

# Examining an Underdeveloped Constitutional Standard: Trial *In Absentia* and the Relinquishment of a Criminal Defendant's Right to be Present

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# EXAMINING AN UNDERDEVELOPED CONSTITUTIONAL STANDARD: TRIAL *IN ABSENTIA* AND THE RELINQUISHMENT OF A CRIMINAL DEFENDANT’S RIGHT TO BE PRESENT

EUGENE L. SHAPIRO\*

*The right of a criminal defendant to be present at trial has been characterized by the Supreme Court as “one of the most basic rights” guaranteed by the Constitution, and yet the Court has only intermittently discussed the constitutional standard for assessing its relinquishment. Both federal and state courts now perceive that the constitutional standard only requires a voluntary, knowing and intelligent waiver, and they frequently focus upon the issue of the voluntariness of a defendant’s absence. A large number of the federal circuits have supplemented this constitutional standard with a non-constitutional, supervisory requirement that a trial court balance the individual and governmental interests involved before proceeding with trial in absentia. This approach has not commended itself to a majority of the state courts which have considered it.*

*This article discusses the evolution of relinquishment analysis in the Supreme Court and the development in the federal courts of this non-constitutional, prudential methodology. It then concludes that there is a need to refine the constitutional standard for assessing a potential relinquishment of the right to be present, so that both the individual and societal interests involved are more adequately accommodated.*

I.	INTRODUCTION .....	593
II.	THE SUPREME COURT’S SIGNPOSTS ON RELINQUISHMENT: <i>DIAZ, TAYLOR, ALLEN, AND CROSBY</i> .....	595
III.	FEDERAL NON-CONSTITUTIONAL METHODOLOGY SUPPLEMENTING RULE 43 .....	608

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592

*MARQUETTE LAW REVIEW*

[96:591

A. *The Approach Among the Circuits* .....608  
B. *Consideration of Similar Approaches Among the States* .....613  
IV. REFINING THE CONSTITUTIONAL STANDARD.....618

## I. INTRODUCTION

In light of the central position occupied in our adversarial system by a criminal defendant's constitutional right to be present at trial,<sup>1</sup> the intermittent attention paid by the Supreme Court to the relinquishment of the right is striking. The slow pace of doctrinal evolution in the area would seem, in part, to be the product of several factors. The case which has emerged as the Court's most influential statement on the right, *Diaz v. United States*, was decided in 1912.<sup>2</sup> It directly recognized the validity of a relinquishment of the right by a defendant who voluntarily absented himself from trial, observing that such absence "operates as a waiver of his right to be present."<sup>3</sup> The next century was marked by two significant developments. One reduced the frequency of judicial challenges alleging the right's abridgement in federal cases, and the other injected uncertainty into the determination of the proper analysis for assessing a relinquishment of the right.

In 1944, Rule 43 of the Federal Rules of Criminal Procedure reflected the above-stated conclusion of *Diaz* while, at the same time, delineating the circumstances under which a defendant's voluntary absence from trial "shall be considered" a waiver.<sup>4</sup> Thereafter, federal courts most frequently focused upon the reach of the federal rule, often rendering a constitutional discussion unnecessary or at times seemingly peripheral. A second important post-*Diaz* development, which posed fundamental doctrinal questions concerning the relinquishment of a defendant's right to be present, occurred in 1970. The Supreme Court's significant, if predictable, conclusion in *Illinois v. Allen*—that a disruptive defendant may relinquish his or her right to be present at trial—employed an approach that appeared to reflect a concept involving the defendant's forfeiture of the right, rather than traditional waiver analysis.<sup>5</sup> There was an emphasis in *Allen* upon the importance of the state's interests,<sup>6</sup> and this characteristic of the opinion will be discussed below.

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1. *Riggins v. Nevada*, 504 U.S. 127, 142 (1992).

2. *Diaz v. United States*, 223 U.S. 442 (1912).

3. *Id.* at 455.

4. FED. R. CRIM. P. 43 advisory committee notes n.1–3 (1944). Rule 43 was rephrased, effective December 1, 2011, retaining the consequence that the right to be present is waived by a defendant who is voluntarily absent from trial. See *infra* note 96 and accompanying text (discussing the current text).

5. *Illinois v. Allen*, 397 U.S. 337, 346–47 (1970).

