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TRIAL IN ABSENTIA

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It has long been settled that a defendant in a criminal case who deliberately absents himself after his trial has begun waives his right to be present and may be tried *in absentia*.¹ Almost as long standing is the widespread notion that there is some sort of talismanic significance to the commencement of trial and that, unless the trial has in fact begun when the defendant wanders, there is no legal authority for trial *in absentia*.² The fact is that there is no such impediment, and the practice of trying *in absentia* those who take flight prior to the commencement of trial seems to be growing.³

The subject of this article is the state of the law in this area today, the origins of that law and the myths surrounding it, the rationale by which the constitutional right to be present is deemed waived by voluntary absence and the effect of such waiver upon other rights.

HISTORY OF TRIAL IN ABSENTIA

The right of an accused to be present at his trial is traceable to

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¹ See, e.g., *Diaz v. United States*, 223 U.S. 442 (1912); *Falk v. United States*, 15 App. D.C. 446 (1899), *cert. denied*, 181 U.S. 618 (1901). Of course there is no requirement that the trial be continued. The court also has the power to declare a mistrial. See *Cureton v. United States*, 396 F.2d 671 (D.C. Cir. 1968); *Smith v. United States*, 357 F.2d 486 (5th Cir. 1966).

² See, e.g., [1943] Notes of the Advisory Committee on the Rules of Criminal Procedure, relative to the preliminary draft of Rule 38 of the Federal Rules of Criminal Procedure which later became Rule 43. The notes on Rule 38 state: "The second sentence [of the rule] permits continuance of trials both in felony cases if the crime is not punishable by death and in misdemeanor cases when the defendant by his voluntary act absents himself after the commencement of the trial. Under this provision the defendant is required to be present at arraignment and plea and the trial must be begun in his presence." *Id.*, quoted in *Cureton v. United States*, 396 F.2d 671, 673 (1968) (quoting 1943 Notes of the Advisory Committee Relating to the Preliminary draft of Rule 38 of the Federal Rules of Criminal Procedure). The Notes of the Advisory Committee to a 1946 edition of the Rules includes the following statement: "The second sentence of the rule is a restatement of existing law . . ." Notes of the Advisory Committee Relating to the Preliminary Draft of Rule 38 of the Federal Rules of Criminal Procedure, S. Doc. No. 175, 79th Cong., 2d Sess. 78 (1946). See also *Commonwealth v. Felton*, 224 Pa. Super. Ct. 398, 307 A.2d 51 (1973); notes 27-29 and accompanying text *infra*.

³ See, e.g., *Tacon v. Arizona*, 410 U.S. 351 (1973); *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *United States v. Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); *Arizona v. Hunt*, 408 F.2d 1086 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969); *People v. Hicks*, 90 Misc. 2d 609, 395 N.Y.S.2d 577 (Sup.

the earliest days of Anglo-Saxon law. From the outset, it appears that no tribunal would enter judgment on a complaint unless the accused was present.⁴ One reason for this rule was the means employed to determine the merits. Among the most common of the early methods used in England was trial by ordeal and, plainly, only a defendant who was available could be tested against hot iron or boiling water.⁵ After the Norman Conquest in 1066 another method was developed, but the new one—trial by battle—also required the defendant's presence as one of the combatants.⁶ Through the efforts of the clergy, trial by ordeal was finally abolished around 1219, but trial by battle remained a standard means of determining the merits for many years afterward.⁷

An accused who unjustifiably absented himself was not tried *in absentia* or formally adjudged guilty by default, instead, he was declared an "outlaw".⁸ While it has been suggested that this distinction is evidence of an innate aversion to default judgments in criminal cases and, therefore, of a relatively healthy sense of justice,⁹ upon scrutiny the difference seems more apparent than real. First, it appears that, at the outset, outlawry was in fact considered punishment for a crime.¹⁰ Moreover, the consequences of conviction upon an accused could hardly have been more severe than those of

Ct. N.Y. County 1977), *aff'd mem.*, 68 App. Div. 2d 1019, 417 N.Y.S.2d 152 (1st Dep't 1979); *State v. La Belle*, 18 Wash. App. 380, 568 P.2d 808 (1977).

⁴ II W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 105 (4th ed. 1936); Goldin, *Presence of the Defendant in Rendition of the Verdict in Felony Cases*, 16 COLUM. L. REV. 18, 18 (1916). Under the Salic law, violations such as mayhem, robbery and homicide were not perceived as offenses against the community, but as private wrongs against the victim. See J. AMES, LECTURES ON LEGAL HISTORY 39 (1913); I J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 60 (1883). See generally *People v. Epps*, 37 N.Y.2d 343, 348, 334 N.E.2d 566, 570, 372 N.Y.S.2d 606, 622, *cert. denied*, 423 U.S. 999 (1975). If an injured party succeeded in an action against the wrongdoer, the latter was required merely to compensate his victim. See J. AMES, *supra*, at 39; H. MAINE, ANCIENT LAW 217-18 (2d ed. New York 1954) (1st ed. London 1861). "If the party injured proceeded against the wrongdoer, the latter, in most cases, escaped with the payment of pecuniary compensation and a fine. . . . One could tell to a shilling just what it would cost to kill one's neighbor's cow, or even the neighbor himself." J. AMES, *supra*, at 39. In many respects this was the mark of a society whose institutions were incapable of maintaining order, acceding to the more efficient retribution of the individual victim. See II F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 449 (2d ed. 1923); Phelps, *Procedural Aspects of Early Common Law*, 7 MANITOBA L.J. 111 (1976).

⁵ IV W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342-43 (15th ed. London 1809). See also *id.* at 345.

⁶ See II F. POLLOCK & F. MAITLAND, *supra* note 4, at 600; J. STEPHEN, *supra* note 4, at 61.

⁷ II F. POLLOCK & F. MAITLAND, *supra* note 4, at 599.

⁸ III W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 604-05 (5th ed. 1942).

⁹ See *People v. Epps*, 37 N.Y.2d 343, 348, 334 N.E.2d 566, 570, 372 N.Y.S.2d 606, 611, *cert. denied*, 423 U.S. 999 (1975); Goldin, *supra* note 4, at 20.

¹⁰ See II F. POLLOCK & F. MAITLAND, *supra* note 4, at 450.

outlawry, which included forfeiture of all property and, at least until about 1329, being subject to summary execution by anyone who came upon him.¹¹ Thus, it seems more accurate to say that the impact of outlawry was "in effect, a conviction,"¹² and that judgments *in absentia* were not entered because the same purpose was accomplished by outlawry.¹³

Later, when trial by jury replaced trial by battle and trial by ordeal, the rule was retained, and the presence of the defendant was still required. Absence of a defendant deprived the court of jurisdiction preventing a trial from commencing, or, if already begun, from continuing.¹⁴ For these reasons and because until relatively recently, an accused was required to defend himself without the assistance of counsel,¹⁵ the right to be present was imbedded in the common law and well recognized when the sixth amendment was drafted.¹⁶

¹¹ See III W. HOLDSWORTH, *supra* note 8, at 605; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 430-31 (5th ed. 1956). The severe consequences of "outlawry" have been graphically described as follows:

[Society] could not measure its blows; he who defied it was outside its sphere; he was outlaw. He who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a 'friendless man,' he is a wolf.

II F. POLLACK & F. MAITLAND, *supra* note 4, at 449.

¹² T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 431 (5th ed. 1956).

¹³ See III W. HOLDSWORTH, *supra* note 8, at 605. As Holdsworth states:

We have seen that English law has always refused to try a man in his absence. The survival of this primitive rule is probably due to the fact that in cases of treason or felony such a power was hardly necessary for the law has always had the power to punish him in his absence by forfeiture, and to treat him as condemned if he could be captured.

¹⁴ See II F. POLLACK & F. MAITLAND, *supra* note 4, at 594-95.

¹⁵ See *Powell v. Alabama*, 287 U.S. 45, 60 (1932); *State v. Adams*, 20 Kan. 311, 326 (1878); *State v. Outs*, 30 La. Ann. 1155, 1156-57 (1878); L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 350 (1947); J. STEPHEN, *supra* note 4, at 424.

¹⁶ See generally *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *State v. Outs*, 30 La. Ann. 1155, 1156 (1878). The right to be present is protected by constitutional or statutory provisions, or both, in virtually every jurisdiction in the United States. See, e.g., U.S. CONST. amend. VI; FED. R. CRIM. P. 43; ALA. CONST. art. I, § 6; ALA. CODE 15, § 15-2-20(c) (1975); ALASKA CONST. art. I, § 11; ALASKA CRIM. R. 38; ARIZ. CONST. art. 2, § 24; ARIZ. R. CRIM. P. 9.2, 14.2, 15.3(d), 19.2, 26.9; CAL. CONST. art. 1, § 15; CAL. PENAL CODE §§ 865, 977, 1018, 1043, 1148, 1193 (West 1970 & Supp. 1979); CONN. CONST. art. 1, § 8; CONN. GEN. STAT. § 54-92 (Supp. 1979); DEL. CONST. art. I, § 7; DEL. SUPER. CT. CRIM. R. 43; DEL. CT. C.P. CRIM. R. 43; DEL. CT. J.P. CRIM. R. 25; FLA. CONST. Declaration of Rights, § 16; FLA. R. CRIM. P. 3.180, 3.190(j); GA. CONST. art. I, § 2-111; ILL. CONST. art. 1, § 8; ILL. ANN. STAT. ch. 38, §§ 113-1, 115-3, -4(h), -4.1, -8 (Smith-Hurd 1977 & Supp. 1979); MD. CONST. DECLARATION OF RIGHTS art. 21; MD. R. PROC. 723, 724, 740(f); MASS. CONST. pt. 1, art. XII; MASS. GEN. LAWS ANN. ch. 278, § 6 (West 1972); MASS. R. CRIM. P. 18 (1979); MICH. CONST. art. I, § 20; MICH. COMP. LAWS §§ 763.1, 768.3 (1970); N.H. CONST. pt. First, art. 15th; N.J. CONST. art. 1, ¶ 10; N.J. R. GOV'G CRIM. PRAC.

