issues, such as Mr. Liming's ability to pay. Further, once this Court establishes clear rules regarding when counsel must be appointed, a court may appoint counsel prior to the scheduled hearing and no delay will result. Finally, as explained in Mr. Liming's merit brief, appointing counsel will result in a de minimis financial burden.

Mr. Liming has demonstrated that he has a due process right to counsel, and that counsel should have been appointed at the June 2010 hearing.

CONCLUSION

This Court should reverse the judgment of the court of appeals, and adopt both of Mr. Liming's propositions of law. Mr. Liming's ten-day jail sentence should be vacated, and this action should be remanded so the trial court may appoint Mr. Liming counsel and conduct a new hearing.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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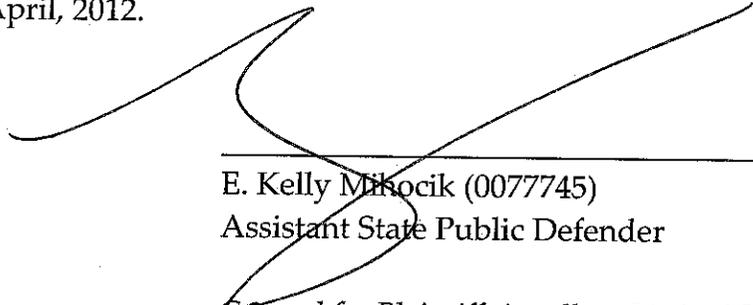
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served, by regular U.S. Mail, upon Keith Wiens, Athens County CSEA, 184 Lancaster Street, Athens, Ohio 45701 this 23rd day of April, 2012.



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#365474

IN THE SUPREME COURT OF OHIO

Michael Liming,	:	
	:	Case Nos. 2011-1170
Plaintiff-Appellant,	:	2011-1985
	:	
v.	:	On Appeal from the Athens
	:	County Court of Appeals
Denday Damos,	:	Fourth Appellate District
	:	Case No. 10 CA 39
Defendant-Appellee.	:	

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APPENDIX TO REPLY BRIEF OF MICHAEL LIMING

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\*\*\* Rules current through rule amendments received through March 2, 2012 \*\*\*  
\*\*\* Annotations current through November 7, 2011 \*\*\*

Ohio Rules Of Criminal Procedure

*Ohio Crim. R. 32.3* (2012)

Review Court Orders which may amend this Rule.

**Rule 32.3. Revocation of Probation**

**(A) Hearing.**

The court shall not impose a prison term for violation of the conditions of a community control sanction or revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which action is proposed. The defendant may be admitted to bail pending hearing.

**(B) Counsel.**

The defendant shall have the right to be represented by retained counsel and shall be so advised. Where a defendant convicted of a serious offense is unable to obtain counsel, counsel shall be assigned to represent the defendant, unless the defendant after being fully advised of his or her right to assigned counsel, knowingly, intelligently, and voluntarily waives the right to counsel. Where a defendant convicted of a petty offense is unable to obtain counsel, the court may assign counsel to represent the defendant.

**(C) Confinement in petty offense cases.**

If confinement after conviction was precluded by *Crim. R. 44(B)*, revocation of probation shall not result in confinement.

If confinement after conviction was not precluded by *Crim. R. 44(B)*, revocation of probation shall not result in confinement unless, at the revocation hearing, there is compliance with *Crim. R. 44(B)*.

**(D) Waiver of counsel.**

Waiver of counsel shall be as prescribed in *Crim. R. 44(C)*.

**HISTORY:** Amended, eff 7-1-98.

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\*\*\* Rules current through rule amendments received through March 2, 2012 \*\*\*  
 \*\*\* Annotations current through November 7, 2011 \*\*\*

Ohio Rules Of Criminal Procedure

*Ohio Crim. R 43 (2012)*

Review Court Orders which may amend this Rule.

**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.

**HISTORY:** Amended, eff. 7-1-08.