

Alabama Rules of Criminal Procedure

Rule 9. Presence of defendant, witnesses, and spectators; televising, photographing, or radio broadcasting of judicial proceedings.

Rule 9.1. Defendant's right to be present.

(a) **RIGHT TO BE PRESENT.** The defendant has the right to be present at the arraignment and at every stage of the trial, including the selection of the jury, the giving of additional instructions pursuant to Rule 21, the return of the verdict, and sentencing.

(b) **WAIVER OF THE RIGHT TO BE PRESENT.**

(1) Except as provided in subsection (2), a defendant may waive the right to be present at any proceeding in the following manner:

(i) With the consent of the court, by an understanding and voluntary waiver in open court or by a written consent executed by the defendant and by the defendant's attorney of record, filed in the case.

(ii) By the defendant's absence from any proceeding, upon the court's finding that such absence was voluntary and constitutes an understanding and voluntary waiver of the right to be present, and that the defendant had notice of the time and place of the proceeding and was informed of the right to be present.

(2) A defendant may not waive the right to be present if:

(i) The defendant is not represented by counsel at the proceeding at which the defendant is not present, except in minor misdemeanor cases or proceedings conducted after the defendant has been adjudicated guilty; or

(ii) The defendant has been convicted of an offense that may be punishable by death and sentence is being imposed.

(c) **OBTAINING PRESENCE OF UNEXCUSED DEFENDANT.** If a defendant is not present at the trial, or at any stage thereof, or at any other proceeding, and the defendant's right to be present has not been waived or the absence has not been excused, the court, by order, may direct law enforcement officers to bring the defendant forthwith before the court for the trial or proceeding.

(d) **APPEARANCE OF A CORPORATION.** A corporation may appear by counsel for all purposes at any proceeding.

[Amended eff.12-1-97.]

Committee Comments as Amended
Effective December 1, 1997

Rule 9.1 sets forth the right of the defendant to be present at every stage of the trial and provides for waiver of that right. Rule 9.1 is based on Rule 43, Fed.R.Crim.P., and Rule 713, Unif.R.Crim.P. (Proposed Final Draft, 1974).

Rule 9.1(a) states the right of a defendant to be present at all stages of the criminal prosecution at which a defendant has a right to be heard. Sixth Amendment to the United States Constitution; Article I, § 6, Alabama Constitution of 1901; *Ex parte Bryan*, 44 Ala. 402 (1870). Under *Neal v. State*, 257 Ala. 496, 59 So.2d 797 (1952), the continuous presence of the defendant from arraignment to sentencing is an essential part of the process provided for the trial of the defendant, without which the court has no jurisdiction to pronounce judgment against the defendant.

Section (b) allows a defendant to waive the right to be present. The defendant may make an express waiver in open court or may waive the right by voluntary absence from the proceeding. See *Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973).

Waiver of the right to be present must be clear and unequivocal. Waiver must be affirmative and positive in nature and made by the defendant personally. *Haynes v. State*, 40 Ala.App. 106, 109 So.2d 738 (1958), cert. denied, 268 Ala. 546, 109 So.2d 746 (1959). Consent or acquiescence of a defendant to a waiver of the right cannot be presumed but must affirmatively appear from the record. *Berness v. State*, 263 Ala. 641, 83 So.2d 613 (1955). Thus, section (b) allows the court to find an implied waiver only when the defendant has been present at the commencement of the trial and fails to appear at some later stage of the trial. Such a waiver may not be inferred if the defendant has never appeared at trial, except in the case of a minor misdemeanor, which by definition carries no threat of imprisonment.

The standards for waiver are those required for waiver of other constitutional rights. The factors that the court should consider in finding a valid waiver are whether the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in the defendant's absence should the defendant fail to appear. However, according to *Taylor*, it is not incumbent upon the court to warn the defendant expressly of these three factors where the defendant has personally appeared at the commencement of trial and it can reasonably be assumed that the defendant has knowledge of the right to be present. On the other hand, where the defendant is not present at the commencement of the proceeding in a

minor misdemeanor case, it is clear that the court must ascertain that the defendant knew of the time and place to appear and the consequences of the failure to appear.

A defendant who has received the required warnings might still be involuntarily absent and should be permitted to prove that fact in a subsequent or collateral proceeding. The trial court does not commit error in trying the defendant in his or her absence where the defendant knows the date of the trial and simply fails to appear and there is no evidence suggesting that the defendant is involuntarily absent. *Gulledge v. State*, 526 So.2d 654 (Ala.Crim.App.1988). Also, the decision to proceed in light of a voluntary waiver is discretionary, not mandatory, with the court. The court is in no instance required to proceed. Of course, the lack of a waiver may not always warrant reversal if the proceeding from which the defendant was absent was not critical or the error, if any, was harmless. See, e.g., *Maund v. State*, 361 So.2d 1144 (Ala.Crim.App.1978); *Johnson v. State*, 335 So.2d 663 (Ala.Crim.App.), cert. denied, 335 So.2d 678 (Ala.), cert. denied, 429 U.S. 1026 (1976); *Ex parte Stout*, 547 So.2d 901 (Ala.1989).

Under the rule as originally adopted, a defendant was prohibited from waiving the right to be present in two situations. The first was where the defendant was charged with an offense punishable by death. Following the United States Supreme Court's holding in *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), the Alabama Supreme Court and the Alabama Court of Criminal Appeals have held that even in a case where the defendant is charged with a capital offense, the defendant "may forfeit his right to be present at trial by exhibiting misconduct." *Ex parte Jackson*, 674 So.2d 1365, 1369 (Ala.1994). See also *Clemons v. State*, [Ms. CR-94-0270, December 20, 1996] 720 So.2d 961 (Ala.Crim.App.1996). The amendment to Rule 9.1(b)(2) allows a defendant charged with a capital offense to waive his or her right to be present at any stage of the proceedings, except for sentencing, provided the waiver complies with the provisions of Rule 9.1(b)(1). The other prohibition, where the defendant is not represented by counsel, has been retained. Fundamental fairness quite clearly is violated if neither the defendant nor counsel for the defendant is present at trial. If a defendant who has waived counsel is subsequently absent during trial under circumstances from which the court may infer a waiver of the right to be present under Rule 9.1(b)(1)(ii), the court may then appoint counsel to represent the defendant in his or her absence and resume trial unless the circumstances would require a mistrial or continuance in the interest of justice.

Rule 9.1(c) is adopted from Rule 713(c), Unif.R.Crim.P. (Proposed Final Draft, 1974), and deals with the situation above where the defendant's presence is required at trial.

A provision similar to Rule 9.1(d) appears in Rule 43, Fed.R.Crim.P.