Further, when the charge was a felony, the defendant's presence was deemed a requisite to jurisdiction, and the right was considered absolute and nonwaivable.¹⁷

Over the years, however, an exception was engrafted onto the rule. While upholding the principle that the defendant's presence was jurisdictional in capital cases and where the defendant was in custody, various state and federal courts held that a defendant in a non-capital case who was not in custody could waive the right to be present by voluntarily absenting himself after the trial had begun.¹⁸ The proposition was well established by the turn of the century, but was not ruled on by the Supreme Court until its landmark decision in *Diaz v. United States*.¹⁹ In that case, the defendant, charged with homicide as a non-capital offense and free on bail, voluntarily absented himself from the trial during the testimony of two witnesses, and expressly consented that the trial proceed in the presence of his attorney.²⁰ On appeal after the conviction, the defendant urged that his presence could not be waived and therefore the trial court lacked jurisdiction to proceed in his absence. The Court, while observing

3:16; N.M. CONST. art. II, § 14; N.M. R. CRIM. P. 47 (1974); N.Y. CONST. art. I, § 7; N.Y. CRIM. PROC. LAW §§ 170.10, 180.10, 210.10, 260.20, 310.30, 310.40, 340.50, 380.40 (McKinney 1971 & Supp. 1979); N.C. CONST. art. I, § 23; OHIO CONST. art. I, § 10; OHIO REV. CODE ANN. §§ 2938.12, 2945.12, .16 (Page 1975); OHIO R. CRIM. P. 5, 10, 43; PA. CONST. art. 1, § 9; PA. R. CRIM. P. 1112, 1117, 1120(b) (1968); VT. CONST. ch. I, art. 10th; VT. STAT. ANN. tit. 13, § 6501 (1974); VT. R. CRIM. P. 43; VA. CONST. art. I, § 8; VA. CODE §§ 19.2-237, -257, -258, -259 (1975); WIS. CONST. art. I, § 7; WIS. STAT. § 971.04 (1975); WYO. CONST. art. I; WYO. R. CRIM. P. 42.

¹⁷ See, e.g., *Lewis v. United States*, 146 U.S. 370, 374 (1892); *Ball v. United States*, 140 U.S. 118, 129-31 (1891); *Hopt v. Utah*, 110 U.S. 574, 579 (1884); *Maurer v. People*, 43 N.Y. 1, 4 (1870); *Noell v. Commonwealth*, 135 Va. 600, 608-09, 115 S.E. 679, 681 (1923); *Cohen, Trial in Absentia Reexamined*, 40 TENN. L. REV. 155, 168 & n.84 (1973); *Flaum & Thompson, The Case of the Disruptive Defendant: Illinois v. Allen*, 61 J. CRIM. L.C. & P.S. 327, 328 (1970).

Historically, the commencement of trial *in absentia* in a misdemeanor case stands on a totally different footing, and the practice of trial *in absentia* for misdemeanors, at least those punishable solely by fine, was quite common. See, e.g., *Henderson v. Town of Murfreesboro*, 119 Ark. 603, 607, 178 S.W. 912, 914 (1915); *Lebanon & Big Spring Turnpike Co. v. State*, 141 Tenn. 675, 675, 214 S.W. 819, 819 (1919). But see, e.g., *In re Speiser*, 150 Cal. App. 2d 561, 566 n.4, 310 P.2d 454, 460 n.4 (1957); *Davenport v. Commonwealth*, 368 S.W.2d 327, 330 (Ky. 1963); *Ellis v. State*, 267 S.C. 257, 260-62, 227 S.E.2d 304, 305-06 (1976). It is also significant to note that until 1836 an Englishman charged with a felony was denied the aid of counsel—a right fully accorded to one charged with a misdemeanor—such that the necessity of the latter's presence was considerably diminished. See IV W. BLACKSTONE, *supra* note 5, at 355.

¹⁸ See, e.g., *People v. Edwards*, 139 Cal. 527, 528, 73 P. 416, 417 (1903); *Robson v. State*, 83 Ga. 166, 167, 9 S.E. 610, 611 (1889); *Commonwealth v. McCarthy*, 163 Mass. 458, 459, 40 N.E. 766, 767 (1895); *Fight v. State*, 7 Ohio 181, 183 (1835); *Hill v. State*, 17 Wis. 697, 700 (1864).

¹⁹ 223 U.S. 442 (1912).

²⁰ *Id.* at 444.

that the right to be present extends to every stage of the trial and is "scarcely less important to the accused than the right of trial itself,"²¹ nevertheless concluded:

[W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, 'that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.'²²

Further, although the *Diaz* case did not involve a defendant who had become a fugitive, the court quoted extensively and with approval from *Falk v. United States*,²³ a case which did. In the *Falk* case, the defendant, who had been released on bail, was present at the commencement of his trial but later absconded. Following his conviction, the defendant was apprehended and sentence was imposed despite his objection that the trial had continued in his absence.²⁴ The Court of Appeals for the District of Columbia affirmed. Basing its determination on policy grounds, the court reasoned that "it does not seem . . . consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleases, to withdraw himself from the courts of his country and to break up a trial already commenced."²⁵ To hold

²¹ *Id.* at 455.

²² *Id.* Neither the capital case nor the custody limitations seem to have any viability today. In 1975, Rule 43 of the Federal Rules of Criminal Procedure was amended to permit the continuation of trial *in absentia* in capital cases. See ADVISORY COMMITTEE NOTE TO FED. R. CRIM. P. 43, reprinted in 62 F.R.D. 271, 326-27; 8B MOORE'S FEDERAL PRACTICE ¶ 43.01[1] (1979). It is also well settled that a waiver by a defendant in custody is now permissible. See, e.g., *Illinois v. Allen*, 397 U.S. 337 (1970); *Pearson v. United States*, 325 F.2d 625 (D.C. Cir. 1963); *People v. Epps*, 37 N.Y.2d 343, 334 N.E.2d 566, 372 N.Y.S.2d 606, cert. denied, 423 U.S. 999 (1975).

²³ 15 App. D.C. 446 (D.C. 1899), cert. denied, 181 U.S. 618 (1901).

²⁴ *Id.* at 450-51.

²⁵ *Id.* at 454. The court also noted that:

[t]he practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute . . . he is entitled as a matter of right to be enlarged upon bail "in all criminal cases where the offense is not punishable by death"; and, therefore, in all such cases he may by absconding prevent a trial. This would be a travesty of justice which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty. On the contrary, the inevitable result would be to abridge the right of personal liberty by abridging or restricting the right now granted by the statute to be abroad on bail until the verdict is rendered. . . .

. . . The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the

otherwise, the court noted, would be to allow a defendant to defy with impunity the processes of the criminal law by which his freedom is protected.²⁶

While discussing the applicable law in factual contexts involving voluntary absence of a defendant after trial had commenced, both the *Diaz* and *Falk* cases seemed to imply that trial *in absentia* was lawful in that context only. In large measure, if not exclusively, it was the language of these cases that gave birth to the notion that a defendant who took flight before the trial commenced could not be tried *in absentia*.²⁷ The confusion was subsequently compounded by various legal draftsmen who injected the same erroneous implication into rules and statutes meant to codify the case law.²⁸ Thus, while the law of trial *in absentia* expanded in other ways after the *Diaz* decision,²⁹ many years passed before it was seriously suggested that a felony trial could be commenced in the absence of the defendant. It appears that the first entity to do so was the American Law Institute in 1930 in its Model Code of Criminal Procedure.³⁰ Eight

humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principal of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

Id. at 454-55, 460-61.

²⁶ *Id.* at 460.

²⁷ See *United States v. Peterson*, 524 F.2d 167, 183-84 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *Government of Virgin Islands v. Brown*, 507 F.2d 186 (3d Cir. 1975); *Commonwealth v. Felton*, 224 Pa. Super. 398, 307 A.2d 51 (1973).

²⁸ See, e.g., FED. R. CRIM. P. 43 (1974)(amended 1975). Prior to amendment, Rule 43 provided:

The defendant shall be present at the arraignment, at every state of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.

Id. See also note 2 *supra*.

²⁹ See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97 (1934) (right of presence may be lost by misconduct)(dicta); *Frank v. Mangum*, 237 U.S. 309 (1915) (waiver of defendant's presence at verdict in capital case upheld).

