

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: MICHAEL CROSBY, Petitioner v. UNITED STATES

CASE NO: 91-6194

PLACE: Washington, D.C.

DATE: November 9, 1992

PAGES: 1-50

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL CROSBY, :  
Petitioner :  
v. : No. 91-6194  
UNITED STATES :  
- - - - -X

Washington, D.C.  
Monday, November 9, 1992

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
1:38 p.m.

APPEARANCES:

MARK D. NYVOLD, ESQ., St. Paul, Minnesota; on behalf of  
the Petitioner.  
RICHARD H. SEAMON, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	MARK D. NYVOLD, ESQ.	
4	On behalf of the Petitioner	3
5	RICHARD H. SEAMON, ESQ.	
6	On behalf of the Respondent	24
7	REBUTTAL ARGUMENT OF	
8	MARK D. NYVOLD, ESQ.	
9	On behalf of the Petitioner	46
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (1:38 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 91-6194, Michael Crosby against the United  
5 States. Mr. Nyvold, you may proceed whenever you're  
6 ready.

7 ORAL ARGUMENT OF MARK D. NYVOLD

8 ON BEHALF OF THE PETITIONER

9 MR. NYVOLD: Mr. Chief Justice, and may it  
10 please the Court:

11 This case involves an obvious clear-cut  
12 violation of Rule 43. That the violation is an obvious  
13 one comes from the plain wording of Rule 43. The rule  
14 requires that a defendant be present at the beginning of  
15 his trial and prohibits the trial in absentia of a  
16 defendant who's not initially present.

17 If the plain language weren't enough the --

18 QUESTION: Mr. Nyvold, would you speak up just a  
19 little bit. Either that, or raise the --

20 QUESTION: There's a crank at the right there.

21 MR. NYVOLD: Thank you.

22 The advisory committee notes are conclusive as  
23 to what Rule 43 means, even if the plain language weren't.  
24 I'd like to --

25 QUESTION: Why should the advisory committee

1 notes be conclusive? I mean it's this Court that adopts  
2 the rule.

3 MR. NYVOLD: That's true. But the Government is  
4 saying that Rule 43(a) does not address the situation of a  
5 defendant who's not present for the beginning of his  
6 trial, and the advisory committee notes are helpful in  
7 showing that the situation of a defendant not initially  
8 present was contemplated by the drafters of the rules and  
9 that the rule was intended to address that.

10 QUESTION: Well, you -- that's all perfectly  
11 legitimate argument, but you said the advisory committee  
12 notes are conclusive.

13 MR. NYVOLD: I think -- I'm sorry, I think I  
14 used too strong a word. The advisory -- the rule, the  
15 plain wording in the rule, obviously, is conclusive, first  
16 of all because it's not ambiguous, it's clear on its face.  
17 But since the Government is saying the plain wording of  
18 the rule doesn't control this situation, it is helpful to  
19 look at what the advisory committee said.

20 First of all, the advisory committee notes that  
21 are appended to the rule specifically speak of the  
22 defendant's -- the defendant's presence being a necessity.  
23 Rule 4 -- the advisory committee note to Rule 43(b) says  
24 that a defendant may be tried only if he -- if he leaves  
25 after the trial begins, and cites the Diaz case.

1           QUESTION: And you take the position that even  
2 if the defendant at the time of arraignment said look,  
3 I -- I understand my right to be present at trial but I  
4 don't want to be, I give up that right and you folks go  
5 ahead without me. That's no good.

6           MR. NYVOLD: That's not sufficient for two  
7 reasons, or for one reason, that he's not initially  
8 present. The judge at that point would have to take  
9 action to ensure that that defendant appeared at trial and  
10 waived that right after the trial began.

11           QUESTION: Well, of course, the practical  
12 effect, I suppose, if you are correct here, is that more  
13 people ought to be incarcerated pending trial if there's a  
14 risk they won't show up.

15           MR. NYVOLD: Exactly. That is one option  
16 available to the court. And now, since the Bail Reform  
17 Act, the -- at least the Federal courts can incarcerate  
18 defendants who pose a flight risk. And a defendant who  
19 makes a statement indicating that he or she will not abide  
20 by the conditions of her release and appear for trial  
21 could then be -- have her -- his or her bail revoked and  
22 be detained. So there are means to deal with this  
23 situation, and --

24           QUESTION: But is it a situation we want to  
25 bring about if we have any choice in the matter? I mean,

1 doesn't it seem odd that -- that the rule would call for  
2 such a result?

3 MR. NYVOLD: That it would permit a defendant  
4 who didn't appear to put off the date of his trial?

5 QUESTION: Yes.

6 MR. NYVOLD: That is the result that the common  
7 law permitted, and it's obvious that Rule 43 adopts the  
8 common law rule in toto.

9 QUESTION: Well, well, I wonder if we should  
10 bring to the interpretation of a rule adopted by a rules  
11 committee and forwarded to this Court and ultimately put  
12 to Congress exactly the same sort of construction  
13 materials as we bring to a statute. It seems to me here  
14 you -- you -- you -- that it's perfectly permissible for  
15 us to inquire, if this wasn't the common law rule, why on  
16 earth did the rule change it, as it appears to have done.  
17 And perhaps we would determine that maybe it didn't change  
18 it.

19 MR. NYVOLD: Oh, certainly the rule did not  
20 change the common law rule. It adopted it entirely.

21 QUESTION: You said -- well, then, you and the  
22 Government disagree on that. Am I not right, from your  
23 briefs?

24 MR. NYVOLD: As far as I can tell, the  
25 Government says that Rule 43 doesn't address the situation



1 of a defendant not initially present. It -- the rule  
2 obviously does, and it's the advisory committee notes that  
3 are helpful in determining what it was the drafters of the  
4 rule wanted the rule to cover.

5 QUESTION: But what was the situation at common  
6 law before there was -- or, say, in this country, before  
7 the rule was adopted?

8 MR. NYVOLD: A defendant could be tried in his  
9 absence only if he initially appeared at the trial. The  
10 common law did not contemplate the trial of a defendant  
11 who did not appear, as -- even though it was obvious that  
12 such a defendant might be putting off the date of his  
13 trial, might be frustrating justice, might be flaunting  
14 justice. It simply was not contemplated that that was  
15 done.

16 And, in fact, the Government has not cited one  
17 case prior to Rule 43 in which the common law dealt with a  
18 defendant who absconded prior to trial, was then tried,  
19 and that that -- and that result was affirmed on appeal.  
20 There are no cases, and the case cited in the Government's  
21 brief, Commonwealth v. Felton, a Pennsylvania case, says  
22 just that, there are no cases prior to Rule 43 which  
23 permit a trial in absentia of a defendant not initially  
24 present.

25 QUESTION: Mr. Nyvold, I -- am I correct that

1 (b) (2), subsection (b) (2) of Rule 43 was later added? Am  
2 I right about that? That said -- the one that makes an  
3 exception for after being warned by the court that  
4 disruptive conduct will cause removal, he persists in  
5 conduct which is such as to justify exclusion from the  
6 courtroom.

