



**Minneapolis**  
City of Lakes

**Office of the City Attorney**

Jay M. Heffern  
City Attorney

333 South 7th Street - Suite 300  
Minneapolis MN 55402-2453

Office 612 673-2010  
Civil Division Fax 612 673-3362  
Criminal Division Fax 612 673-2189  
MCDA Fax 612 673-5112  
TTY 612 673-2157

TO: Dana Banwer, Deputy City Attorney  
FROM: Scott Christenson, Assistant City Attorney *SR*  
DATE: September 7, 2003  
RE: Minnesota Law Prohibits Trials *In absentia*

**INTEROFFICE MEMORANDUM**

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**ISSUE**

Does current Minnesota allow trials *in absentia*?<sup>1</sup> A review of the relevant case law and rules of criminal procedure indicates that Minnesota law currently prohibits trial *in absentia*.

**ANALYSIS**

The federal constitutional right to be present during trial is based upon the confrontation clause of the Sixth Amendment to the United States Constitution, and is applicable to the states through the Fourteenth Amendment. State v. Cassidy, 567 N.W.2d 707, 709 (Minn. 1997). Like any constitutional right, the right to be present at trial may be competently and intelligently waived by the accused. Id.; State v. Worthy, 583 N.W.2d 270 (Minn. 1998). The United States Supreme Court, however, has never addressed the issue of whether a defendant's failure to appear on the day of trial constitutes a competent and intelligent waiver of this federal constitutional right. Crosby v. United States, 506 U.S. 255, 262, 113 S.Ct. 748, 753 (1993). One of the reasons the United States Supreme Court has not reached this issue is the Court has held that Federal Rule of Criminal Procedure, Rule 43, creates a right to be present at trial that is even greater than the federal constitutional right to be present. The Rule 43 right to be present at trial may only be waived under the circumstances expressly stated in the rule. Id. (the relevant portion of Rule 43 defines waiver as "voluntary absence after the trial has commenced.") Those circumstances do not include a defendant's failure to

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<sup>1</sup> Trials *in absentia* are trials where the defendant is not present.

appear on the day of trial. Id. As a result, defendants who fail to appear on the day of trial in federal court may not be tried *in absentia*.

In states, like Pennsylvania, where the rules of criminal procedure provide that a defendant's failure to appear on the day of trial constitutes a waiver of the right to be present at trial, the state appellate courts have distinguished Crosby, on the grounds that it focused on the specific language of Fed R. Crim P. 43. See Commonwealth v. Johnson, 734 A.2d 864 (Super. PA 1999); Pa. R. Crim. P. 1117(a) ("The defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict"). In those jurisdictions, defendants who fail to appear on the day of trial may be tried *in absentia*.

The Minnesota Court of Appeals, in discussing petty misdemeanor defendants' failures to appear on the day of trial explained that, pursuant to the rules of criminal procedure, a defendant could not be convicted without a guilty plea or a guilty verdict after trial. State v. Haney, 600 N.W.2d 469, 471 (Minn. Ct. App. 1999)(allowing certification to the driver's license pursuant to Minn. Stat. Sec. 171.01, subd 13 which states that a defendant's failure to comply with a written notice to appear in court is "equivalent" to a conviction). The court in a footnote, however, noted that "a trial court may try a defendant *in absentia* if the defendant constructively waives the right to be present. But here there was no evidence presented and no finding of guilt made." Id. (citations omitted). Although this footnote is dicta, it suggests that the defendants' failures to appear were a constructive waiver that would have allowed the state to present evidence and seek a guilty verdict *in absentia*. Future Minnesota appellate courts, however, are likely to reject this argument because Federal Rule of Criminal Procedure, Rule 43 nearly mirrors Minnesota Rule of Criminal Procedure, Rule 26.03, subd. 1(2) which defines waiver as "voluntarily and without justification absents himself or herself after trial has commenced." Minn. R. Crim. P. 26.03 subd. 1(2) (emphasis added). See Cassidy, 567 N.W.2d 707, (Minn. 1997)(Rule 26.03 creates a right even greater than the federal constitutional right to be present at trial; defendant failed to return for the second day of trial because he was unable to find a car); Worthy, 583 N.W.2d 270, 277 (Minn. 1998)(defendant was present at the impaneling of the jury, but unequivocally stated that they did not wish to stay in the courtroom during the trial). As a result, Minn. R. Crim. P. 26.03, subd 1(2) currently prohibits the state from trying "*in absentia*" defendants who fail to appear on the day of trial.

### CONCLUSION

If the language of Rule 26.02 were amended to reflect the language of Pa.R.Crim.P. 1117(a), the state would be able to try defendants *in absentia*. An alternative approach that may provide relief to an already over-burdened criminal justice system would be to recommend that the Minnesota Supreme Court add language to Rule 26.02 specific to petty misdemeanors, stating that failure to comply with a written notice to appear for a petty misdemeanor trial constitutes a waiver of the right to be present at trial.