³⁰ ALI MODEL CODE CRIM. PROC. § 287 (1930). Section 287 provides:

Presence of defendant under prosecution for felony. In a prosecution for a felony the defendant shall be present: -

- (a) At arraignment.
- (b) When a plea of guilty is made.
- (c) At the calling, examination, challenging, impanelling and

years later, the Arizona legislature adopted the Institute's provision intact,³¹ and the practice of commencing trials *in absentia* has been thriving there ever since.³² For reasons which remain obscure, the constitutionality of the Arizona legislation was apparently not challenged for almost 30 years. When it was, the statute was promptly declared unconstitutional by a United States district court,³³ but the decision was reversed and the legislation upheld on appeal.³⁴

Soon thereafter the United States Court of Appeals for the

swearing of the jury.

(d) At all proceedings before the court when the jury is present.

(e) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.

(f) At a view by the jury.

(g) At the rendition of the verdict.

If the defendant is voluntarily absent, the proceedings mentioned above except those in clauses (a) and (b) may be had in his absence if the court so orders.

Id.

³¹ ARIZ. CODE ANN. § 44-1401 (1939); see *State v. Ransom*, 62 Ariz. 1, 162 P.2d 621 (1944). Section 44-1401 was subsequently superseded and substantially duplicated by ARIZ. CRIM. P. 231 (1956), which in turn was superseded by the current provision, ARIZ. CRIM. P. 9.1 (1973). Section 9.1 provides:

Except as otherwise provided in these rules, a defendant may waive his right to be present at any proceeding by voluntarily absenting himself from it. The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, his right to be present at it, and a warning that the proceeding would go forward in his absence should he fail to appear.

While some writers have suggested that other states have adopted similar legislation, see 10 NATIONAL CONF. OF COMM'RS ON UNIFORM LAWS, UNIFORM L. ANN., RULES OF CRIM. P., 315-16 (1974) (Comment Rule 713) (referring to Pennsylvania, Texas); Cohen, *supra* note 17, at 160 (referring to Louisiana), scrutiny of the relevant authorities does not support this proposition. See *Commonwealth v. Felton*, 224 Pa. Super. 398, 307 A.2d 51 (1973) (commencement of felony trial *in absentia* held reversible error); *Commonwealth v. Estep*, 84 York 93, 50 Pa. D. & C.2d 200 (1970) (misdemeanor trial commenced *in absentia*; ambiguity of Rule 1117 of Pa. R. of Crim. P. discussed); LA. CODE CRIM. PRO. ANN. art. 832 (West 1967) (providing only that "temporary" voluntary absence is not objectionable); TEX. CODE CRIM. P. art. 33.03, 36.01 (1966) (providing that "when the defendant voluntarily absents himself after pleading to the indictment . . . the trial may proceed to its conclusion." Art. 36.01, however, provides for pleading *after* jury selection.). See also *Gonzalez v. State*, 515 S.W.2d 920 (Tex. Ct. Crim. App. 1974). The United States Court of Appeals for the Second Circuit has also concluded that Arizona stands alone. See *United States v. Tortora*, 464 F.2d 1202, 1208 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972).

³² See, e.g., *Arizona v. Hunt*, 408 F.2d 1086 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969); *State v. Bohn*, 116 Ariz. 500, 570 P.2d 187 (1977); *State v. Davis*, 108 Ariz. 335, 498 P.2d 202 (1972); *State v. Tacon*, 107 Ariz. 353, 488 P.2d 973 (1971), *cert. dismissed*, 410 U.S. 351 (1973); *State v. Cook*, 118 Ariz. App. 154, 575 P.2d 353 (1978); *State v. Rice*, 116 Ariz. App. 182, 568 P.2d 1080 (1977).

³³ *In re Hunt*, 276 F. Supp. 112 (E.D. Mich. 1967), *vacated sub nom. Arizona v. Hunt*, 408 F.2d 1086 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969).

³⁴ *Arizona v. Hunt*, 408 F.2d 1086 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969). See also *State v. Goldsmith*, 112 Ariz. 399, 400, 542 P.2d 1098, 1099 (1976) (en banc).

Second Circuit, in *United States v. Tortora*,³⁵ became the first court in the country—in a case not originating in Arizona—to uphold a felony conviction after trial *in absentia* of a defendant who fled before the commencement of trial.³⁶ In that case, one of five defendants voluntarily failed to appear in court on the day designated for the commencement of trial.³⁷ The trial, which had been previously postponed because of conflicting schedules of defense attorneys and the absence of other defendants, was begun and the absent defendant was convicted.³⁸ On appeal, the defendant relied upon the confrontation clause of the sixth amendment³⁹ and the clear implication of Rule 43 of the Federal Rules of Criminal Procedure that trial could not be commenced in a defendant's absence.⁴⁰

The court of appeals, while acknowledging that only courts construing Arizona law had found a waiver of the right to be present when the defendant had taken flight prior to trial, held that there was no constitutional barrier to trial *in absentia* in such a case and that Rule 43 was similarly no impediment, relying on the Advisory Committee's note that "the rule is a restatement of existing law."⁴¹ The court emphasized, however, that it must be clear that defendant was advised when proceedings were to commence and voluntarily, knowingly and unjustifiably failed to appear. Further, the

³⁵ 464 F.2d 1202 (2d Cir.), *cert. denied sub nom.* Santoro v. United States, 409 U.S. 1063 (1972).

³⁶ Two years earlier, the same court had blazed a similar trail by upholding a ruling that a defendant had waived his right to be present at a pretrial suppression hearing by failing to apply for permission to enter the country for that purpose. *See United States v. Dalli*, 424 F.2d 45, 48 (2d Cir.), *cert. denied*, 400 U.S. 821 (1970). More recently, the court applied the guidelines set forth in the *Tortora* case and affirmed another conviction in a case where trial was commenced (and the jury selected) *in absentia*. *See United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977).

³⁷ 464 F.2d at 1209.

³⁸ *Id.* at 1207.

³⁹ *Id.* at 1208. The confrontation clause of the sixth amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The fourteenth amendment makes the confrontation clause binding upon the states. *See Pointer v. Texas*, 380 U.S. 400 (1965).

⁴⁰ *See* notes 2 & 28 *supra*. At almost the same time, the Court of Appeals for the District of Columbia Circuit agreed with that interpretation of Rule 43. *See Campbell v. United States*, 295 F.2d 498 (D.C. Cir. 1978). Then, on rehearing after the *Tortora* case was decided, the court deferred to the Second Circuit, but adhered to its decision on the ground that the lower court, by commencing trial *in absentia*, had either abused its discretion or failed to exercise it at all. *Id.*

⁴¹ *See United States v. Tortora*, 464 F.2d at 1210 n.6. *See also* note 2 *supra*. It should be noted that, while Rule 43 authorizes trial *in absentia*, there is no corresponding right of a defendant to absent himself if he chooses—especially when identification is a prime issue. *See United States v. Moore*, 466 F.2d 547 (3d Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973); *United States v. Fitzpatrick*, 437 F.2d 19, 27 (2d Cir. 1970).

court determined that commencing trial in the absence of a defendant is discretionary and only to be done "in circumstances as extraordinary as those before us. Indeed, we would add that this discretion should be exercised only when the public interest clearly outweighs that of the voluntarily absent defendant."⁴² The court noted that the factors to be considered in deciding whether to proceed included: (1) the likelihood that the trial could soon take place with the defendant present; (2) the difficulty in rescheduling, particularly in multiple defendant trials; and (3) the burden on the prosecution in having to undertake two trials, again particularly in multiple defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the prosecution's witnesses in substantial jeopardy.⁴³ In a footnote, the court narrowed the standards still further by noting: "It is difficult for us to conceive of any case where the exercise of this discretion would be appropriate other than a multiple-defendant case."⁴⁴

Shortly after the *Tortora* case, the United States Supreme Court impliedly upheld the constitutionality of commencing trial in the absence of a defendant who voluntarily fails to appear on the designated date and, further, indicated that the narrow limits suggested by the Second Circuit in the *Tortora* case exceed constitutional requirements. In *Tacon v. Arizona*,⁴⁵ the defendant, while serving in the army was arrested and charged with the sale of marijuana in Arizona. Prior to trial he was discharged from the army and voluntarily left Arizona for New York. He did not return for his trial and was tried and convicted *in absentia*.⁴⁶ Shortly afterward, he returned to Arizona and claimed that he had not appeared for trial because he had been unable to raise travel funds. He was held to have waived his right to be present and received a sentence of 5 to 5 ½ years.⁴⁷ The conviction was affirmed by the Arizona Supreme Court⁴⁸ and the United States Supreme Court granted certiorari.⁴⁹ The court then dismissed the writ as improvidently granted, stating that the question upon which certiorari had been granted involved "constitutional limits of the States' authority to try in absentia a

⁴² United States v. *Tortora*, 464 F.2d at 1210.

⁴³ *Id.*

⁴⁴ *Id.* at n.7.

⁴⁵ 107 Ariz. 353, 488 P.2d 973 (1971), *cert. dismissed*, 410 U.S. 351 (1973).

⁴⁶ *Id.* at 354, 488 P.2d at 974.

⁴⁷ *Id.* at 356-57, 488 P.2d at 976-77.

⁴⁸ *Id.* at 358, 488 P.2d at 978.