7 MR. NYVOLD: That was added, yes, sir.

8 QUESTION: That was a later amendment.

9 MR. NYVOLD: In response to Illinois v. Allen,  
10 which allows a -- the disruptive defendant to be removed  
11 from the courtroom after being warned.

12 QUESTION: Well, how could we have decided  
13 Illinois v. Allen?

14 MR. NYVOLD: Illinois v. Allen was certainly  
15 within -- or the result in that case, that the defendant  
16 who departs or who is disruptive can be removed, that  
17 result was clearly within the contemplation of the rule,  
18 and here's why. The rule --

19 QUESTION: The old rule that didn't have that  
20 exception.

21 MR. NYVOLD: The old -- the old -- the old rule.  
22 And the old rule read that a defendant who voluntarily  
23 absents himself after the trial commences can be tried  
24 in -- in his absence. And, obviously, it doesn't take a  
25 great leap of logic or common sense to find that the

1 disruptive --

2 QUESTION: To say that making a fuss at trial is  
3 being voluntarily absent. I don't know.

4 MR. NYVOLD: Well, the disruptive defendant can  
5 be equated to someone who is voluntarily absent.

6 QUESTION: Only if you want to. I don't know --

7 MR. NYVOLD: Well, as it's -- it's not difficult  
8 to, or it's certainly within the scope of the language to  
9 conclude that --

10 QUESTION: No, I think -- I think that -- I mean  
11 I have a problem with that as far as your case goes. It  
12 seems to me that if -- if you think that Illinois v. Allen  
13 was rightly decided, you -- you acknowledge that the rule  
14 is not exclusive and that there are some other reasons why  
15 you may allow the trial to proceed without the defendant.  
16 I find it very difficult to say that someone is  
17 voluntarily absent if he disrupts the trial, and is  
18 therefore, you know, required to leave.

19 MR. NYVOLD: Functionally, that's the equivalent  
20 of being voluntarily absent. If one makes the trial  
21 impossible to proceed, a decision has to be made. Either  
22 we're going to remove this defendant or we're going to  
23 continue with him, and the trial obviously can't continue  
24 in those circumstances.

25 QUESTION: This doesn't even -- even speak to

1 the situation here, and I gather you're saying that it's  
2 just like the rule just doesn't speak to a disruptive  
3 defendant.

4 MR. NYVOLD: My point is that the rule, as it  
5 was previously written, permitted the result in Illinois  
6 v. Allen. Here, we don't have anything like that. We  
7 have -- we would have to basically engraft an exception  
8 onto Rule 43 that was not within the contemplation of the  
9 drafters.

10 The reason that Rule 43 wasn't -- or was  
11 intended to address the situation of the defendant not  
12 initially present is obvious from the notes appended to  
13 the first draft of Rule 43, and this was in 1943, in which  
14 the initial draft read that a defendant has the right to  
15 be present at arraignment. And the Government says, well,  
16 later that was changed to shall be present, and the reason  
17 it was changed to shall be present was just to avoid a  
18 defendant from exercising a right of -- his right of  
19 presence by not attending, by opting not to attend.

20 And it appears that the present version of the  
21 rule, the one that says the defendant shall be present,  
22 was proposed by Judge Sanborn of the Eighth Circuit, and  
23 this was in 1943. And his notes or his version of Rule 43  
24 has appended to it his own comment, which is that, quote:

25 I think it would be inadvisable to conduct

1 criminal trials in the absence of the defendant. That has  
2 never been the practice, and whether the defendant wants  
3 to attend the trial or not, I think he should be compelled  
4 to be present. If, during trial, he disappears, there is,  
5 of course, no reason why he should -- the trial should not  
6 proceed without him.

7 So this is the person who proposed, apparently,  
8 the draft that we have right now. And that person, Judge  
9 Sanborn, obviously didn't feel that the common law  
10 permitted the trial in absentia of a defendant who wasn't  
11 present.

12 And if you look at the first advisory committee  
13 note appended to the first draft of Rule 43, that -- and  
14 this is the draft that says the defendant simply has a  
15 right to be present, it doesn't say he shall be present.  
16 This is the very first advisory committee draft and it  
17 says:

18 The second sentence permits continuing with the  
19 trial in a felony case not punishable by death or in a  
20 misdemeanor case when the defendant, by his voluntary act,  
21 absents himself after the commencement of trial. Under  
22 this provision the defendant is required to be present at  
23 arraignment, at plea, and the trial must begin in his  
24 presence.

25 So the first published draft of Rule 43 had that

1 appended to it. It was obvious --

2 QUESTION: Well, the -- the -- the comment went  
3 further than the actual rule did itself.

4 MR. NYVOLD: At that time, yes. But that's  
5 significant because it shows that even though the rule  
6 didn't make it explicit, at least at that time, that the  
7 defendant had to be present, the advisory committee note  
8 said that the defendant must -- or the trial must begin in  
9 the defendant's presence.

10 QUESTION: Well, that may reflect on the  
11 competence of the advisory committee.

12 MR. NYVOLD: Well, they -- they were citing the  
13 Diaz case, though, in connection with that. Immediately  
14 after that sentence --

15 QUESTION: And --

16 MR. NYVOLD: The --

17 QUESTION: Over themselves.

18 QUESTION: Over themselves. I guess the rule --  
19 the rule now says shall, doesn't it?

20 MR. NYVOLD: It says shall. The Government says  
21 that the -- the right to be present versus shall be  
22 present is indicative only of an attempt to prevent a  
23 defendant from exercising his right of presence by not  
24 attending.

25 But it's -- the point I'm making here is that

1 the person who -- Judge Sanborn who proposed the present  
2 draft or the present wording of the rule, when he did  
3 that, included that language, which was that it is  
4 inadvisable to conduct criminal trials in the absence of  
5 the defendant, and that has never been the practice.

6 So the judge who's proposing that language is  
7 saying we just don't try defendants in their absence, and  
8 it's obvious what the committee was -- its intent or its  
9 view of the law was at the time it proposed -- proposed  
10 this rule.

11 If one looks at what -- well, not only --  
12 staying with the drafting history for a moment. The  
13 Government's brief cites at page 19, note 6, a proposed  
14 amendment to the draft or to rule 43, a 1973 proposed  
15 amendment. That amendment would have covered the  
16 situation we have here where a defendant does not appear  
17 for the beginning of his trial, and that amendment would  
18 have permitted the trial to proceed in that defendant's  
19 absence.

20 The significance of that is that the rule -- if  
21 the rule did not -- if the rule permitted that, it  
22 wouldn't have been necessary to add that language. And  
23 the fact that the committee rejected it shows that the  
24 committee didn't want the rule to permit the trial in  
25 absentia of a defendant who wasn't present.

1 QUESTION: Well, the committee was just --  
2 perhaps, just paying some respect to Diaz.

3 MR. NYVOLD: Well, and well it should, because  
4 the rule incorporated the common law rule as stated in  
5 Da -- Diaz, and that is what's controlling here. That's  
6 since we don't, at common law, try defendants in their  
7 absence, at least if they're not present for the trial,  
8 we're not going to permit that under the Federal rules.  
9 That was the -- the whole point of incorporating Diaz.