6. *Id.*

In 1972, the Court briefly appeared to be poised to closely scrutinize the relinquishment of the constitutional right to be present at trial when it granted certiorari in *Tacon v. Arizona*<sup>7</sup> to consider questions that the Court characterized as involving “constitutional limits on the States’ authority to try *in absentia* a person who has voluntarily left the State and is unable, for financial reasons, to return.”<sup>8</sup> While serving in the Army in Arizona, defendant Tacon had been charged with a state felony for the sale of marijuana.<sup>9</sup> After he was discharged from the service and went to New York, he asserted that he lacked the funds to return to Arizona for trial.<sup>10</sup> The trial proceeded in his absence, as authorized by state law, and Tacon was convicted and sentenced to a prison term of five to five and a half years.<sup>11</sup> Certiorari was granted to consider four questions: whether a felony defendant can be tried “completely in absentia”; whether a felony defendant can “be held to have voluntarily waived his right to be present at his trial without a hearing” and express findings on the issue; whether a felony defendant can “be deprived of [the] right . . . because he is too impoverished to afford travel expenses to the site of the trial”; and whether Arizona had “establish[ed] a knowing and intelligent waiver . . . in [the] case.”<sup>12</sup>

In February of 1973, the Supreme Court dismissed the writ of certiorari as “improvidently granted.”<sup>13</sup> It concluded that “these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. . . . 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.”<sup>14</sup> The Court concluded that this was “primarily a factual issue which [did] not, by itself, justify the exercise of [its] certiorari jurisdiction.”<sup>15</sup> In dissent, Justice Douglas, joined by Justices Brennan and Marshall, stated that the Arizona Supreme Court’s consideration of whether the defendant had validly waived “his right to confrontation and to be present at the

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7. *Tacon v. Arizona*, 410 U.S. 351, 351–52 (1973).

8. *Id.* at 352 (emphasis added).

9. *Id.* at 351.

10. *Id.*

11. *Id.* at 351–52.

12. Brief for Petitioner at 2, *Tacon v. Arizona*, 410 U.S. 351 (1973) (No. 71-6060).

13. *Tacon*, 410 U.S. at 352.

14. *Id.*

15. *Id.*

trial of his case”<sup>16</sup> raised a sufficient issue to warrant review.<sup>17</sup> Focusing most extensively upon the former right, the dissenters found no showing of a valid waiver.<sup>18</sup> With the Court’s dismissal of certiorari in *Tacon* so soon after its opinion in *Allen*, uncertainty concerning the impact of *Allen* upon the proper approach to a defendant’s relinquishment of the right to be present remained.

Part II of this article will discuss the development of the Supreme Court’s waiver analysis in assessing the relinquishment of the constitutional right to be present at trial, noting the contexts within which the issue has been addressed. Part III will describe the development in the federal courts of a non-constitutional methodology supplementing their implementation of Rule 43 of the Federal Rules of Criminal Procedure, which was enacted to embody the Supreme Court’s conclusion in *Diaz v. United States*. More specifically, it will be observed that this supervisory and prudential approach, which in addition to considering a defendant’s waiver also balances the state and personal interests involved, appeared to develop in part as a reflection of the Supreme Court’s methodology in *Illinois v. Allen*. In conclusion, Part IV will argue that appropriate federal constitutional relinquishment analysis should include both the issue of a defendant’s voluntary waiver and a structured consideration of interests similar to some of those now examined in the prevalent non-constitutional federal approach supplementing Rule 43.

## II. THE SUPREME COURT’S SIGNPOSTS ON RELINQUISHMENT: *DIAZ*, *TAYLOR*, *ALLEN*, AND *CROSBY*

As previously noted, the Supreme Court’s discussion of the constitutional requirements for a criminal defendant’s relinquishment of the right to be present has not always followed a linear course of development. This Part will demonstrate that the Court’s most consistent relinquishment analysis has focused upon the approach to a defendant’s waiver of the right that was employed in *Diaz v. United States*.<sup>19</sup> As will be discussed below, in the 1970 Supreme Court Case *Illinois v. Allen*, a potential alternative approach appeared, employing a kind of forfeiture inquiry that highlighted the interests of the State as

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16. *Id.* at 353 (Douglas, J., dissenting).

17. *Id.* at 355.

18. *Id.* at 354–55.

19. *Diaz v. United States*, 223 U.S. 442, 455 (1912).

well as those of the defendant.<sup>20</sup> Over the years, however, *Allen*'s methodology has not developed further as an alternative constitutional relinquishment approach, and the Court's reaffirmations of *Diaz*'s waiver analysis have created significant confusion in lower courts.