⁴⁹ 407 U.S. 909 (1972).

person who has voluntarily left the State and is unable, for financial reasons, to return to that State"⁵⁰ and that that question had not been raised below. Significantly, however, the court went on to note that:

The only related issue actually raised below was whether petitioner's conduct amounted to a knowing and intelligent waiver of his right to be present at trial. . . . [T]his is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction⁵¹

Since the *Tacon* case, the courts of appeals for the third and fourth circuits have also affirmed convictions after trials begun *in absentia*. In the third circuit case, *Government of the Virgin Islands v. Brown*,⁵² the defendant was served with a subpoena directing him to appear for commencement of trial. He failed to appear at the designated time and voir dire was commenced over his attorney's objection.⁵³ The defendant appeared in the afternoon, offered no explanation for his absence, and the trial was continued. He was convicted and urged on appeal that it had been error to commence the trial in his absence. In affirming, the court of appeals observed that it did not perceive any magical properties which differentiate the commencement of a trial from later stages. "It would be anomalous," the court states, "to hold that a defendant cannot waive his right to be present during the period of often routine voir dire questioning but can waive that right during the time when witnesses against him are presenting crucial evidence."⁵⁴

The court cited the *Tortora* case as authority and, like the court in the *Tortora* case, held that Rule 43 of the Federal Rules of Criminal Procedure was merely a restatement of the common law and no barrier to commencement of trial *in absentia*. Unlike the court in

⁵⁰ 410 U.S. 351, 352 (1973).

⁵¹ *Id.* In a stinging dissent, Justice Douglas, joined by Justices Brennan and Marshall, charged the majority with holding that "the broad issue of whether a defendant charged with a felony can ever waive his right to be present at trial is not properly before us." *Id.* at 353 (Douglas, J., dissenting). The language of the majority, however, appears to disprove that statement. It seems clear that the majority assumed an affirmative answer to that question and merely declined to determine whether the evidence in this case justified that conclusion. *See id.* at 352. Further, it seems worthy of note that examination of the briefs submitted to the Supreme Court suggests that the evidence against the defendants on that issue was considerably stronger than that set forth in the dissent. *See also* *State v. Tacon*, 107 Ariz. 353, 488 P.2d 973 (1971), *cert. dismissed*, 410 U.S. 351 (1973).

⁵² 507 F.2d 186 (3d Cir. 1975).

⁵³ *Id.* at 187.

⁵⁴ *Id.* at 189.

the *Tortora* case, however, the third circuit did not view the fact that the trial involved only one defendant as controlling or, indeed, even worthy of discussion.⁵⁵

In *United States v. Peterson*,⁵⁶ one of several defendants voluntarily failed to appear in court on the date designated for trial and became a fugitive. He was tried and convicted *in absentia*; then apprehended and sentenced several months after the trial.⁵⁷ On appeal, the court rejected the contention that Rule 43 of the Federal Rules of Criminal Procedure restricts trial *in absentia* to defendants who are present at the commencement of trial. Like the courts in the *Tortora* and *Brown* cases, the court held that Rule 43 was merely a restatement of the common law and did not preclude the commencement of trial *in absentia* in an appropriate case.⁵⁸ The court also noted:

[There are] two reasons for the general common law right of presence in federal trials: (1) assuring, a nondisruptive defendant the opportunity to observe all stages of the trial not involving purely legal matters so as to prevent the loss of confidence in courts as instruments of justice; and (2) guaranteeing the defendant the opportunity to aid in his defense so as to protect the integrity and reliability of the trial mechanism. So long as the defendant has been provided with the opportunity to be present, neither purpose is thwarted by a defendant's voluntary exercise of his option not to attend.⁵⁹

Since 1975, courts in at least two states besides Arizona have also permitted commencement of trial *in absentia*.⁶⁰ In one case⁶¹

⁵⁵ *Id.*

⁵⁶ 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976).

⁵⁷ *Id.* at 183.

⁵⁸ *Id.* at 183-84. A set of extraordinary circumstances similar to those in the *Tortora* case — including multiple defendants — existed in this case and the court referred with approval to the restrictive language found in the *Tortora* case. *Id.* at 185-86.

⁵⁹ *Id.* at 184. *See also* *United States v. Gregorio*, 497 F.2d 1253, 1258-59 (4th Cir.), *cert. denied*, 419 U.S. 1024 (1974).

⁶⁰ *People v. Thomas*, 97 Misc. 2d 845, 412 N.Y.S.2d 752 (Sup. Ct. Kings County 1978); *People v. Hicks*, 90 Misc. 2d 609, 395 N.Y.S.2d 577 (Sup. Ct. N.Y. County 1977), *aff'd mem.*, 68 App. Div. 2d 1019, 417 N.Y.S.2d 152 (1st Dep't 1979); *State v. LaBelle*, 18 Wash. App. 380, 568 P.2d 808 (1977). In the *LaBelle* case, the defendant was charged with burglary. Although he was notified of the date and time his trial would begin, the defendant failed to appear and became a fugitive. He was tried and convicted *in absentia*, then apprehended and sentenced 4 years later. On appeal, the Washington appellate court affirmed, citing both the *Tortora* and the *Peterson* cases. *Id.* at 390, 392, 568 P.2d at 814, 815. The court did not discuss and was apparently untroubled by the suggestion in those cases that commencement of trial *in absentia* should occur in extraordinary circumstances only.

⁶¹ *People v. Hicks*, 90 Misc. 2d 609, 395 N.Y.S.2d 577 (Sup. Ct. N.Y. County 1977), *aff'd*

where trial proceeded *in absentia*, the court expressed doubts that it was necessary for the prosecution to demonstrate a compelling necessity to proceed pursuant to the teaching of the *Tortora* case, but held that such a necessity existed because there was more than one defendant and some witnesses were both intimidated and mobile.⁶² In a second state case where an absent defendant was tried,⁶³ the court acknowledged that multiple defendants were not involved and that there was no question of requiring the prosecution to undertake two trials, but noted that the charge (murder) was serious, that the only eyewitness lived outside the jurisdiction, and that there was no likelihood that the trial could soon take place with the defendant present.⁶⁴ Relying on the *Tortora* case, the court stated that two out of three criteria prescribed there was satisfied and, finding that sufficient, proceeded to trial *in absentia*.⁶⁵

The notion that trial may be commenced *in absentia* has also gained respectability in other quarters. Several years ago, for example, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended that commencement of trial *in absentia* be authorized as to a defendant who voluntarily fails to appear for trial.⁶⁶ Rule 713 of the Uniform Rules of Criminal Procedure, adopted by The National Conference

mem., 68 App. Div.2d 1019, 417 N.Y.S.2d 152 (1st Dep't 1979). In the *Hicks* case two defendants were charged with robbery. During a pretrial hearing, a witness gave damaging evidence against one defendant, Phillip Bermudez, who never returned from a recess declared when the witness left the stand. *Id.* at 610, 395 N.Y.S.2d at 578. The trial court held that the defendant had waived his right to be present and concluded the hearing *in absentia*, after which a jury was selected and the defendant Bermudez was tried and convicted *in absentia* as well.

⁶² 90 Misc. 2d at 611-12, 395 N.Y.S.2d at 579. In addition, the court noted that the case had been moved for trial prior to the commencement of the hearing and, employing what would appear to be a legal fiction, ruled that the trial was in progress when the defendant became a fugitive. *Id.* at 617-18, 395 N.Y.S.2d at 583.

⁶³ *People v. Thomas*, 97 Misc. 2d 845, 412 N.Y.S.2d 752 (Sup. Ct. Kings County 1978). In the *Thomas* case the defendant's trial had been repeatedly postponed because the prosecution had been unable to locate the only eyewitness who had left the jurisdiction. On November 29, 1978, both sides answered ready, but the case was adjourned for 2 days because of involvement of the defense attorney in another trial. The defendant failed to appear on the adjourned date and after a hearing at which the People demonstrated their attempts to locate the defendant, the People moved the case to trial. *Id.* at 846, 412 N.Y.S.2d at 753.

⁶⁴ *Id.* at 849, 412 N.Y.S.2d at 754-55.

⁶⁵ *Id.*

⁶⁶ See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS (Apr. 1971 & Jan. 1973), reprinted in 21 A.L.R. FED. at 910. The Committee recommended that Rule 43 of the Federal Rules of Criminal Procedure be amended, to provide for commencement of trial *in absentia*, as follows:

(b) Continued Presence Not Required.

of Commissioners on Uniform State Laws in August, 1974, contains a similar provision.⁶⁷

NATURE OF WAIVER

The early cases gave little consideration to the nature of the waiver imputed to a defendant who voluntarily absented himself from his trial. When the defendant absented himself temporarily and consented that the trial proceed in his absence, there was, of course, an express waiver.⁶⁸ When, on the other hand, the defendant became a fugitive after the commencement of trial, most of the cases seemed to rule that he had lost the right to be present as a matter of policy.⁶⁹ More recently, however, the United States Supreme Court has often discussed the law of waiver and prescribed strict standards which must be met before a waiver of constitutional rights will be found—at least as to those rights which guarantee a fair trial and protect the reliability of the truth-finding process.⁷⁰ It

The progress of a trial to and including the return of a verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever:

...