10 QUESTION: But, the -- the -- Diaz didn't deal  
11 with a situation where the defendant was not present at  
12 the beginning of his trial, did it?

13 MR. NYVOLD: Factually, that's correct, and that  
14 is one of the points on which the circuit courts have  
15 distinguished Diaz. But the point about Diaz is that it  
16 lays down the common law rule. And even though the --  
17 factually, the defendant in that case was initially  
18 present, that doesn't lessen or detract the force of that  
19 common law rule.

20 And that's what this -- or the advisory  
21 committee and this Court was adopting when it promulgated  
22 Rule 43. If one looks at the advisory committee note to  
23 Rule 43, the exact page of the Diaz opinion is the one  
24 cited, the page where the common law rule is discussed,  
25 page 455. So it's obvious that when the advisory



1 committee was thinking about Diaz, it was thinking about  
2 that common law rule that doesn't admit a defendant to be  
3 tried unless he's initially present.

4 The common law and case law origins of Rule  
5 40 -- I've been talking mainly about the advisory  
6 committee treatment of the rule, and that, obviously,  
7 deals with the common law and case law origins of Rule 43.  
8 But if one looks at some of the important State cases  
9 cited in Diaz, it's obvious that no one was tried in his  
10 absence if he didn't show up for trial.

11 The case of Commonwealth v. McCarthy  
12 specifically said it is irregular and improper to begin  
13 trial without the presence of the accused. In State v.  
14 Way, a Kansas case, 1907, trial cannot begin in his  
15 absence. In Feit v. State, an Ohio case from 1835, the  
16 court said the trial cannot begin in the defendant's  
17 absence, but if he leaves during the trial it may proceed.

18 So Diaz summarized -- gathered together and  
19 summarized all the State cases in arriving at what the  
20 common law and discerning what the common law said about  
21 trial in absentia.

22 QUESTION: Do you see any constitutional  
23 privilege here that couldn't be waived? I mean could the  
24 rule be changed to allow the court to do what it did here?

25 MR. NYVOLD: I'm a little ambivalent about that.

1 I would say, first of all, that Diaz could be read broadly  
2 enough to equate the Sixth Amendment right of presence to  
3 the common law rule. But that seems to take Diaz a little  
4 bit too far, because Diaz did, in fact, deal with a  
5 defendant who was initially present.

6 QUESTION: Well, we certainly have said that a  
7 defendant can waive his right against self-incrimination,  
8 a right to jury trial, the right to have an attorney --

9 MR. NYVOLD: In --

10 QUESTION: -- you think this is a right that is  
11 in that same league?

12 MR. NYVOLD: Although I think, as I was saying,  
13 Diaz could be read broadly enough to say that the Sixth  
14 Amendment right cannot be waived, practically speaking I  
15 don't think that -- I'm not arguing that and I don't think  
16 the Sixth Amendment should be so read. I think that a  
17 defendant could waive his or her constitutional right of  
18 presence prior -- prior to trial by -- by conduct or  
19 express --

20 QUESTION: Now, a good many courts have -- have  
21 read the rule as not preventing their practice in  
22 accordance with what was done here. Isn't that right?

23 MR. NYVOLD: Well, they've -- they've done it  
24 not because one can waive a constitutional right. I mean,  
25 the right -- constitutional right of presence, I'm not

1 arguing that. What I'm saying is that the common law  
2 aspect of Rule 43 -- and Rule 43 incorporates not only the  
3 constitutional right of presence, but the common law right  
4 of presence. That's why it's broader than the  
5 Constitution.

6 A defendant could waive the constitutional right  
7 of presence, but it would have to be a knowing, voluntary,  
8 and intelligent waiver. And our position would be that  
9 there was no waiver of the constitutional right of  
10 presence because nothing in the record shows that the  
11 petitioner was ever told that if he didn't appear, that  
12 the trial could proceed in his absence.

13 And I don't know, in this context at least,  
14 prior to trial, how one could have a knowing, voluntary,  
15 and intelligence waiver if one didn't know the consequence  
16 of absconding. We have in this case -- or in this country  
17 no common law tradition of trial in absentia, which is  
18 another reason why a defendant who leaves prior to trial  
19 could not be presumed to have waived the constitutional  
20 right of presence.

21 And I'd like -- as long as I'm talking about  
22 this, I'd like to distinguish the Taylor case. In Taylor  
23 v. United States, this Court said that it's obvious that  
24 the defendant who departs after the trial begins must be  
25 presumed to know that in -- by departing, he or she waives

1 the right of presence and that the trial -- and must know  
2 that the trial will continue in his absence. That's not  
3 the situation as to a defendant prior to trial who's never  
4 been advised of the consequences and who is not in the  
5 midst of a trial.

6 In 19 -- I was mentioning earlier that in 1973  
7 the common law -- or, I'm sorry, the advisory committee  
8 proposed an amendment to Rule 43 that would have addressed  
9 this situation. It would have permitted a defendant who  
10 did not appear for the -- for the beginning of his trial  
11 to be tried if there was a finding of a knowing and  
12 voluntary disappearance without justification.

13 In a note to that proposed amendment the  
14 advisory committee said that this subdivision is added to  
15 make clear that a defendant not present at the start of  
16 the trial, the requirement of the -- of the current rule,  
17 may be tried in absentia.

18 In other words, in 1973 the proposed amendment  
19 said or recognized that the current requirement is that  
20 the defendant has to be present and trial cannot proceed  
21 without him. The Government quotes that proposed -- or  
22 makes reference to that proposed amendment in its brief,  
23 but they don't make reference to that comment by the  
24 advisory committee which recognizes what the current rule  
25 requires.

1           The Government's arguments as to why the rule  
2 does not address the situation are incorrect. The  
3 Government argues that because Rule 43 does not prohibit  
4 trial in absentia, it must permit it. There's no -- but  
5 the Government cites no authority for this. Obviously,  
6 the rule -- the plain language of the rule doesn't permit  
7 that. The advisory or the drafting history of the rule is  
8 -- or contradicts that and, as in the case of Commonwealth  
9 v. Felton, there are no cases prior to Rule 43 that permit  
10 a trial in absentia of a defendant not initially present.

11           The structure of the rule also argues against  
12 the result -- or the Government's point. The Government  
13 says that Rule 43 doesn't address this, but it's odd that  
14 if, in drafting a rule, the only waiver provision  
15 contemplated has to do with the defendant who is initially  
16 present.

17           In other words, if the rule were going to be  
18 drafted to permit the result the Government wants, it  
19 would have been a simple matter to make the waiver  
20 provision include not only defendants initially present  
21 but also those who are not initially present. So the  
22 structure of the rule argues against the Government's --  
23 the result the Government wants.

24           The Government argues that defendants will be  
25 able to manipulate the system if the rule is interpreted

1 as we ask it to be interpreted. Well, the Government's  
2 concerns about defendants holding up trials and flaunting  
3 justice obviously had to have been known to the drafters  
4 of the rule, and the Government's argument now seeks to  
5 elevate that concern above the rule that was drafted in  
6 awareness of it.

