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# Recent Developments: Crosby v. United States: Criminal Trial May Not Proceed if Defendant Is Not Present at Commencement of Trial

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less, such considerations did not operate to dissolve the court's power to hear the case at bar.

The Court also rejected the Government's contention that, because funds deposited in the United States Treasury may be released only by a congressional appropriation under Art. I, § 9, Cl. 7 of the United States Constitution, any judgment handed down would necessarily be "useless" within the meaning of the exception to appellate jurisdiction discussed above. *Id.* at 560. The Court reasoned that in 31 U.S.C. § 1322(b)(2) Congress has provided for the refund of funds that are erroneously received. *Id.* In addition, 28 U.S.C. § 2465 states that property seized under any act of Congress shall be returned following the disposition of judgment in the defendant's favor. Under the Court's interpretation of these statutes, a formal appropriation would not be required under these circumstances. *Id.* at 561. Because the funds would be returned to their rightful owner following a favorable judgment, the Court concluded that a decision in the bank's favor would thus be enforceable. *Id.*

Justice Thomas, in a concurring opinion, stated that he would have applied § 1521 of the Housing and Community Development Act of 1992, 106 Stat. 3672, which amended 28 U.S.C. § 1355. Section 1521, which the President signed on October 28, 1992, provides that the removal of property by a prevailing party in a civil forfeiture action does not deprive the appellate court of jurisdiction in the matter. The majority expressly declined to interpret the statute or to determine its retroactive effect. *Republic National Bank of Miami*, 113 S. Ct. at 560 n.5. Justice Thomas, however, believed the Court should have applied the principle recognized in *United States v. Alabama*, 362 U.S. 602 (1960), that new laws which enlarge jurisdiction apply to cases currently pending before a court.

*Republic National Bank of Miami v. United States* represents a refusal by the Court to curtail the right of property

owners to appeal an adverse decision in civil forfeiture proceedings brought by the Government. In declining to interpret the retroactive effect of § 1521 of the Housing and Community Development Act of 1992, the Court indicated that, even absent such a statute, it would not permit the Government to escape a full adjudication of a civil forfeiture claim on technical procedural grounds. Based on this decision, owners of property seized by the Government pursuant to 21 U.S.C. § 881(a)(6) will be guaranteed the right to appeal a district court ruling forfeiting title to their property to the United States.

-Scott N. Alperin

## **Crosby v. United States: CRIMINAL TRIAL MAY NOT PROCEED IF DEFENDANT IS NOT PRESENT AT COMMENCEMENT OF TRIAL.**

In *Crosby v. United States*, 113 S. Ct. 748 (1993), the United States Supreme Court held that Federal Rule of Criminal Procedure 43 prohibits a trial *in absentia* of a defendant who is not present at the commencement of trial. In arriving at this holding, the Court examined the express language, the history, and the logic of the Rule.

Michael Crosby and others were indicted on several counts of mail fraud by a federal grand jury in the District of Minnesota. He and his codefendants were accused of devising a scheme to fraudulently sell military-veteran commemorative medallions. Crosby appeared before a federal magistrate and pleaded not guilty. He was conditionally released from detention upon agreeing to post a bond and remain in the state. He attended pretrial conferences and hearings with his attorney and was advised of the trial date.

Crosby, however, did not appear for his trial in the United States District Court for the District of Minnesota. Deputy marshals attempted to locate him but were unsuccessful. The court expressed concern over the delay because the pool of potential jurors was waiting and the delay could have interfered with the court's calendar. The prosecutor noted that Crosby's attorney and codefendants were present and that it would be difficult for her to reschedule the case due to the age and health problems of some of the witnesses.

The district court suggested that the trial begin despite Crosby's absence, and Crosby's attorney objected. The Government formally requested that the trial commence because Crosby was still not located after several days of search, and Crosby's bond was forfeited.