(3) a defendant, who has personally entered a plea to the charge and has been personally advised when the trial is to commence, voluntarily, knowingly, and without justification, fails to be present at the designated time and place for trial.

Id. This proposal was not adopted in the 1974 amendments.

⁶⁷ 10 UNIFORM RULES OF CRIMINAL PROCEDURE (U.L.A.) Rule 713. Rule 713 provides in pertinent part:

(b) Required presence. The defendant must be present at every stage of the trial and at the disposition hearing, but if he will be represented by counsel at the trial or hearing, the court may:

...

(2) Direct that the trial or part thereof or disposition hearing be conducted in his absence if the court determines that he understandingly and voluntarily failed to be present after personally having been informed by the court of:

(i) His right to be present at the trial or hearing;

(ii) When the trial or hearing would commence; and

(iii) The authority of the court to direct that the trial or hearing be conducted in his absence.

⁶⁸ See, e.g., *Diaz v. United States*, 223 U.S. 442 (1912).

⁶⁹ *Falk v. United States*, 15 App. D.C. 446, 460 (1899), *cert. denied*, 181 U.S. 618 (1901); *United States v. Loughery*, 26 F. Cas. 998, 1000 (C.C.E.D.N.Y. 1876); *Gore v. State*, 52 Ark. 285, 287, 12 S.W. 564, 565 (1889), *appeal dismissed*, 180 U.S. 636 (1901); *Sahlinger v. People*, 102 Ill. 241 (1882); *State v. Perkins*, 40 La. Ann. 210, 212, 3 So. 647, 648 (1888); *Commonwealth v. McCarthy*, 163 Mass. 458, 460, 40 N.E. 766, 767 (1895); *State v. Gorman*, 113 Minn. 401, 129 N.W. 589 (1911); *Price v. State*, 36 Miss. 531, 542-43 (1858); *State v. Hope*, 100 Mo. 347, 13 S.W. 490 (1890); *State v. Kelly*, 97 N.C. 404, 2 S.E. 185 (1887).

⁷⁰ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-37 (1973); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

is well settled, for example, that the courts indulge every reasonable presumption against the waiver of such rights.⁷¹ It is further settled that a waiver of such a right must be "an intentional relinquishment or abandonment of a known right or privilege."⁷² All of this means, as the Court has stated: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."⁷³

The application of these standards relative to waiver of the right to be present has, of course, presented little difficulty when the defendant was actually present in court or, at least, in custody. In such cases the court has invariably been in a position to be sure that the defendant was aware of his rights and the consequences of a waiver.⁷⁴ But as to the defendant who has become a fugitive before and even during the trial, reconciling the applicable standards with a holding that the defendant has waived the right to be present has frequently proved troublesome. For example, a number of courts have been concerned by a proposition not even deemed worthy of notice in most of the early cases,⁷⁵ which is that the average defendant, unless expressly so advised, would not be aware that the consequences of his departure would include trial *in absentia*.⁷⁶

The argument was unsuccessfully urged upon the Supreme Court in *Taylor v. United States*.⁷⁷ In that case the defendant became a fugitive after the commencement of his trial. The trial was

⁷¹ See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *But cf.* *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (upholding a consent search). In that case, the Court noted: "[U]nlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment [of fourth amendment rights]." *Id.* at 243.

⁷² *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁷³ *Brady v. United States*, 397 U.S. 742, 748 (1970). See also *Tacon v. Arizona*, 410 U.S. 351, 355 (1973) (Douglas, J., dissenting).

⁷⁴ See, e.g., *Illinois v. Allen*, 397 U.S. 337 (1970); *United States v. Ives*, 504 F.2d 935 (9th Cir. 1974), *vacated and remanded*, 421 U.S. 944 (1975); *Pearson v. United States*, 325 F.2d 625 (D.C. Cir. 1963); *People v. Epps*, 37 N.Y.2d 343, 334 N.E.2d 566, 372 N.Y.S.2d 606, *cert. denied*, 423 U.S. 999 (1975). *But see* *United States v. Crutcher*, 405 F.2d 239, 243 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963) (trial court did not sufficiently assure a knowing and intelligent waiver before proceeding *in absentia*).

⁷⁵ See note 69 *supra*.

⁷⁶ See, e.g., *Wade v. United States*, 441 F.2d 1046, 1051 (D.C. Cir. 1971); *United States v. McPherson*, 421 F.2d 1127, 1130 (D.C. Cir. 1969); *State v. Tacon*, 107 Ariz. 353, 355, 488 P.2d 973, 975 (1971), *cert. dismissed*, 410 U.S. 351 (1973). See also *People v. Burts*, 64 App. Div. 2d 283, 286, 409 N.Y.S.2d 862, 864 (4th Dep't 1978).

⁷⁷ 414 U.S. 17 (1973).

continued and he was convicted *in absentia*. On appeal, he urged that mere voluntary absence from the trial could not be an effective waiver "unless it [was] demonstrated that he knew or had been expressly warned by the trial court, not only that he had a right to be present, but also that the trial would continue in his absence and thereby effectively foreclose his right to testify and to confront personally the witnesses against him."⁷⁸

The Court rejected the argument that it must be *demonstrated* that the defendant knew these things,⁷⁹ but ruled, in the same breath, that it was self-evident that he had such knowledge:

It is wholly incredible to suggest that petitioner . . . entertained any doubts about his right to be present at every stage of his trial. It seems equally incredible to us, as it did to the Court of Appeals, "that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence." Here the Court of Appeals noted that when petitioner was questioned at sentencing regarding his flight, he never contended that he was unaware that a consequence of his flight would be a continuation of the trial without him.⁸⁰

Thus, in the *Taylor* case, the Court seems to have steered a middle course between charging a waiver to the defendant as a matter of policy and strict adherence to the standards previously prescribed for waiver of fundamental rights. While paying formal obedience to the proposition that knowledge of the consequences is required for an effective waiver, the court simply postulated that the defendant had the requisite knowledge.⁸¹

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 20. Further in a footnote, the Court made the following observation:

This [erroneous view] was substantially the holding of *United States v. McPherson*, on which petitioner relies. But the Court of Appeals in the case now before us disagreed with *McPherson*, and, in our view, rightly so. *McPherson* itself appears to have strayed from recent precedent in the District of Columbia Circuit, *Cureton v. United States*, as well as from older authority. In *Cureton*, *supra* Judge Fahy stated the controlling rule:

"[I]f a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away."

Id. at 19 n.3 (citations omitted).

⁸⁰ *Id.* at 20. See also *State v. Davis*, 108 Ariz. 335, 337, 498 P.2d 202, 204 (1972) (en banc).

⁸¹ That such a defendant would know his trial will continue *in absentia* is not, it is suggested, as clear to everyone as it was to the Supreme Court. It seems at least conceivable,

Where the defendant has taken flight *prior to trial*, of course, that position is less easy to defend.⁸² It is not surprising then, that the courts which have countenanced the commencement of trial *in absentia* have generally been more inclined to discuss the exigencies than whether the defendant knew the trial would start without him.⁸³ An exception is the line of cases decided pursuant to statutory authority in Arizona which requires warning that the proceeding will go forward *in absentia* if the defendant fails to appear.⁸⁴ Interestingly, full compliance has apparently been accomplished in that state by including the warning in the release order which every defendant receives and signs after he posts bond or is paroled.⁸⁵

therefore, that the compelling policy considerations for continuing trial *in absentia* in such circumstances contributed to the result.

At least one lower court had evinced puzzlement at the decision. *See State v. Staples*, 354 A.2d 771 (Me. 1976). There, while noting that a waiver of the right to be present must meet the standards laid down in *Johnson v. Zerbst*, the court interpreted the *Taylor* case to mean that it was not necessary for the accused to know that the trial would continue in his absence. Understandably, the court experienced some difficulty in reconciling the two notions as indicated by the following language: "Although the Court's reasoning in *Taylor* is not fully explained, the opinion points out, significantly, that the right at issue is the right to be present. We understand the Court to be distinguishing between One's right to be present at trial and the right to absent oneself from trial." 354 A.2d at 776.

⁸² Since the notion that trial may be commenced *in absentia* still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients.

⁸³ *See, e.g.*, *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *United States v. Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied sub nom. Santoro v. United States*, 409 U.S. 1063 (1972); *People v. Hicks*, 90 Misc. 2d 609, 395 N.Y.S.2d 577 (Sup. Ct. N.Y. County 1977), *aff'd mem.*, 68 App. Div. 2d 1019, 417 N.Y.S.2d 152 (1st Dep't 1979); *State v. LaBelle*, 18 Wash. App. 380, 586 P.2d 808 (1977). Nor has the United States Supreme Court come to grips with the question. To date, the Court has consistently declined to review any conviction stemming from a trial commenced *in absentia*.