7 There is at least one State that has  
8 specifically, by case law, prohibited trying a defendant  
9 not initially present and that's Pennsylvania. I'm not  
10 aware of any problem that Pennsylvania has had in trying  
11 its defendants and in making sure that its court system  
12 operates smoothly and efficiently.

13 There are means to discourage defendants who are  
14 not initially -- or who are on bail and contemplate  
15 absconding prior to trial. We don't have to go to the  
16 extreme of holding the trials in their absence.  
17 Defendants can be required, as a condition of their  
18 release, to appear at trial. If they don't, they know  
19 that their bail will be forfeited.

20 As I mentioned earlier, a defendant who's been  
21 given -- or who's been released prior to trial could be --  
22 have his bail revoked or he could be detained initially.  
23 There just is no reason why we have to go to the extreme  
24 of trying defendants who are not initially present.

25 The implications of the Court's decision should

1 be important in the result -- in reaching the result that  
2 we're asking for. First of all, if the Court finds that a  
3 defendant not initially present can be tried in spite of  
4 the clear language of the rule, it's going to be creating  
5 a wedge effect.

6 The Government will be seeking to try defendants  
7 at an earlier and earlier stage of the trial. The next  
8 stage, obviously, will be the defendant who hasn't been  
9 arraigned. Now, arraignment is a precondition of trial,  
10 or is a sine qua non of trial, but if the Government is  
11 able to succeed in this case in having the rule ignored,  
12 then why not ignore the part of the rule that says the  
13 defendant cannot be tried unless he's been arraigned?

14 And the requirement that the defendant be  
15 arraigned prior to trial is the same part of the rule  
16 requiring his presence at trial. So what the Court would  
17 be doing here is creating a precedent for interpreting the  
18 requirement of presence at arraignment to be superfluous,  
19 to not really mean what it says.

20 QUESTION: Or at verdict, or at sentencing.

21 MR. NYVOLD: Exactly. And in this case the  
22 court did -- the district court that tried the petitioner  
23 did not sentence him in his absence. It abided by that  
24 part of the rule. So to be consistent in interpreting the  
25 rule, it's necessary to give effect to all parts of it.

1 So the part that says the defendant has to be present at  
2 arraignment should be interpreted consistently with the  
3 part of the rule that says the defendant has to be present  
4 at trial and at sentencing.

5 And they're all in the same -- all in Rule  
6 43(a). The rule doesn't admit of distinctions or of  
7 differences in interpretation as to those clauses.

8 QUESTION: Well, there -- there was no  
9 inconvenience involved in deferring the sentencing since  
10 the sentence couldn't be executed until they caught him  
11 anyway. You may as well wait until you catch him to  
12 determine the sentence as well.

13 MR. NYVOLD: Well, there --

14 QUESTION: Whereas there was a lot of  
15 inconvenience in rescheduling the whole trial just because  
16 he took off after -- right? I mean --

17 MR. NYVOLD: Well, I have --

18 QUESTION: -- the witnesses were ready to go and  
19 he was expected to be there and he just never showed up  
20 for the beginning of the trial.

21 MR. NYVOLD: But it's that inconvenience and  
22 that's -- the problems that defendants create when they  
23 abscond, that is irrelevant under the rule. It was  
24 irrelevant to the common law. I mean it wasn't  
25 unimportant, but it -- it wasn't made paramount. The



1 defendant's presence at the trial was made paramount. So  
2 your concern is --

3 QUESTION: I understand, but it -- all I'm  
4 saying is that there was some logic to the fact that the  
5 court in this case required him to be present for the  
6 sentencing, did not impose the sentence without his  
7 presence. There was some reason for making a distinction.

8 MR. NYVOLD: Well --

9 QUESTION: You say it's not a reason permitted  
10 by the rule. That may well be, but there was a logical  
11 reason for it anyway.

12 MR. NYVOLD: That very reason goes to, really,  
13 what's at the root of the problem here. It wasn't  
14 inconvenient to postpone the petitioner's sentencing, it  
15 was inconvenient to postpone his trial. But it's that  
16 inconvenience that is irrelevant under the common law,  
17 it's irrelevant under the rule.

18 QUESTION: Well, surely more than just  
19 inconvenience, if -- if the Government has a bunch of  
20 witnesses put together, it's a very frustrating thing.

21 MR. NYVOLD: It is, but that's why this Court  
22 needs to take a stand and let the district courts and the  
23 courts of appeal know that rules must be enforced as  
24 written. If the rule is --

25 QUESTION: So -- so these frustrations can

1 continue.

2 MR. NYVOLD: No. If the rule is inconvenient,  
3 if this Court doesn't want to tolerate the results it that  
4 would obtain here, it can change the rule. It's -- I'm  
5 not arguing that this rule should remain forever. It's  
6 not that difficult a process to change a rule. This Court  
7 has the authority to initiate changes, and I, by no means,  
8 am arguing that this rule must be retained.

9 But it -- as long as it's in effect, as long as  
10 its meaning is clear, it must be given effect. And giving  
11 the rule effect will have a salutary effect on the  
12 enforcement of other rules. You won't have district  
13 courts departing from other rules that produce  
14 inconvenient results.

15 I reserve the rest of my time.

16 QUESTION: Very well, Mr. Nyvold. Mr. Seamon,  
17 we'll hear from you.

18 ORAL ARGUMENT OF RICHARD H. SEAMON

19 ON BEHALF OF THE RESPONDENT

20 MR. SEAMON: Thank you, Mr. Chief Justice, and  
21 may it please the Court:

22 There are three possible ways in which the  
23 drafters of Rule 43 could have responded to the problem of  
24 a criminal defendant who absconded prior to trial. They  
25 could have expressly authorized trial in absentia under

1 those circumstances, could have expressly prohibited it,  
2 or it could have left the matter for courts to decide.

3 We think the drafters took the third route.  
4 They left the matters for the courts because the issue had  
5 not been resolved at the time the rule was adopted. Since  
6 Rule 43 was adopted, every court of appeals that has  
7 considered the issue has concluded that a defendant who  
8 deliberately fails to show up for his trial can be tried  
9 in his absence. We think --

10 QUESTION: Of course, that doesn't always  
11 prevent us from ruling the other way.

12 MR. SEAMON: That's correct. I would suggest,  
13 however, that the unanimity of the lower courts in this  
14 respect casts serious doubt on the contention that Rule 43  
15 has a plain meaning with respect to the question we have  
16 here.

17 QUESTION: Well, how do you parse down a rule  
18 that says shall be present at every stage of the trial  
19 except as hereafter provided?

20 MR. SEAMON: We think that -- you're referring  
21 to subsection (a) of Rule 43, and we think that Rule 43  
22 means that in general the defendant has both a right and a  
23 duty to attend all of the criminal proceedings against  
24 him.