*Diaz* involved a defendant who, while on bail, had voluntarily absented himself from portions of his non-capital homicide trial in the Philippines.<sup>21</sup> *Diaz* had expressly consented to the continuation of those portions of the trial with his counsel's participation.<sup>22</sup> Following his conviction and unsuccessful appeal to the Supreme Court of the Philippines, he argued that he had not voluntarily waived his right to be present, that the right was not waivable, and that the trial court had lacked the power to proceed.<sup>23</sup>

The case presented the Supreme Court with the opportunity to assess the application of the congressional enactments that governed the matter in the Philippines, and to address the prevailing policies concerning the relinquishment of the right to be present. As did *Diaz*'s objections, the Court focused squarely upon the issue of waiver.<sup>24</sup> In doing so, the Court addressed the question of

whether the provision in § 5 of the Philippine Civil Government Act, securing to the accused in all criminal prosecutions "the right to be heard by himself and counsel," makes his presence indispensable at every stage of the trial, or invests him with a right which he is always free to assert but which he also may waive by his voluntary act.<sup>25</sup>

Noting that the provision's "substantial equivalent is embodied in the Sixth Amendment to the Constitution of United States" and in state

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20. *Illinois v. Allen*, 397 U.S. 337, 343 (1970); see also Sarah Podmaniczky, *Order in the Court: Decorum, Rambunctious Defendants, and the Right to Be Present at Trial*, 14 U. PA. J. CONST. L. 1283 (2012) (discussing forfeiture of the right to be present at trial and arguing that courts should consider the fairness of the proceedings, not the etiquette and decorum of the courtroom).

21. *Diaz*, 223 U.S. at 444–45. Those portions of the trial involved the examination and cross-examination of two government witnesses. *Id.* at 453.

22. *Id.* at 445.

23. *Id.* at 453.

24. *Id.* at 453–56.

25. *Id.* at 454. In addition to providing individual rights for Filipinos, this federal enactment established the governmental structure in the Philippines during the American colonial term. See Donald M. Seekins, *Historical Setting*, in PHILIPPINES: A COUNTRY STUDY 1, 28 (Ronald E. Dolan ed., 4th ed. 1993).

constitutions,<sup>26</sup> the Court observed, “It is the right which these constitutional provisions secure to persons accused of crime in this country that was carried to the Philippines by the congressional enactment.”<sup>27</sup> Consequently, the Court found that “the prevailing course of discussion here may and should be accepted as determinative of the nature and measure of the right there.”<sup>28</sup> The Court then stated that, in the case of a non-capital felony and when the accused is not in custody,<sup>29</sup>

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 the 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.<sup>30</sup>

The Court’s conclusion rested upon strong considerations of public policy, which echo to this day in the judicial consideration of voluntary absence during trial. Quoting an earlier view of the Court of Appeals for the District of Columbia with clear approval, the Court noted that it was not “consonant with the dictates of common sense” to permit a defendant on bail “whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced.”<sup>31</sup> The result of such a practice, “if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it.”<sup>32</sup>

In 1973, in *Taylor v. United States*, the Court reaffirmed the policy in *Diaz*, noting that it was the very voluntariness of a defendant’s absence

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26. *Diaz*, 223 U.S. at 454–55. The reference to an embodiment of a “right to be heard” in the Sixth Amendment, *id.* at 454, bears a strong resemblance to the Court’s later discussion in 1934 in *Snyder v. Massachusetts* of the Due Process Clause’s “opportunity to defend,” which there provided a basis for the right to be present, 291 U.S. 97, 105–06 (1934).

27. *Diaz*, 223 U.S. at 455.

28. *Id.*

29. *Id.* The Court noted that “with like accord [authorities] have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right.” *Id.* The first barrier existed “because his presence or absence is not within his own control” and the second because the defendant “is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction.” *Id.*

30. *Id.*

31. *Id.* at 457 (quoting *Falk v. United States*, 15 App. D.C. 446, 454 (D.C. Cir. 1899)).