⁸⁴ *See note 31 supra*. *But see State v. Sanchez*, 116 Ariz. 118, 568 P.2d 425 (1977). In that case the defendant, tried and convicted *in absentia*, argued that he had not had personal notice of the trial date as required by Rule 9.1. *Id.* at 121, 568 P.2d at 427. The court noted that the defendant had effectively prevented his attorney from notifying him of the date and held that this constituted a waiver of notice or justified the inference of voluntary absence. *Id.*

⁸⁵ The release order that a defendant must sign prior to his release on bail provides in pertinent part:

WARNING TO THE DEFENDANT:

YOU HAVE A RIGHT TO BE PRESENT AT YOUR TRIAL AND AT A NUMBER OF OTHER PROCEEDINGS OF WHICH YOU WILL BE NOTIFIED. IF YOU DO NOT APPEAR AT THE TIME SET BY THE COURT, A WARRANT WILL BE ISSUED FOR YOUR ARREST and the proceeding will begin without you.

17 ARIZ. REV. STAT. ANN. Form VI, at 724 (1973)(emphasis in original); *see State v. Tacon*, 107 Ariz. 353, 355, 488 P.2d 973, 975 (1971), *cert. dismissed*, 410 U.S. 351 (1973); ARIZ. R. CRIM. P. 9.1, 17 ARIZ. REV. STAT. ANN., Comment at 120-21 (1973).

EFFECT OF WAIVER BY VOLUNTARY ABSENCE ON OTHER RIGHTS

The defendant, who, by voluntary absence, waives his right to be present may be affected in several significant ways. One involves the admissibility during trial of evidence of flight. The principle that evidence of flight is admissible to show consciousness of guilt has plain application when a fugitive is tried *in absentia*,⁸⁶ but the subject has been somewhat obscured by ambiguous practices and language. Since evidence of a post-arrest bail jump⁸⁷ or attempted escape⁸⁸ from jail is admissible against a defendant who is present at trial, there is clearly no basis for exempting the more successful fugitive who is tried *in absentia*.⁸⁹ The cases suggest some disagreement, however, about the extent of the evidence that must be adduced before the prosecution is entitled to a charge concerning flight. For example, in *State v. Camino*,⁹⁰ it has been held that while failure to appear for trial is sufficient to infer voluntary absence and to proceed to trial *in absentia*, it is "insufficient to support an inference of the element of concealment or attempted concealment which is essential to warrant the giving of a flight instruction unless

⁸⁶ See, e.g., *United States v. DeLeon*, 498 F.2d 1327, 1331 (7th Cir. 1974); *State v. Carmino*, 118 Ariz. 89, 574 P.2d 1308 (1977); *People v. Vargas*, 53 Cal. App. 3d 516, 126 Cal. Rptr. 88 (1975). But see *State v. Staples*, 354 A.2d 771 (Me. 1976) (where Maine's highest court approved the practice of merely informing the jury that the defendant had made a choice not to be present and, in cases where they became aware of defendant's conduct, instructed them to give no weight to the act of flight). See also *State v. Shetsky*, 229 Minn. 566, 572-73, 40 N.W.2d 337, 341 (1949) (evidence of flight stated to be admissible, but conviction reversed because of prejudicial comments by trial judge).

⁸⁷ See *Hanks v. United States*, 388 F.2d 171, 175 (10th Cir.), cert. denied, 393 U.S. 863 (1968); *Rowan v. United States*, 277 F. 777 (7th Cir. 1921), cert. denied, 257 U.S. 600 (1922).

⁸⁸ See *People v. Yazum*, 13 N.Y.2d 302, 196 N.E.2d 263, 246 N.Y.S.2d 626 (1963). Here, the court held evidence of the attempted escape admissible, rejecting the interesting argument that the conduct was ambiguous since there were charges pending in Ohio as well as in New York. See also *State v. Roderick*, 9 Ariz. App. 19, 448 P.2d 891 (1968).

⁸⁹ See *State v. Andrial*, 150 N.J. Super. 198, 201-02, 375 A.2d 292, 294 (1977). Notwithstanding the logic of this proposition, it is the writer's experience that, in the trial courts of New York, counsel for an absconding defendant requests and — possibly through an excess of caution — usually receives an instruction to the jury that they should not draw any adverse inferences from, or even speculate about, the defendant's absence. For example, the trial judge in *People v. Thomas*, 97 Misc. 2d 845, 412 N.Y.S.2d 752 (Sup. Ct. Kings County 1978), a murder trial commenced *in absentia*, has advised that he gave such an instruction in that case and that, incidentally, the trial ended in an acquittal despite a strong prosecution case. It should be further noted that apparently the New York courts do not stand alone in this regard. As noted in *Taylor v. United States*, 414 U.S. 17, 18 (1973), the trial judge repeatedly gave a similar instruction in that case. See also *United States v. DeLeon*, 498 F.2d 1327, 1331 (7th Cir. 1974); *United States v. Garcia-Turino*, 458 F.2d 1345, 1346 (9th Cir.), cert. denied, 409 U.S. 951 (1972).

⁹⁰ 118 Ariz. App. 89, 574 P.2d 1308 (1978).

the flight or attempted flight is open, as upon immediate pursuit."⁹¹

At least two other courts have taken a less stringent position, however, and upheld convictions in cases where the jury had been charged concerning flight, even though all of the testimony tending to show voluntary absence had been received outside their presence.⁹² Each court also held it permissible for the trial judge to make statements to the jury tending to suggest that the absence was voluntary.⁹³

Further, in *People v. Snyder*,⁹⁴ it was held that the court had properly given a flight charge when the jury had observed the defendant's absence but been given no further information whatsoever on the subject. The court ruled that: "It was proper for the trial court to instruct the jury [concerning flight] since in the absence of any explanation it would be reasonable to infer that defendant's absence was voluntary"⁹⁵

Some courts also have taken the position that where the defendant has in fact been a fugitive, he will not be heard to complain that there was insufficient evidence before the jury to support a flight charge. For example, in *United States v. DeLeon*,⁹⁶ the court

⁹¹ *Id.* at 94, 574 P.2d at 1310. The court contrasted *Camino* with *State v. Roderick*, 9 Ariz. App. 19, 448 P.2d 891 (1968), where evidence showed that a bench warrant had been issued when the defendant failed to appear for trial and that extradition proceedings had been commenced in the State of Washington. *Id.* See also *Commonwealth v. Brimage*, 374 N.E.2d 607 (Mass. App. 1978). In *Brimage* it was urged that the trial court erred in making inquiry regarding the defendant's absence, allowing limited testimony that the police were ignorant of the defendant's whereabouts, allowing the prosecutor to suggest an adverse inference in his summation, and referring to a possible inference against the defendant in its charge. The appellate court refused to reach the merits because no exception had been taken below.

⁹² *People v. Vargas*, 53 Cal. App. 3d 516, 126 Cal. Rptr. 88 (1975); *State v. Andrial*, 150 N.J. Super. 198, 375 A.2d 292 (1977). In the *Vargas* case, the testimony received out of the presence of the jury was that the defendant was seen running through the courthouse parking lot shortly before the trial was to begin. 53 Cal. App. 3d at 523, 126 Cal. Rptr. at 93. In the *Andrial* case, testimony was admitted out of the jury's presence that the defendant and his girlfriend had packed their belongings and had departed in the defendant's car on the evening prior to the commencement of his trial. 150 N.J. Super. at 199, 375 A.2d at 293.

⁹³ In the *Vargas* case, the trial court flatly stated that: "It appears [the defendant] has voluntarily left." 53 Cal. App. 3d at 522 n.2, 126 Cal. Rptr. at 92 n.2. In the *Andrial* case, the court advised the jury "of the facts surrounding the departure of the defendant. . . ." 150 N.J. Super. at 200, 375 A.2d at 293.

⁹⁴ 56 Cal. App. 3d 195, 128 Cal. Rptr. 297 (1976).

⁹⁵ *Id.* at 199, 128 Cal. Rptr. at 299.

⁹⁶ *United States v. DeLeon*, 498 F.2d 1327 (7th Cir. 1974). See also *People v. Vargas*, 53 Cal. App. 3d 516, 126 Cal. Rptr. 88 (1975). The court in *Vargas* affirmed the conviction using the following language:

In the second place, even if the instruction [concerning flight] may have been of questionable validity on the evidence properly before the jury, the facts, as ultimately established, demonstrated that the defendant's absence was occasioned by

was relatively untroubled by a charge relative to flight which could have been construed as applying to a defendant named Gloria Diaz, and which would then have been based upon mere absence. During the trial, the defendant Diaz failed to appear after lunch on the second day. The judge told the jury that she was unable to be present and had waived her right to be present and the trial proceeded. The court refused to tell the jury that Diaz was absent without permission, but charged them concerning flight—a charge coincidentally appropriate to the codefendant DeLeon who had fled the initial arrest.⁹⁷ The court of appeals was unsympathetic to the argument that the charge apparently included the defendant Diaz and was unsupported by the evidence. It was observed that the defendant Diaz had not been apprehended for 4½ months after the trial and that “[e]ven if the jury understood the flight instruction as applying to Diaz’ absence from trial, there was no prejudice since her own counsel did not know her whereabouts, and no plausible excuse for her absence has been offered.”⁹⁸

As a practical matter, meeting any reasonable standard of evidence that a defendant has taken flight should be relatively easy in most cases. Judicial restraint and prudence require that an appropriate investigation establish that the absence is not voluntary before a trial is begun or continued *in absentia*,⁹⁹ so that a mistrial after the trial has gone forward is not caused by the arrival of a defendant who has merely been unavoidably detained.¹⁰⁰ The submission of the evidence already in hand from such a reasonably thorough investigation,¹⁰¹ along with any appropriate subjects of judicial notes,¹⁰² will ordinarily more than meet the need.

consciousness of guilt. This is not to say that subsequent events can cure a prior error, but it indicates that if the premise on which the instruction was given was invalid, the defendant would have been entitled to a new trial on other grounds.