25 QUESTION: But it says, shall be present.

1 MR. SEAMON: That's correct.

2 QUESTION: It doesn't say anything about his  
3 right. It says, that he shall be present.

4 MR. SEAMON: It requires him to be present. And  
5 in this case petitioner breached that requirement.

6 QUESTION: Well, it requires. Isn't it  
7 addressed to the court too, he shall be present?

8 MR. SEAMON: It is addressed to the court as  
9 well. The court has a responsibility to bring the --

10 QUESTION: All right, go ahead.

11 MR. SEAMON: -- defendant before the court if it  
12 is possible to do so. In this case there was no  
13 ability ---

14 QUESTION: It doesn't say that.

15 MR. SEAMON: -- to do that.

16 QUESTION: It doesn't say that, if possible to  
17 do so.

18 MR. SEAMON: That's right. It requires the  
19 defendant's presence. But what 43(a) does not do is  
20 address what options are open to a -- to the court when  
21 the defendant skips -- skips bond the night before trial  
22 as petitioner did in this case.

23 QUESTION: Well, it says shall be present except  
24 as is provided elsewhere in the rule. And the exception  
25 certainly doesn't cover his absence at the beginning of

1 the trial.

2 MR. SEAMON: That's right. The exceptions in  
3 the rule address situations in which the -- a criminal  
4 defendant does not have a duty to appear before trial, and  
5 it also addresses a couple of situations in which a  
6 defendant gives up the right to attend. But what Rule  
7 43(a) doesn't do is address what options are open to the  
8 court when the criminal defendant simply cannot be brought  
9 before the court.

10 QUESTION: Well, I -- arguably, it -- it -- it  
11 deals with it expressly. You don't go forward with the  
12 trial.

13 MR. SEAMON: The --

14 QUESTION: It says there are no options.

15 MR. SEAMON: That proviso --

16 QUESTION: There are no options, that's what it  
17 says, shall be required.

18 MR. SEAMON: Well, that's -- that's the part of  
19 the rule that has to be read in by negative implication,  
20 that the trial should not go forward. But nothing -- and  
21 no wording of that sort is in Rule 43(a).

22 QUESTION: It sure is. The defendant shall be  
23 present at every stage of the trial, and then it has  
24 exceptions later, and you admitted it doesn't come with  
25 any -- any of the exceptions.

1 MR. SEAMON: What it doesn't say is or else the  
2 trial may not go forward.

3 QUESTION: No, but it says -- but if he's not  
4 present, obviously it can't go forward if he's required to  
5 be present at the commencement of the trial.

6 MR. SEAMON: Well, we --

7 QUESTION: But it also doesn't say he can't  
8 shoot the judge.

9 (Laughter.)

10 MR. SEAMON: That's right. And the shall be  
11 present language does a couple of things. It -- it  
12 certainly imposes a duty on the court to ensure his  
13 presence, and it certainly also imposes an obligation on  
14 the defendant to show up. But what it doesn't do, in our  
15 position, is address what happens when he doesn't.

16 QUESTION: What effect do you give to the words  
17 except as otherwise provided? I take it your argument is  
18 that Rule 43(b) simply gives examples of instances where  
19 the rule would be inapplicable.

20 MR. SEAMON: It's -- well, that's right. 43(b)  
21 specifies two examples in which a defendant gives up the  
22 right to be present.

23 QUESTION: But you could make that argument if  
24 the phrase, except as otherwise provided by this rule is  
25 not present. So, then, I take it you give no effect at

1 all to that language?

2 MR. SEAMON: We do give effect to that language.  
3 What we say is that subsection (a) of Rule 43 sets up the  
4 general requirement of the defendant's presence. There  
5 are certain circumstances, namely specified in subsections  
6 (b) and (c), in which the defendant's presence is not  
7 required or the defendant, having the right, loses that  
8 right through misconduct.

9 But besides setting forth that general  
10 requirement of presence, Rule 43(a), in our view, does not  
11 specify that the trial should not go forward if the  
12 defendant isn't present.

13 QUESTION: My point is I take it you could make  
14 precisely the same argument if the words except as  
15 otherwise provided were absent from subsection (a).

16 MR. SEAMON: If that except as phrase were  
17 missing from 43(a), there could be questions concerning  
18 conflicts between subsection (a) and subsection (c). For  
19 example, under -- under subsection (c) it says that the  
20 defendant's presence is not required at a conference or  
21 argument under a question of law. If the except as  
22 otherwise provided clause were not in 43(a), a question  
23 could arise whether, in fact, the defendant was required  
24 to be present at such conferences if they took place  
25 during the trial.

1           43(a) lays down a blanket rule of presence, but  
2 it also recognizes that there are certain circumstances in  
3 which the defendant does not have an obligation to be  
4 present during the trial, and some of those examples are  
5 set forth in subsection (c). And there are also cases in  
6 which the defendant loses the right to be present and they  
7 are set forth in subsection (b).

8           Subsection (a) sets forth a general  
9 requirement --

10           QUESTION: But what I don't understand, Mr.  
11 Seamon, is this. Central to your argument as you made it  
12 is that -- is that (a) does not address, does not address  
13 what happens if the defendant is not present. It does not  
14 say anything about whether the trial shall proceed, right?

15           MR. SEAMON: That's correct.

16           QUESTION: If that's so, then why is (b) even  
17 necessary? Why do you have to make an exception? I mean  
18 if (a) doesn't address it, why do you then go on to say in  
19 (b), however, the trial may proceed if the defendant is  
20 voluntarily absent. You wouldn't go ahead with (b). (b)  
21 would not have existed if (a) didn't address that  
22 situation.

23           MR. SEAMON: What Rule 43(b) does is it  
24 addresses two specific factual situations in -- in -- and  
25 then specifies what the court's options are in those



1 situations.

2 QUESTION: Which wouldn't have to be addressed  
3 if the -- if the prohibition of (a) did not apply to them.

4 MR. SEAMON: It wouldn't have to be addressed,  
5 but the reason it was when Rule 43 was adopted was because  
6 this Court had addressed those situations. 43(b)(1) had  
7 been addressed in Diaz v. United States, and then  
8 subsequently the situation described in Rule 43(b)(2) was  
9 addressed in Illinois v. Allen.

10 So the -- the -- but the rule that was --

11 QUESTION: -- was addressed in Illinois against  
12 Allen?

13 MR. SEAMON: That situation --

14 QUESTION: That was a State case.

15 MR. SEAMON: That's correct.

16 QUESTION: And the only thing that was at issue  
17 was the -- was the Constitution.

18 MR. SEAMON: That's right. Illinois v. Allen  
19 was a State case and it was a constitutional question of  
20 whether the --

21 QUESTION: Well, the Court didn't address  
22 it -- address the rule then. They just had it -- they  
23 just recited it in a footnote.

24 MR. SEAMON: That's right. Illinois was a State  
25 case and it wasn't governed by the rules. And, in fact,

1 the rule was amended to apply the Illinois v. Allen  
2 exception to Federal courts.

3 And, actually, that addition to the rule, which  
4 occurred in 1974, is significant because the drafters  
5 described the addition permitting the exclusion of  
6 disruptive defendants as designed to, quote, make clear  
7 that Federal courts, as well as State courts, had the  
8 power to exclude disruptive defendants from the courtroom.

9 We think it's significant that they described  
10 the amendment as clarifying a preexisting power, rather  
11 than creating a new one, because prior to the 1974  
12 amendment the rule didn't expressly authorize Federal  
13 courts to exclude disruptive defendants. Nonetheless, the  
14 drafters, in adding the '74 amendment, plainly did not see  
15 Rule 43's prior silence on that question as creating a  
16 prohibition.