32. *Id.* (quoting *Falk*, 15 App. D.C. at 454).

during trial that implicated *Diaz*'s concerns.<sup>33</sup> It expressly rejected the defendant's argument that the refined waiver requirements of *Johnson v. Zerbst*<sup>34</sup> mandated that it be demonstrated that an absent defendant "knew or had been expressly warned by the trial court" that he had a right to be present, that the trial would continue in his absence, and that absence would foreclose his right to testify and confront witnesses.<sup>35</sup> *Johnson v. Zerbst* had required that an effective waiver of the right to counsel at trial required an "intentional relinquishment or abandonment of [the] known right or privilege."<sup>36</sup> In *Taylor*, the Court responded that it was "wholly incredible" to suggest that the defendant, who had attended the beginning of trial and was free on bail, "entertained any doubts" about his right to be present.<sup>37</sup> The Court added,

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."<sup>38</sup>

While *Taylor* elaborated upon *Diaz*'s waiver discussion only three years after *Illinois v. Allen* was decided, it did little to undermine the strong possibility that *Allen*'s quite different approach, discussed more fully below, might provide a separate path of analysis. To the contrary, in *Taylor* the Court approvingly quoted from Justice Brennan's concurrence in *Allen*, which had emphasized the state's interest in proceeding: "As was recently noted, '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.'"<sup>39</sup>

A brief observation concerning the simultaneous evolution of the Supreme Court's view of the constitutional source of the right to be present is appropriate. In the 1934 Supreme Court case *Snyder v. Massachusetts*,<sup>40</sup> Justice Cardozo, speaking for the court, was prepared to

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33. *Taylor v. United States*, 414 U.S. 17, 18–19 (1973).

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

35. *Taylor*, 414 U.S. at 19.

36. *Johnson*, 304 U.S. at 464.

37. *Taylor*, 414 U.S. at 20.

38. *Id.* (citations omitted).

39. *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 349 (1970) (Brennan, J., concurring)).

40. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

state that a defendant's right to be present was encompassed within the Fourteenth Amendment's guarantee of due process, for "[i]t bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend."<sup>41</sup> The defendant, Snyder, on trial for murder and attempted robbery, had been denied permission to accompany the jury, the judge, and counsel to the scene of the crime.<sup>42</sup> Citing its due process methodology of recognizing principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"<sup>43</sup> the Court viewed the scope of the right to be present in this narrow methodological context, stating that "[s]o far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."<sup>44</sup> In *Snyder*, the Court concluded that the defendant's presence at a view of the crime scene was not assured by the privilege to be present, as "[t]here is nothing he could do if he were there, and almost nothing he could gain."<sup>45</sup> Citing *Diaz*, Justice Cardozo observed that the right to be present might be lost by "consent or at times even by misconduct,"<sup>46</sup> and cautioned that "[c]onfusion will result . . . if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned."<sup>47</sup> While "due process of law in a fair adversary process" continues to occupy a central position as a source of the defendant's right to be present,<sup>48</sup> the Court has since embraced the notion that both the Due Process Clauses and the Confrontation Clause "guarantee to a criminal defendant . . . the 'right to be present at all stages of the trial where his absence might

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41. *Id.* at 106.

42. *Id.* at 103.

43. *Id.* at 105 (citing *Twining v. New Jersey*, 211 U.S. 78, 106, 111–12 (1908)).

44. *Id.* at 107–08.

45. *Id.* at 108. The Court added that the risk of an undetected erroneous viewing was "so remote that it dwindles to the vanishing point." *Id.* *Snyder's* inquiry into the function served by a proceeding alleged to be within the right to be present continues to be important. See *Kentucky v. Stincer*, 482 U.S. 730, 745–47 (1987) (concluding that the questions asked of child witnesses at competency hearing and the potential role of defendant at that hearing did not implicate the right); *United States v. Gagnon*, 470 U.S. 522, 526–27 (1985) (finding that a conference concerning impartiality of juror did not involve the right of the defendant to personally attend).

46. *Snyder*, 291 U.S. at 106.

47. *Id.* at 107.

48. *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975).

frustrate the fairness of the proceedings.”<sup>49</sup>

*Snyder*’s contemplation of a defendant’s loss of the right to be present by misconduct foreshadowed the central issue of relinquishment in *Illinois v. Allen* in 1970.<sup>50</sup> In *Allen*, Justice Black’s opinion for the Court began with an observation that “[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”<sup>51</sup> The Court then framed the question before it as “whether an accused can claim the benefit of this constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial.”<sup>52</sup>

Allen had been excluded from the courtroom at his robbery trial after extraordinarily abusive behavior and repeated warnings by the trial judge.<sup>53</sup> His request to represent himself had initially been granted, and an attorney was appointed by the court to “sit in and protect the record.”<sup>54</sup> During jury selection, Allen again abusively and disrespectfully argued with the judge about the scope of his questions, and the court asked standby counsel to proceed with jury selection.<sup>55</sup> Allen continued to talk, stating that the attorney was not going to serve as his lawyer, and “terminated his remarks by saying, ‘When I go out for lunchtime, you’re [the judge] going to be a corpse here.’ At that point he tore the file which his attorney had and threw the papers on the floor.”<sup>56</sup> Allen was warned that another such outbreak would result in his removal, but the warning “had no effect.”<sup>57</sup> His abusive remarks continued, he was removed from the courtroom, and the jury was selected in his absence.<sup>58</sup>

After a noon recess and before the jury returned, Allen was permitted to return to the courtroom, where he complained about the

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49. *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (quoting *Faretta*, 422 U.S. at 819 n.15 (1975)); see also *Gagnon*, 470 U.S. at 526 (1985).