Id. at 531, 126 Cal. Rptr. at 98. Paradoxically, a defendant who may be subject to an adverse inference because of flight would seem at the same time still entitled to an instruction that no adverse inferences may be drawn from his failure to testify. *See id.*; *State v. Andrial*, 150 N.J. Super. 198, 203-04, 375 A.2d 292, 295 (1977).

⁹⁷ 498 F.2d at 1331.

⁹⁸ *Id.*

⁹⁹ *See, e.g., People v. Hicks*, 90 Misc. 2d 609, 611, 395 N.Y.S.2d 577, 579 (Sup. Ct. N.Y. County 1977), *aff'd mem.*, 68 App. Div. 2d 1019, 417 N.Y.S.3d 152 (1st Dep’t 1979). *See also People v. Vargas*, 53 Cal. App. 3d 516, 526, 126 Cal. Rptr. 88, 95 (1975).

¹⁰⁰ *See also Wade v. United States*, 441 F.2d 1046, 1049 (D.C. Cir. 1971); *State v. Cook*, 115 Ariz. App. 146, 148, 564 P.2d 97, 100 (1977).

¹⁰¹ There is ample authority for the proposition that flight may be established by showing unsuccessful efforts by the police to find the defendant. *See, e.g., United States v. Malizia*, 503 F.2d 578, 582 (2d Cir. 1974); *United States v. Waldman*, 240 F.2d 449, 452 (2d Cir. 1957); *Kanner v. United States*, 34 F.2d 863, 866 (7th Cir. 1929).

¹⁰² *See, e.g., State v. Camino*, 118 Ariz. App. 89, 574 P.2d 1308 (1977). There the court

Waiver by voluntary absence of the right to be present also affects a number of other important rights. In general, the courts have been scrupulous to protect the affected rights, consistent with the policy considerations involved in the practice of conducting trial *in absentia*.¹⁰³

It has been held, for example, that while the defendant may waive the right to be present, counsel has no authority to do so on his client's behalf¹⁰⁴ and counsel for an absent defendant has no power to waive his client's right to trial by jury.¹⁰⁵ Nor may counsel, during the inquiry concerning the reasons for defendant's absence, properly disclose communications from his client which arose out of the attorney-client relationship and which were clearly meant to be confidential.¹⁰⁶

It also seems clear that waiver by voluntary absence acts as a waiver of neither the right to counsel¹⁰⁷ nor the requirement that the prosecution adduce evidence sufficient to prove guilt beyond a reasonable doubt.¹⁰⁸ It should be noted, however, that while the right to effective assistance of counsel abides, the New York Court of Appeals, in *People v. Aiken*,¹⁰⁹ observed that refusal of the defense attorney, as a tactical matter, to participate in the trial will not entitle the defendant to reversal for deprivation of the right to counsel.¹⁰⁹ Further, waiver of the right to be present by a fugitive neces-

held that it was proper for the trial court to take judicial notice of its records which recorded both notification to defendant of the trial date and his right to be present and warning that the trial would proceed if he failed to appear. *Id.* at 90, 574 P.2d at 1309.

¹⁰³ See notes 104-112 *infra*. Codefendants claiming guilt by association with a defendant tried *in absentia*, of course, have a more remote claim. See *United States v. Cianchetti*, 317 F.2d 584, 588 (2d Cir. 1963). The *Cianchetti* court held that the defendant who was present was not entitled to a severance.

¹⁰⁴ See *United States v. Crutcher*, 405 F.2d 239 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); *Evans v. United States*, 284 F.2d 393 (6th Cir. 1960); *Greenberg v. United States*, 280 F.2d 472 (1st Cir. 1960); *Miles v. State*, 222 Ind. 312, 53 N.E.2d 779 (1944). See also *People v. Anderson*, 16 N.Y. 2d 282, 213 N.E.2d 445, 266 N.Y.S.2d 110 (1965) (defendant's right to be present at suppression hearing held not waived when court and counsel proceeded without explanation in his absence).

¹⁰⁵ *State v. Cochran*, 109 Ariz. 327, 509 P.2d 220 (1973); *State v. Little*, 104 Ariz. 479, 455 P.2d 453 (1969).

¹⁰⁶ See *People v. Vargas*, 53 Cal. App. 3d 516, 126 Cal. Rptr. 88 (1975). In that case it was held that statements by the defendant evincing consciousness of guilt, *i.e.*, fear that the key prosecution witness would show up and testify against him, were privileged. By way of contrast, a statement immediately before his departure that he was going to his car for his coat was held not privileged. *Id.* at 527-28, 126 Cal. Rptr. at 95-96.

¹⁰⁷ See *People v. Aiken*, 45 N.Y.2d 394, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978).

¹⁰⁸ See *People v. Singleton*, 62 App. Div. 2d 1043, 404 N.Y.S.2d 444 (2d Dep't 1978).

¹⁰⁹ *People v. Aiken*, 45 N.Y.2d 394, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978).

¹¹⁰ The court also noted that the defendant who becomes a fugitive during his trial must

sarily includes waiver of the right to testify,¹¹¹ and it has been held that this right can even be waived by persistently disruptive conduct.¹¹²

Another right which may be affected by voluntary absence is the right to be present at sentencing. A defendant convicted in a federal court may not be sentenced *in absentia*.¹¹³ The same rule applies in a number of other jurisdictions,¹¹⁴ but there is no constitutional impediment and many states countenance sentencing *in absentia* as well.¹¹⁵ Further, it has been held that the court may properly take into account on sentence the fact that the defendant took flight during his trial.¹¹⁶ Finally, though many fundamental rights turn on the question of whether a defendant tried *in absentia* was voluntarily absent, it seems clear that such a defendant is not entitled to a trial by jury of that issue.¹¹⁷

CONCLUSION

As noted above, it has long been the rule that, as to a defendant who takes flight during his trial, the trial may be continued to a conclusion *in absentia*.¹¹⁸ Indeed, the reasonableness and necessity of the procedure seem virtually beyond debate.¹¹⁹ It is true that one

be prepared to accept less effective assistance of counsel than he would have received had he remained present. "To be sure, a defendant's absence from trial may severely hamper even the most diligent counsel's ability to represent his client effectively." *Id.* at 399, 380 N.E.2d at 275, 408 N.Y.S.2d at 447. See also *State v. Staples*, 354 A.2d 771, 778 (Me. 1976); *People v. Vega*, 80 Misc. 2d 59, 64, 363 N.Y.S.2d 214, 218 (Sup. Ct. Kings County 1974).

¹¹¹ See *Taylor v. United States*, 414 U.S. 17 (1973).

¹¹² See *United States v. Ives*, 504 F.2d 935 (9th Cir. 1974), *vacated and remanded*, 421 U.S. 944 (1975), *cert. denied*, 429 U.S. 1103 (1977). *But see* *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied sub nom. Mirra v. United States*, 375 U.S. 940 (1963).

¹¹³ See *Cureton v. United States*, 396 F.2d 671 (D.C. Cir. 1968); *FED. R. CRIM. P.* 43. *But cf.* *United States v. Boykin*, 222 F. Supp. 398 (D. Md. 1963) (defendant permitted to expressly waive presence because of age and illness).

¹¹⁴ See, e.g., *State v. Neff*, 67 N.J. Super. 213, 170 A.2d 456 (1961); *State ex rel. Boner v. Boles*, 148 W. Va. 802, 137 S.E.2d 418 (1964).

¹¹⁵ See, e.g., *Byrd v. Hopper*, 537 F.2d 1303 (5th Cir. 1976), *cert. denied*, 429 U.S. 1048 (1977); *State v. Camino*, 118 Ariz. 89, 574 P.2d 1308, 1310 (1977); *People v. Brown*, 102 Cal. App. 2d 60, 226 P.2d 609 (1951); *People v. Smith*, 6 Ill. 2d 414, 129 N.E.2d 164 (1955); *People v. Root*, N.Y.L.J. Apr. 5, 1979, at 4, col. 1; *People v. Montez*, 65 App. Div. 2d 777, 410 N.Y.S.2d 8 (2d Dep't 1978).

¹¹⁶ See *State v. Staples*, 354 A.2d 771, 778 (Me. 1976).

¹¹⁷ See *United States v. Partlow*, 428 F.2d 814 (2d Cir. 1970); *United States v. Cureton*, 302 F. Supp. 1065 (D.D.C. 1968), *aff'd*, 413 F.2d 418 (D.C. Cir. 1969); *State v. Taylor*, 104 Ariz. 264, 451 P.2d 312 (1969). It has also been urged, unsuccessfully, that an absent defendant is entitled to notice and a hearing on the question of the voluntariness of the departure before trial could be resumed *in absentia*. *State v. Staples*, 354 A.2d 771, 775-76 (Me. 1976).

¹¹⁸ See notes 18-26 and accompanying text *supra*.