17 QUESTION: Mr. Seamon, can a defendant be  
18 arraigned in his absence?

19 MR. SEAMON: In -- in the -- the defendant's  
20 presence is required at arraignment under Rule 43(a).

21 QUESTION: Well, but how is that different from  
22 the requirement for trial? I mean, it's the same  
23 provision, the defendant shall be present at arraignment  
24 and at every stage of the trial except as otherwise  
25 provided.

1 MR. SEAMON: That's correct. And we would say  
2 that there are circumstances in which a defendant can  
3 waive the right to be present at arraignment.

4 QUESTION: At arraignment as well as trial.

5 MR. SEAMON: That's correct.

6 QUESTION: Well you go farther than that, if I  
7 understand it. You say the rule simply doesn't address  
8 the problem of what happens if he's not present.

9 MR. SEAMON: That's correct as well.

10 QUESTION: So that would mean that, apart from  
11 the Constitution and the common law, the judge could just  
12 do anything he wanted. He'd say, well, he's not here but  
13 I think I'll take the guilty plea anyway from his sister,  
14 or something like that, or not guilty plea.

15 (Laughter.)

16 QUESTION: What would prevent the judge from  
17 doing that?

18 MR. SEAMON: Now, what would prevent the judge  
19 from doing that are the principles enunciated in this  
20 Court's decisions concerning waiver of the right to be  
21 present, and as well as --

22 QUESTION: Yeah, but what if he does -- there's  
23 nothing here that says he must waive, so he just doesn't  
24 show up without waiving. The rule doesn't address the  
25 situation, in your view. It doesn't require that the

1 right be waived. Maybe the Constitution does and common  
2 law does, but the rule, under your reading, doesn't. It  
3 just doesn't tell the judge what to do. He can take the  
4 plea from his sister.

5 QUESTION: And so if his lawyer shows up at  
6 arraignment and he gives in a letter to the judge and  
7 there's no question that he wrote it and that he -- he  
8 goes and he says I know that if I were here at  
9 arraignment, here's what you would tell me, and all that,  
10 and I don't want to be there. And you would say that  
11 would be a decent waiver, yes?

12 MR. SEAMON: It would be a decent waiver, but  
13 the question would still remain whether the trial court  
14 should accept that waiver and say we'll go forward in the  
15 defendant's absence.

16 QUESTION: Well, what -- what's your answer?  
17 The rule just doesn't speak to it.

18 MR. SEAMON: That's right. It does require the  
19 defendant to be present. Rule 43(a) does lay a --

20 QUESTION: But it doesn't say -- it doesn't say  
21 what happens if he isn't present.

22 MR. SEAMON: That's correct.

23 QUESTION: You read it as kind of addressed to  
24 the bailiff.

25 MR. SEAMON: We read it as, under the facts of

1 this case, it was addressed to petitioner and -- and he  
2 violated his duty to show up. It is addressed, as well,  
3 to whoever has custody of the defendant, and it's  
4 certainly addressed to the court as well. But in this  
5 case the -- the violation of the right -- of the duty to  
6 be present was the petitioner's and not the court's.

7 QUESTION: Do you think that without the rule,  
8 the judge could -- was -- is without power to require the  
9 defendant to be present at all stages of the trial,  
10 subject to the penalty of contempt?

11 MR. SEAMON: No. There are -- there are --  
12 certainly the conditions under which detention and  
13 appearance bond -- detention hearings are held and  
14 appearance bonds are executed.

15 QUESTION: And in order to appear subject to  
16 contempt.

17 MR. SEAMON: That's right. And there are all --

18 QUESTION: So then the rule doesn't really serve  
19 a very important purpose at all insofar as it's directed  
20 to the defendant, does it?

21 MR. SEAMON: It serves an important purpose. It  
22 restates what rule -- what the law was at the time the  
23 rule was adopted, which is that, in general, the defendant  
24 shall be present throughout the proceedings against him.

25 And it's very clear, though, that at the time

1 Rule 43 was adopted the right of presence could be waived;  
2 this Court had established that in Diaz. It was not clear  
3 whether the right could be waived by the defendant's  
4 absconding prior to trial, and our position is that the  
5 drafters simply left that for courts to decide. It hadn't  
6 been resolved at the time the rule was adopted. It was an  
7 open question, certainly not an insignificant question,  
8 but nonetheless one that had not been dealt with at that  
9 time, and has yet to be.

10 QUESTION: Well, there's language in the Diaz  
11 opinion, albeit dicta, that suggests that our Court was of  
12 the view that the common law thought that a defendant  
13 could not waive his presence at the beginning of trial.

14 MR. SEAMON: It's -- it is correct that Diaz's  
15 description of the prevailing rule at that time suggests  
16 that. And for that matter, Diaz also suggested that in  
17 noncapital cases -- it was only in noncapital cases that a  
18 defendant's absconding during trial could permit the trial  
19 to go forward.

20 But the -- the law has been evolving on that  
21 point, and to come to back to the -- the question of -- of  
22 a capital -- a defendant charged with a capital offense,  
23 in 1974 the rule was amended to drop the wording regarding  
24 capital offenses so that courts would have the opportunity  
25 to address the issue of whether a defendant charged with a

1 capital offense can waive the right to be present at his  
2 trial.

3 My point is that the drafters have generally not  
4 anticipated issues that have not been resolved by the  
5 courts. And one of those issues is the status of a  
6 defendant charged with a capital offense, and another of  
7 those issues is the question of a defendant who absconds  
8 prior to trial.

9 QUESTION: Was there a proposed amendment of  
10 Rule 43 at one time to deal with the absence at the start  
11 of trial?

12 MR. SEAMON: Yes, there was. In 1973 the  
13 advisory committee proposed an amendment that -- that  
14 would have permitted that.

15 QUESTION: And what happened to that?

16 MR. SEAMON: It was -- it was never passed. And  
17 the reasons why --

18 QUESTION: By whom?

19 MR. SEAMON: -- are unclear.

20 QUESTION: By whom?

21 MR. SEAMON: It was never adopted by the  
22 advisory committee on the rules of criminal procedure, nor  
23 presented to this Court. And although we've diligently  
24 researched the history of that, it simply is unclear  
25 what -- why the advisory committee decided not to adopt

1 it. We tend to think, in light of the rest of the history  
2 of the rule, that this was yet another situation in which  
3 the drafters did not decide to decide an issue that had  
4 not yet been passed upon by the courts.

5           Around the time that this proposal I was just  
6 speaking of came up, this Court had granted cert in Tacon  
7 v. Arizona to address the question of whether a defendant  
8 could waive the right to be present -- as a constitutional  
9 matter, could waive the right to be present at trial at  
10 all. But cert was dismissed as improvidently granted, and  
11 so the issue was -- was not resolved, although I would  
12 suggest that the drafters anticipated that this Court's  
13 resolution of that issue may have obviated the need  
14 for -- for the amendment that you're speaking of.

15           The -- I'd like to return to the lower courts,  
16 because ever since Rule 43 was adopted the lower courts  
17 have unanimously held that waiver is appropriate in these  
18 situations if the public interest in proceeding with the  
19 trial outweighs the defendant's interest in being present.