50. *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

51. *Id.*

52. *Id.*

53. *Id.* at 346.

54. *Id.* at 339.

55. *Id.* at 339–40.

56. *Id.* at 340.

57. *Id.*

58. *Id.*

procedure and his attorney.<sup>59</sup> He asked to be present at trial and was told by the judge that he would be permitted to remain “if he ‘behaved [himself] and [did] not interfere with the introduction of the case.’”<sup>60</sup> When the jury returned, his attorney moved to exclude the witnesses from the courtroom.<sup>61</sup> Allen objected by stating, “There is going to be no proceeding. I’m going to start talking and I’m going to keep on talking all through the trial. There’s not going to be no trial like this. I want my sister and my friends here in court to testify for me.”<sup>62</sup> Allen was again removed from the courtroom, and, except for his appearance for identification purposes, he remained out of the courtroom during the presentation of the State’s case.<sup>63</sup> During one of these identification appearances, he “responded to one of the judge’s questions with vile and abusive language.”<sup>64</sup> After the presentation of the State’s case, the judge reaffirmed his promise to Allen that he could return to the courtroom if he agreed to conduct himself properly.<sup>65</sup> After giving such assurances, Allen was permitted to return for the remainder of the trial.<sup>66</sup> It was then conducted by his standby counsel.<sup>67</sup>

Allen’s conviction was affirmed on appeal<sup>68</sup> and the Supreme Court denied certiorari.<sup>69</sup> In a petition for a federal writ of habeas corpus, Allen then alleged that he had been deprived of his constitutional right to remain present throughout the trial.<sup>70</sup> While the district court found no constitutional violation,<sup>71</sup> the court of appeals disagreed.<sup>72</sup> Addressing the issue of waiver, it stated:

A relinquishment of rights by waiver that is compelled by an election of choices is involuntary and not a waiver at all. The choice given the petitioner in the instant case by the trial judge,

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 340–41.

63. *Id.* at 341.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *People v. Allen*, 226 N.E.2d 1, 4 (Ill. 1967).

69. *Allen v. Illinois*, 389 U.S. 907 (1967).

70. *Illinois v. Allen*, 397 U.S. at 339.

71. *United States ex rel. Allen v. Illinois*, 413 F.2d 232, 233 (7th Cir. 1969).

72. *Id.* at 235.

either to behave or be expelled from the courtroom, compelled the petitioner to involuntarily “waive” a constitutional right. No conditions may be imposed on the absolute right of a criminal defendant to be present at all stages of the proceeding. The insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver. Such conditions, if insisted upon, should and must be dealt with in a manner that does not compel the relinquishment of his right.<sup>73</sup>

The Court of Appeals added that “[t]he proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged.”<sup>74</sup>

The Supreme Court concluded that the exclusion of Allen from the courtroom constituted a permissible measure for the trial judge to have taken.<sup>75</sup> The Court explained its holding as follows:

Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights . . . we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.<sup>76</sup>

The Court added that the right to be present may be reclaimed when the defendant is willing to conduct himself appropriately.<sup>77</sup> It stated that “[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country,”<sup>78</sup> observing that the accused may not be “permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him.”<sup>79</sup> In his separate concurrence, Justice Brennan

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73. *Id.*

74. *Id.*

75. *Illinois v. Allen*, 397 U.S. at 347.

76. *Id.* at 343 (citation omitted). The Court also discussed permissible actions such as binding and gagging a disruptive defendant or citing him or her for contempt, noting the constitutional availability of these measures and their disadvantages. *Id.* at 343–44.

77. *Id.* at 343.