The court stated for the record its findings that Crosby had adequate no-

tice of the trial and that his absence was knowing and deliberate. It further stated that trying Crosby separately from his codefendants would present problems for the Government, witnesses, counsel, and court. The court concluded that Crosby had voluntarily waived his constitutional right to be present during the trial and that the public interest in proceeding with trial in his absence outweighed his interest in being present at the proceedings. The jury found Crosby guilty, and months later Crosby was found, arrested, and sentenced.

The United States Court of Appeals for the Eighth Circuit upheld the convictions. The United States Supreme Court granted certiorari.

Rule 43 provides in pertinent part that “[t]he defendant shall be present . . . at every stage of the trial . . . except as otherwise provided by this rule.” *Crosby*, 113 S. Ct. at 751 (quoting Fed. R. Crim. P. 43(a))(emphasis added). The Rule further states that the defendant is considered to have waived the right to be present if he is initially present and then voluntarily absent after the trial has commenced. *Crosby*, 113 S. Ct. at 751 (citing Fed. R. Crim. P. 43(b)).

In its analysis, the Supreme Court examined the plain language of the Rule. The Court noted that the Rule contains a comprehensive listing of the circumstances under which the right to be present may be waived. *Crosby*, 113 S. Ct. at 751. The Rule’s use of the limiting phrase “except as otherwise provided” indicates that the list of situations in which the trial may proceed without the defendant is not exhaustive. *Id.* In that respect, the Court found the language to be unambiguous. *Id.*

The Court also looked to the law as it existed at the time the Rule was adopted. The general rule at common law was that the personal presence of the defendant was essential to a valid trial and conviction on a felony charge, and a conviction was required to be set aside if the defendant was absent. *Id.* Recognizing that the notion that a fair trial could only take place if the jurors

and witnesses testifying against the defendant met face-to-face with the defendant, the Court explained that this right to be present could not be waived. *Id.*

The Court next examined the common law as it was applied in *Diaz v. United States*, 223 U.S. 442 (1912). In that case, the Court held that the defendant’s voluntary absence after the trial had begun did not nullify what had been done and did not prevent the completion of the trial. *Crosby*, 113 S. Ct. at 752 (citing *Diaz*, 223 U.S. at 455). Instead, the defendant’s absence operated as a waiver of his right to be present and left the Court free to proceed with the trial as if he were present. In *Diaz*, however, the Supreme Court did not address the situation in which a defendant fails to appear for the commencement of the trial. *Crosby*, 113 S. Ct. at 752.

The Supreme Court established important differences between flight before trial and flight during trial, and the Court emphasized several practical considerations that supported its conclusion. To begin with, the costs of suspending a proceeding already under way would be greater than the costs of postponing a trial which has not yet begun. Because of this, the Court deemed the commencement of trial a plausible place to make the distinction. *Id.* In addition, Rule 43 treats mid-trial flight as a knowing and voluntary waiver of the right to be present. The initial presence of the defendant, asserted the Court, assures that any subsequent waiver is voluntary. *Id.* Furthermore, the Rule deprives the defendant of the option of terminating the trial if it seems that the verdict will go against him. Otherwise, the Court stated, a defendant may choose to abscond during the trial so that it would be terminated. *Id.* at 752-53. For that reason, a trial must be allowed to continue if the defendant is present at the beginning of the trial and later flees.

In *Crosby v. United States*, the Supreme Court clarified the scope of Federal Rule of Criminal Procedure 43. The language, history, and logic of the Rule all support a straightforward in-

terpretation that prohibits the trial *in absentia* of a defendant who is not present at the commencement of trial. This holding makes it clear that if the defendant is present at the commencement of the trial and later is absent, his absence is considered knowing and deliberate. Under these circumstances, his constitutional right to be present during his trial is considered waived. This assures that the Government, witnesses, counsel, and court will not be kept waiting and that the defendant’s right to a speedy trial is not abridged. In so holding, the Supreme Court clarified an arguably ambiguous rule of law.

- Maria Ellena Carey