20           Those decisions are significant in two respects.  
21 First at all -- first of all, they cast serious doubt on  
22 petitioner's contention that the plain language of Rule 43  
23 supports his reading. Now, if the language were so plain,  
24 so many Federal courts of appeals would not have decided  
25 the question against him.



1           And secondly, all of the court of appeals  
2 decisions have been grounded on common reasoning, which  
3 simply is -- is that just as a defendant may waive his  
4 right to be present at trial by absconding once the trial  
5 begins, he may also waive the right by -- by absconding  
6 before the trial begins. That approach fully protects the  
7 defendant's right to be present by giving him an  
8 opportunity to show up, but at the same time it prevents  
9 the sort of calculated manipulation of the judicial system  
10 that's involved in this case.

11           The lower courts take a two-part inquiry. The  
12 first is directed to whether the defendant's absence is,  
13 in fact, knowing and voluntary. Once that's determined,  
14 it does not mean that the -- that automatically trial in  
15 absentia goes forward. Instead, the courts have gone on  
16 to determine whether the public interest in proceeding  
17 outweighs the defendant's interest in being present.

18           In fact, the decisions in this case below  
19 illustrate the care with which the lower courts have  
20 approached this issue. The trial court judge was faced  
21 with a very difficult situation on the morning of October  
22 12, 1988 when this trial was scheduled to go forward.  
23 Petitioner's three codefendants were present, as were  
24 their counsel, the Government had assembled dozens -- over  
25 80 witnesses to testify and hundreds of proposed exhibits.

1 In short, everything was waiting to go forward, including  
2 the selection of potential jurors, except the petitioner  
3 wasn't there.

4 Nonetheless, the trial went --

5 QUESTION: Well, yeah, but you would be -- you  
6 would be making the same argument if there was just a  
7 single witness.

8 MR. SEAMON: But our argument would have less  
9 force in that situation because postponing the trial --

10 QUESTION: But you're making the argument and  
11 you think you should win it.

12 MR. SEAMON: Certainly, sir.

13 QUESTION: And like, apparently, the Government  
14 has won in every case where -- in the case -- when the  
15 issue has come up.

16 MR. SEAMON: We've -- we've been very successful  
17 with the argument.

18 QUESTION: And I doubt very much if there were  
19 100 witnesses in all those cases.

20 MR. SEAMON: That's right. And my only point is  
21 that this -- that if -- if waiver of the right to be  
22 present and a continuation of the trial in a defendant's  
23 absence was ever proper, this is a case in which it was.  
24 The case was expected -- the trial was expected and, in  
25 fact, did last about 4 weeks. There were hundreds of

1 exhibits and dozens of witnesses that had come from all  
2 over the country, and several had come from Canada.

3 Nonetheless, the trial court put everything on  
4 hold and waited 5 days, in the meantime making substantial  
5 inquiries into finding out where petitioner was, and there  
6 was no indication that he was ever going to show up. In  
7 fact, apparently the marshals had been told that he was  
8 packing the trunk of his car the night before trial began  
9 and was never seen from again.

10 QUESTION: Of course, in at least one of those  
11 cases from the other circuits, isn't it a fact that  
12 the -- although the defendant was not there at the very  
13 beginning of the trial, he was there for most of the  
14 trial?

15 MR. SEAMON: Yes, that's right.

16 QUESTION: That makes it -- it's a little  
17 different situation, I suppose.

18 MR. SEAMON: It -- it certainly is different.

19 QUESTION: Yeah.

20 MR. SEAMON: Obviously -- and, certainly, the  
21 Government prefers to try defendants in their -- in their  
22 presence, and it -- it imposes a great burden on everyone,  
23 no matter what a court ultimately decides to do, when a  
24 defendant is absent. Again, as in this case, the marshals  
25 had to be dispatched, a bond forfeiture hearing had to be

1 undertaken, inquiries were made of petitioner's family and  
2 his bondsman. And then, still, the question had to be  
3 decided what to do.

4 QUESTION: Well, has the -- the Government  
5 always has a -- or the Justice Department always has a  
6 representative on the advisory committee, doesn't it?

7 MR. SEAMON: I believe so.

8 QUESTION: And I suppose if these cases kept  
9 coming up and they're -- how many courts of appeals have  
10 held in your favor?

11 MR. SEAMON: Eight circuits.

12 QUESTION: Eight circuits. Well, so it's sort  
13 of a repetitive sort of a situation, and it looks to me  
14 like you would have prevailed upon the advisory committee  
15 to change the rule.

16 MR. SEAMON: Well, we -- we didn't think the  
17 rule needs fixing, and neither have any of the courts of  
18 appeal. Those courts have concluded, as we argue, that --

19 QUESTION: Well, it may not have needed fixing  
20 except that all the courts of appeals haven't ruled on it  
21 yet, but I -- I -- I would almost bet that sooner or later  
22 they would have to.

23 MR. SEAMON: Well, that's right. And, actually,  
24 it -- that is significant, because it brings up the  
25 question that petitioner's suggested of the specter of

1 lots of defendants being -- or defendants being  
2 deprived --

3 QUESTION: Mr. Seamon, have they ever found Mr.  
4 Crosby?

5 MR. SEAMON: They did find Mr. Crosby. He  
6 was -- he was arrested approximately 8 month after -- 8  
7 months after his trial was scheduled.

8 QUESTION: Say it over again, I can't hear.

9 MR. SEAMON: He was arrested about 8 months  
10 after his trial was scheduled to begin.

11 QUESTION: I'm sorry. Now do it a third time,  
12 will you?

13 MR. SEAMON: Yes.

14 QUESTION: He was arrested where?

15 MR. SEAMON: He was arrested in Florida about 8  
16 months after the trial started.

17 QUESTION: So he is in custody now.

18 MR. SEAMON: He is in custody now, and he was  
19 sentenced upon his return.

20 QUESTION: If you lose this case, apart from  
21 this case, to what extent is the Government -- Government  
22 discomforted?

23 MR. SEAMON: Well, significantly. I mean,  
24 obviously, the Government would go forward and ask for an  
25 explicit amendment to the rule to address this situation.

1 But we -- we don't think it's necessary, because we think  
2 that the courts of appeal have correctly decided that  
3 trial in absentia, under these circumstances, is correct.

4 It would impose -- in the meantime, it would  
5 impose a significant burden because the position for which  
6 petitioner is contending actually gives defendants who are  
7 contemplating flight an incentive to skip before the trial  
8 ever gets started. And --

9 QUESTION: Well, maybe defendants would abscond  
10 earlier, hum?

11 MR. SEAMON: Some do.

12 QUESTION: Or bail would be higher or something.

13 MR. SEAMON: Some do and the -- the enhanced  
14 risk that defendants would flee before their trial would  
15 tend to -- to have the Government argue in favor of  
16 pretrial detention in more cases, and may well dispose  
17 courts to grant those -- those requests.

18 QUESTION: And yet here you've sailed along on  
19 the face of the language in the rule without any concern,  
20 I guess because the courts of appeals have been going  
21 your way.