78. *Id.*

79. *Id.* at 346.

emphasized that “[c]onstitutional power to bring an accused to trial is fundamental to a scheme of ‘ordered liberty’ and prerequisite to social justice and peace.”<sup>80</sup>

More than thirty years ago, Professor Peter Westen explored the distinction between the waiver of a defendant’s constitutional defense and its forfeiture.<sup>81</sup> Traditional waiver analysis involved the “rigorous” test of whether the relinquishment of a right was “knowing, intelligent, and voluntary.”<sup>82</sup> Professor Westen continued,

In other words, before the state could permanently prevent a defendant from asserting constitutional defenses, it had to show that he made a deliberate decision to forgo these defenses, that he made the decision after being fully apprised of the consequences and alternatives, and that the state itself had done nothing to make a decision to assert his rights more “costly” than a decision to relinquish them.<sup>83</sup>

The relinquishment of a constitutional right, however, may also occur through a process of forfeiture.<sup>84</sup> “Unlike waiver, forfeiture occurs by operation of law without regard to the defendant’s state of mind.”<sup>85</sup> A defendant can forfeit constitutional defenses “without ever having made a deliberate, informed decision to relinquish them, and without ever having been in a position to make a cost-free decision to assert them.”<sup>86</sup> Focusing upon the forfeiture of defenses by pleas of guilty and rules of timing, Professor Westen concluded,

In sum, the analysis of forfeiture in criminal procedure is no different from the analysis of constitutional rights in other contexts: it requires one to identify the nature of the defendant’s interests, to identify the nature and magnitude of the state’s interest, and to strike a balance between the two in light of

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80. *Id.* at 347 (Brennan, J., concurring).

81. Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

82. *Id.* at 1214. Professor Westen described the formulation in *Johnson v. Zerbst* as “classic”: “A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” *Id.* at 1214 n.1 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

83. *Id.* at 1214.

84. *Id.*

85. *Id.*

86. *Id.*

alternatives for achieving their respective goals.<sup>87</sup>

While Professor Westen's analysis focused upon forfeiture in these specific areas, the then-recent analysis in *Illinois v. Allen* did not go unnoticed.<sup>88</sup> He found that the "real" basis for the decision was that

the defendant "forfeited" his right to be present by his misconduct: that is, even though the defendant continued in his desire to remain in the courtroom, his constitutional right to be present was outweighed by the state's overriding interest in being able to proceed with the trial in an orderly fashion.<sup>89</sup>

He added that Professor Yale Kamisar had expressed a similar view of *Allen* in an unpublished memorandum in 1972.<sup>90</sup> This view of *Illinois v. Allen*—that the non-waiving defendant's interest in one of his "most basic"<sup>91</sup> rights was weighed against the State's obviously paramount interest—is inescapable from the *Allen* opinion itself. The broader methodological question that *Allen* raised was the extent to which this interest-balancing forfeiture analysis might more generally provide an alternative to traditional waiver standards in assessing a potential relinquishment of the constitutional right to be present.

*Allen's* forfeiture approach has received scant attention from legal commentators.<sup>92</sup> In a rare commentary on the matter, one treatise does briefly express the view that, in assessing the consequences of a defendant's voluntary absence, forfeiture analysis "would seem preferable."<sup>93</sup> It is now apparent, however, that *Allen's* forfeiture analysis has simply failed to materialize as an independent alternative constitutional inquiry. It has nevertheless provided the backdrop for the development of a non-constitutional balancing-of-interests approach in the Federal Courts of Appeals, supplementing their implementation of Federal Rule of Criminal Procedure 43. This development will be

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87. *Id.* at 1239. Professor Westen made this observation in the context of discussing forfeiture by guilty plea. *Id.* He reached a similar conclusion with regard to forfeiture analysis and rules of timing. *See id.* at 1254.

88. *Id.* at 1239 n.50.

89. *Id.*

90. *Id.*

91. *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

92. Instead, discussion of relinquishment is customarily confined to waiver analysis alone. *See, e.g.*, JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 21:2 (3d ed. 1996); 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 721 (3d ed. 2004).

93. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.2(d) (3d ed. 2007).

2012]

## TRIAL IN ABSENTIA

605

discussed in Part III.

The continuing vitality of the Court's constitutional waiver rationale was most recently reflected in *Crosby v. United States*, which did not address the defendant's constitutional claim but still had much to say in reaffirming the significance of the 1912 *Diaz* opinion.<sup>94</sup> *Crosby* presented the issue of whether Rule 43 permitted the trial *in absentia* of a defendant who is voluntarily absent at the beginning of trial.<sup>95</sup> As considered by the Court in *Crosby*, Rule 43 provided, in part,

(a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, at every stage 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 this rule.

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

(1) is voluntarily absent after the trial has commenced . . . .<sup>96</sup>

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94. *Crosby v. United States*, 506 U.S. 255, 259–60 (1993).

95. *Id.* at 256.