¹¹⁹ See *Illinois v. Allen*, 397 U.S. 337, 348-49 (1970) (Brennan, J., concurring). Justice

writer has taken the view that the practice of trying defendants *in absentia* has an inherent tendency to foster disrespect for the law because of its "totalitarian imagery."¹²⁰ Another has suggested that even with advance warning, the practice is inherently unfair.¹²¹ To this observer such criticism seems invalid, and when public trials of defendants who have freely and knowingly chosen not to be present¹²² are compared to totalitarian practices, it is suggested that the fault lies with the analogy, not the system.

A more open question relates to the commencement of trial *in absentia* after a defendant has fled prior to trial, but the applicable principles invite the same conclusion. A defendant who is informed that his trial will be held at a certain time and place and declines an invitation to participate would seem to have little standing to complain.¹²³ Nor do the standards of fundamental fairness appear to be seriously offended. As previously noted, such respectable institutions as the American Law Institute,¹²⁴ the legislature and courts of the State of Arizona,¹²⁵ the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,¹²⁶ the National Conference of Commissioners on Uniform States Laws,¹²⁷ the United States courts of appeals for the second, third and fourth circuits,¹²⁸ the Court of Appeals of the State of Washington¹²⁹ and even the United States Supreme Court¹³⁰ have found the notion a tolerable one.

The advantages to the orderly administration of justice are ob-

Brennan noted: "Thus there can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." *Id.* (Brennan, J., concurring). *See also*, *Taylor v. United States*, 417 U.S. 17, 20 (1973) (per curiam).

¹²⁰ *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 98 (1970).

¹²¹ *See, e.g., In re Hunt*, 276 F. Supp. 112 (E.D. Mich. 1967), *vacated*, 408 F.2d 1086 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969).

¹²² Indeed, they are violating the law by not being present. *See United States v. Marotta*, 518 F.2d 681, 698 (9th Cir. 1975); *People v. Vargas*, 53 Cal. App. 3d 516, 523, 126 Cal. Rptr. 88, 96 (1975).

¹²³ Of course, a conviction after trial *in absentia* must be set aside in cases where it later develops that the defendant was involuntarily absent. *See Wade v. United States*, 441 F.2d 1046 (D.C. Cir. 1971); *State v. Taylor*, 104 Ariz. 264, 451 P.2d 312 (1969). The phenomenon seems to be a rare one, though, and not a significant drawback when the pros and cons are weighed.

¹²⁴ *See note 30 supra.*

¹²⁵ *See notes 31 and 32 supra.*

¹²⁶ *See note 66 supra.*

¹²⁷ *See note 67 supra.*

¹²⁸ *See notes 36-44 and 52-59 and accompanying text supra.*

¹²⁹ *See note 60 supra.*

¹³⁰ *See notes 49-51 and accompanying text supra.*

vious. As matters now stand in most jurisdictions, the defendant who becomes a fugitive prior to trial can prevent his trial as long as he can escape apprehension. In places like New York City this generally means delay until and unless he is arrested on another charge.¹³¹ Prolonged delay in the commencement of trial frequently means that the case is never tried at all because evidence is lost by accident or carelessness, witnesses die or drift out of reach,¹³² or the defendant becomes the beneficiary of legal principles which would otherwise be inapplicable.¹³³

In most jurisdictions, too, a prosecution for the crime of bail jumping is, all too frequently, a poor substitute for a determination on the merits of the original charge.¹³⁴ If the latter is among the more serious ones, the penalties for bail jumping are generally mild by comparison.¹³⁵

All of these factors would seem to add up to a system of justice that obtains for society a resolution of serious criminal charges on the merits less frequently than it might, that encourages bail and parole jumping by rewarding it, and possibly prejudices the rights of defendants to reasonable bail because of that fact.¹³⁶ It is suggested that a system which permits an accused, by his own misconduct, to frustrate the orderly administration of justice in that fashion hobbles itself unnecessarily.

This is not to say that no errors have been made relative to trial *in absentia* or that there is no room for improvement. Commencement of trial *in absentia* as to defendants who have not been warned that this will occur is a particularly delicate area. To pronounce a

¹³¹ See *People v. Vega*, 80 Misc. 2d 59, 64-65, 363 N.Y.S.2d 214, 219 (Sup. Ct. Kings County 1974). In that case, the court further observed that there were then approximately 300,000 bench warrants outstanding in New York City "and the number issued each week exceeds the number successfully executed." *Id.* at 64, 363 N.Y.S.2d at 219. National surveys indicate a similar trend. See generally W. THOMAS, BAIL REFORM IN AMERICA 87-109 (1976); P. WICE, FREEDOM FOR SALE 65-80 (1974).

¹³² See also *People v. Vega*, 80 Misc. 2d 59, 64-65, 363 N.Y.S.2d 214, 219 (Sup. Ct. Kings County 1974).

¹³³ It had been held, for example, that a fugitive, when finally apprehended, was entitled to a dismissal of the charges because he had been denied a speedy trial. The authorities, it was ruled, had not tried to find him with sufficient diligence. See *People v. Canton*, N.Y.L.J., Sept. 19, 1978, at 7, col. 3 (Sup. Ct. N.Y. County).

¹³⁴ See, e.g., *United States v. Marotta*, 518 F.2d 681, 684 (9th Cir. 1975); *United States v. Tortora*, 464 F.2d 1202 (2d Cir.), cert. denied sub nom. *Santoro v. United States*, 409 U.S. 1068 (1972); *People v. Vega*, 80 Misc. 2d 59, 64-65, 363 N.Y.S.2d 214, 219 (Sup. Ct. Kings County 1974).

¹³⁵ See, e.g., *United States v. Marotta*, 518 F.2d 681 (9th Cir. 1975).

¹³⁶ See *Falk v. United States*, 15 App. D.C. 446, 455 (1899), cert. denied, 181 U.S. 618 (1901); *State v. Way*, 76 Kan. 928, 931, 93 P. 159, 162 (1907).

rule that the right to be present cannot be waived without knowledge of the probable consequences and then, without warning, commence trial *in absentia*, seems difficult to defend. Truth in packaging would appear to require either a revision of the law of waiver as it affects the right to be present, or advance warning to the defendant that the trial will proceed in his absence.

Of the two possibilities, a change in the law of waiver seems unlikely. It is true that one writer has recently suggested that trial *in absentia* involves a forfeiture rather than a waiver and that the right to be present might be lost without an intent to waive it.¹³⁷ Nevertheless the Supreme Court seems wedded to the contrary position—at least where commencement of trial *in absentia* is concerned.¹³⁸

Advance warning to the defendant that the trial will proceed in his absence is eminently practical, as the State of Arizona has demonstrated, with automatic notice to every defendant released on bail or parole.¹³⁹ In every jurisdiction that has permitted or contemplates permitting commencement of trial *in absentia*, adoption of the Arizona procedure would seem an appropriate course, easily accomplished. It is also suggested that in jurisdictions where the

¹³⁷ See 10 UNIFORM RULES OF CRIMINAL PROCEDURE Rule 713(b) Comment at 315 (1974). The comment accompanying Rule 713 notes:

Although courts frequently describe voluntary-absence provisions as based upon a waiver concept, the provisions are difficult to sustain in terms of traditional waiver principles. For example, most do not require that the defendant have been informed of the consequences of his failure to be present at trial. It seems likely that the term "waiver" in this context has frequently been utilized to describe what more accurately can be characterized as a procedural "forfeiture." The Supreme Court has recognized that certain constitutional rights can be lost, notwithstanding lack of intent to waive those rights, by simply failing to raise the constitutional claim in accordance with a valid procedural Rules. Provisions relating to voluntary-absence may often be viewed in the same light. Indeed, these provisions often are framed in terms of a forfeiture concept—*e.g.*, they state that "the further progress of the trial shall not be prevented" by the voluntary absence.

Id.

¹³⁸ See *Taylor v. United States*, 414 U.S. 17 (1973) (per curiam); *Schneekloth v. Bustamonte*, 412 U.S. 218, 235-37 (1973). *Davis v. United States*, 411 U.S. 233 (1973), a case cited in the comment to the Rules of Criminal Procedure, see note 37 *supra*, involves an unsuccessful collateral attack on a conviction, based upon the belated claim that Blacks had been excluded from the indicting grand jury. 411 U.S. at 235. Aside from the different nature of the right, the decision relies heavily upon the failure of the defense to object in a timely way—a phenomenon virtually unheard of when a trial proceeds *in absentia*. In the latter case, counsel almost always objects, and strenuously. See, *e.g.*, *People v. Snyder*, 56 Cal. App. 3d 195, 199, 128 Cal. Rptr. 297, 299 (1976); *People v. Vargas*, 53 Cal. App. 3d 516, 520, 126 Cal. Rptr. 88, 92 (1975); *State v. Staples*, 354 A.2d 771, 774 (Me. 1976).

¹³⁹ See note 31 *supra*.

question is an open one, trial judges who consider the commencement of trial *in absentia* a viable alternative should explicitly advise the defendant the failure to appear on the date set for trial will be treated as a waiver and result in the commencement of trial *in absentia*.¹⁴⁰

¹⁴⁰ See *State v. Camino*, 118 Ariz. App. 89, 90, 574 P.2d 1308, 1309 (1977).