22 MR. SEAMON: The courts of appeal have  
23 consistently gone our way since the rule was adopted,  
24 and -- and --

25 QUESTION: It might even be easier for you to

1 argue that -- that a pretrial conference is part of the  
2 trial and he was present at the pretrial conference.

3 MR. SEAMON: We -- we don't think that that's a  
4 tenable argument. We think that -- that the trial begins  
5 with the empaneling of the -- of the jury, as this Court  
6 has held and continues through --

7 QUESTION: Plain meaning, I guess, right.  
8 Pretrial means pretrial, yeah.

9 (Laughter.)

10 MR. SEAMON: That much is clear on the face of  
11 Rule 43. I would concede that.

12 QUESTION: Mr. Seamon, do you happen to  
13 know -- I don't know the answer to this -- what the  
14 practice in most State courts is?

15 MR. SEAMON: Most State courts have rules very  
16 similar to Rule 43.

17 QUESTION: What do they do when the -- in facts  
18 like this, do you know?

19 MR. SEAMON: In facts like this, the majority of  
20 them -- although not all of them -- do the same thing that  
21 the Eighth Circuit did here, which is to first make an  
22 inquiry to determine if the defendant really has absconded  
23 and is voluntarily away and the, as a second point,  
24 looking to whether, in fact, the trial can be postponed or  
25 rescheduled or it needs to go forward because of the

1 witnesses or because of codefendants, and that sort of  
2 thing.

3 QUESTION: Thank you.

4 MR. SEAMON: If there are no other questions.

5 QUESTION: Thank you, Mr. Seamon.

6 MR. SEAMON: Thank you.

7 QUESTION: Mr. Nyvold, you have 5 minutes  
8 remaining.

9 REBUTTAL ARGUMENT OF MARK D. NYVOLD

10 ON BEHALF OF THE PETITIONER

11 MR. NYVOLD: Thank you. The Government is  
12 arguing now that Rule 43 doesn't address this situation.  
13 Although this isn't -- or terribly significant, it is  
14 important that the interpretation the Government is urging  
15 now is not the one the Government took at trial.

16 At page 15 of the joint appendix, the prosecutor  
17 said when this subject came up, the possibility of trying  
18 Mr. Crosby in absentia -- the prosecutor said: The rule  
19 appears to require that the defendant be there at the  
20 beginning of the trial and that you proceed if he takes  
21 off, and that is usually the way it happens. The  
22 Government went on to urge or to cite the many circuits  
23 that have said this is okay to do, but it's significant  
24 that the reading that they are giving the rule now is not  
25 the reading that they gave the rule when the question



1 first arose.

2 QUESTION: Well, I don't understand.

3 What -- what -- what -- how did they -- what reason did  
4 they give there?

5 MR. NYVOLD: Well, the prosecutor -- when the  
6 question arose, let's think about trying Mr. Crosby in  
7 absentia, the prosecutor got out the rule and her comment  
8 was, quote: The rule appears to require that the  
9 defendant be there at the beginning of the trial and that  
10 you proceed if he takes off, and that is usually the way  
11 it happens. In other words, the prosecutor --

12 QUESTION: Well, but -- but, in fairness, the  
13 Government goes on to say: But the cases indicate you can  
14 proceed against him in his absence even if he's not there  
15 at the outset of the trial.

16 MR. NYVOLD: Yes, Justice Kennedy, that was the  
17 point I was making, that the Government went on to urge  
18 the cases, or to cite the cases in the circuits that  
19 permit the --

20 QUESTION: Well, I assume the Government was  
21 saying that this is the way the rule has been interpreted  
22 by the courts.

23 MR. NYVOLD: Well, the plain reading, or the  
24 reading the prosecutor was giving it was not the one the  
25 Government is giving it now. That's the only point I'm

1 making. I'm not saying that's dispositive of the case,  
2 but they are being -- the Government is inconsistent in  
3 its argument.

4 QUESTION: Well, he was -- but he did -- he did  
5 point out that apparently the courts of appeals knew more  
6 about the rule than he did.

7 MR. NYVOLD: No, the prosecutor then cited the  
8 cases or went on to urge that the cases indicate you can  
9 proceed -- proceed against him.

10 The Government, or the solicitor, made the  
11 statement that a defendant can be proceeded against even  
12 if he or she is not at the arraignment. I don't know of  
13 any authority for that. It's -- arraignment, at least  
14 under Crane v. United States, is an absolute to --  
15 prerequisite to proceeding against a defendant. And in  
16 Crane, the defendant's conviction was reversed because,  
17 although he was present at every other proceeding, the  
18 defendant had never been arraigned. So I don't know any  
19 authority for that contention.

20 The circuit court opinions make the -- make some  
21 rather facile distinctions in getting around Rule 43.  
22 They say that since the defendant can waive his presence  
23 at any early stage of the trial when some fairly -- or  
24 less significant events like jury selection are going on,  
25 and he -- why can't he waive it at the beginning of the

1 trial.

2 That clouds the reasoning behind the common law  
3 rule, which was to draw a bright line at the beginning of  
4 trial. The common law has recognized, as does Rule 43,  
5 that a defendant can waive the right of presence after the  
6 trial begins, but to reason that -- within those  
7 parameters, that because he can waive it during different  
8 stages, that he can waive it prior to the trial is  
9 illogical. It's taking the common law rule and basically  
10 pulling the rug out from under it. That's not what the  
11 common law did. It didn't permit the trial in absentia  
12 prior -- if the defendant wasn't there.

13 The Government took some pains to point out that  
14 Mr. Crosby's presence appears to have been deliberate and  
15 calculated to postpone the trial. This, again, was a  
16 circumstance well-known to the common law and well-known  
17 to the drafters of the rule, and yet they didn't write the  
18 rule to distinguish between defendants who are absent  
19 through no fault of their own and those who deliberately  
20 abscond. That's just irrelevant under the rule.

21 The Government makes the point that a defendant,  
22 if the rule is interpreted as we urge, will have an  
23 incentive to leave at an early stage of the trial. Well,  
24 a defendant has an incentive to leave prior to arraignment  
25 since it's obvious the defendant can't be proceeded

1 against if he hasn't been arraigned.

2 So if there's an incentive to leave at an early  
3 stage, it occurs prior to the trial. That would be the  
4 smartest point at which to abscond, is prior to  
5 arraignment, since no one disputes that a defendant cannot  
6 be tried if he hasn't been arraigned.

7 The point that -- the question that Justice --

8 QUESTION: The arraignment, though -- if the  
9 defendant absconds before he's arraigned, the State has  
10 not marshaled the witnesses and that sort of thing for the  
11 arraignment the way they would have for the trial, so the  
12 -- the amount of inconvenience is considerably different.

13 MR. NYVOLD: That's true. But the common law  
14 recognized that it was only at the point at which the  
15 trial began that that inconvenience factor would weigh --  
16 would predominate and favor -- and permit the trial of a  
17 defendant who's not initially present.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nyvold.  
20 The case is submitted.

21 (Whereupon, at 2:31 p.m., the case in the  
22 above-entitled matter was submitted.)

23

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Michael Crosby v United States

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Marie Federico

(REPORTER)