96. *Id.* at 258 (quoting FED. R. CRIM. P. 43 (1990)). Since December 1, 2011, Rule 43 states:

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing. . . .

...

(c) Waiving Continued Presence.

(1) In General. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

In that case, Crosby had fled before jury selection at his trial with others for mail fraud.<sup>97</sup> After a fruitless search and several days of delay, the trial court found his absence to be “knowing and deliberate,” adding that “requiring the Government to try Crosby separately from his codefendants would present extreme difficulty for the Government, witnesses, counsel, and the court.”<sup>98</sup> The Court stated that “Crosby voluntarily had waived his constitutional right to be present during the trial, and that the public interest . . . outweighed his interest in being present during the proceedings.”<sup>99</sup> Consequently, Crosby was tried *in absentia* and was convicted, along with two of his codefendants.<sup>100</sup>

On appeal, Crosby argued that Rule 43 precluded the trial *in absentia* of a defendant who is absent at the commencement of trial.<sup>101</sup> While the Court of Appeals rejected this claim, the Supreme Court reversed.<sup>102</sup> The Court unanimously found that “[t]he language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial.”<sup>103</sup> With regard to the language and structure of the Rule’s limit upon those situations in which a trial may proceed, the Court noted that the Rule “could not be more clear.”<sup>104</sup>

In response to the Government’s request for the Court to seek guidance from an examination of the law at the time of the Rule’s adoption in 1944, the Court concluded that such history did not support the Government’s position.<sup>105</sup> It took the occasion to comment upon the

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(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver’s Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict’s return and sentencing, during the defendant’s absence.

FED. R. CRIM. P. 43.

97. *Crosby*, 506 U.S. at 256.

98. *Id.* at 257.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 262.

103. *Id.*; see Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U. L. REV. 63, 97–99 (2002).

104. *Crosby*, 506 U.S. at 259.

105. *Id.*

context of *Diaz*, which had manifested a policy “that was codified eventually in Rule 43(b).”<sup>106</sup> The Court noted that “at common law the personal presence of the defendant [was] essential to a valid trial and conviction on a charge of felony.”<sup>107</sup> At felony trials, the right was generally considered unwaivable and was premised on the notion that fairness required that the jurors meet the defendant face-to-face and that witnesses testify in his presence.<sup>108</sup> Quoting an 1851 Pennsylvania opinion, the Court added, “It was thought ‘contrary to the dictates of humanity to let a prisoner “waive that advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence.”’”<sup>109</sup>

*Diaz*, which involved a defendant who had “absented himself voluntarily . . . from his ongoing trial,” had authorized “a limited exception” which was later incorporated into Rule 43(b).<sup>110</sup> *Diaz*’s policy against permitting a defendant to defeat proceedings “after trial has been commenced in his presence” was reflected in the comments of the Advisory Committee that drafted Rule 43,<sup>111</sup> and the Court found “no reason to believe that the drafters intended the Rule to go further.”<sup>112</sup> It noted, “[W]e do not find the distinction between pretrial and midtrial flight so farfetched as to convince us that Rule 43 cannot mean what it says.”<sup>113</sup> The Court specifically noted that it expressed no opinion on “[w]hether or not the right constitutionally may be waived in other circumstances,”<sup>114</sup> and, since Crosby’s Rule 43 claim was dispositive, the Court did not address his constitutional objection.<sup>115</sup>

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106. *Id.* at 259–60.

107. *Id.* at 259 (quoting WM. L. CLARK, JR. & WILLIAM E. MIKELL, HANDBOOK OF CRIMINAL PROCEDURE 492 (2d ed. 1918)).

108. *Id.*

109. *Id.* (quoting 1 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE 178 (4th ed. 1895) (quoting *Prine v. Commonwealth*, 18 Pa. 103, 104 (1851))).

110. *Id.* at 259–60.

111. *Id.* at 260; see also FED. R. CRIM. P. 43 advisory committee notes n.2 (1944).

112. *Crosby*, 506 U.S. at 260.

113. *Id.* at 261.

114. *Id.*

115. *Id.* at 262. For an argument that Rule 43 should be revised to embody a “public necessity” requirement reflecting an interest in proceeding, see Lucas Tassara, *Trial in Absentia: Rescuing the “Public Necessity” Requirement to Proceed with a Trial in the Defendant’s Absence*, 12 BARRY L. REV. 153, 170 (2009).

### III. FEDERAL NON-CONSTITUTIONAL METHODOLOGY SUPPLEMENTING RULE 43

#### A. *The Approach Among the Circuits*

Just two years after *Allen*, federal Courts of Appeal began to develop a non-constitutional methodology, supplementing Rule 43 and incorporating a balancing-of-interests analysis. The Second Circuit's opinion in *United States v. Tortora*<sup>116</sup> has provided the foundational basis for this prudential, supervisory doctrine, sometimes referred to as a "complex of issues" analysis,<sup>117</sup> that examines a trial court's exercise of discretion when deciding to proceed to trial under Rule 43(b).<sup>118</sup> While *Tortora*'s approach has been significantly augmented in the Second Circuit by *United States v. Nichols*,<sup>119</sup> the *Tortora-Nichols* approach has by now commended itself to most of the federal circuits.

*Tortora* involved a trial of five defendants for loansharking.<sup>120</sup> Defendant Samuel Santoro jumped bail and was absent throughout trial.<sup>121</sup> After having to accommodate the disparate schedules of the attorneys and the previous absences of two other defendants, the trial judge concluded that since Santoro had voluntarily and knowingly absented himself his trial would proceed without him.<sup>122</sup> Santoro and John Tortora were convicted.<sup>123</sup> Citing *Diaz*, the Second Circuit found that a defendant's absence could waive his right to be present under both Rule 43 and the Constitution, if the absence occurred before jury selection.<sup>124</sup> Reiterating the policy that "[n]o defendant has a unilateral right to set the time or circumstances under which he will be tried,"<sup>125</sup> the Second Circuit examined the circumstances of Santoro's absence and found that his waiver was both knowing and voluntary.<sup>126</sup> The court

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116. *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972).

117. The phrase was used in *Tortora*. *Id.* at 1210; see *infra* note 134 and accompanying text.

118. *Tortora*, 464 F.2d at 1210.

119. *United States v. Nichols*, 56 F.3d 403, 417-18 (2d Cir. 1995).

120. *Tortora*, 464 F.2d at 1204-05.

121. *Id.* at 1206. Santoro later pled guilty to bail jumping. *Id.* at 1206 n.3. The trial was deemed to have commenced before Santoro's absence. *Id.* at 1206.

122. *Id.*

123. *Id.* at 1207.

124. *Id.* at 1208. *Tortora* was, of course, decided before *Crosby v. United States*, 506 U.S. 255 (1993).

125. *Tortora*, 464 F.2d at 1208.

126. *Id.* at 1209. When discussing such waiver, the court quoted Justice Brennan's

thus concluded that “there were no constitutional constraints against the trial judge’s proceeding with the trial.”<sup>127</sup> It added that the protections of Rule 43 were similarly waived.<sup>128</sup>

In addition to examining the constitutional question of waiver, the court added a second inquiry that it deemed necessary in assessing a trial court’s decision to proceed in the absence of the defendant:

It is obviously desirable that a defendant be present at his own trial. We do not here lay down a general rule that, in every case in which the defendant is voluntarily absent at the empanelment of the jury and the taking of evidence, the trial judge should proceed with the trial. We only hold that this is within the discretion of the trial judge, to be utilized only 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. Whether the trial will proceed will depend upon the trial judge’s determination of a complex of issues. He must weigh the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the Government 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 Government’s witnesses in substantial jeopardy.<sup>129</sup>

In a footnote, the court noted, “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.”<sup>130</sup>

Weighing these issues in determining whether the circumstances were “extraordinary” enough to proceed, the Second Circuit found the trial judge to have been “well within his discretion in refusing to adjourn

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concurrence in *Allen*: “[T]here 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.* at 1209 (quoting *Illinois v. Allen*, 397 U.S. 337, 349 (1970) (Brennan, J., concurring)).

127. *Id.* at 1209.

128. *Id.* at 1210 n.6. The court stated, “The rule is no more than a restatement of the defendant’s constitutional rights.” *Id.*

129. *Id.* at 1210 (footnote omitted).

130. *Id.* at 1210 n.7.

the trial” or to sever Santoro’s case.<sup>131</sup> The court also considered the fact that numerous delays had already occurred due to the difficulty of coordinating the attorney’s conflicting schedules and because of defendants’ “unsubstantiated claims of physical ailments” resulting in absences from trial.<sup>132</sup> It added that one witness had been threatened and that the potential danger to that witness “would have continued until that indefinite time in the future when [his] testimony in the second trial would have been completed.”<sup>133</sup> The “complex of issues” considered by the trial court thus supported the exercise of its discretion to proceed in Santoro’s absence.<sup>134</sup>

In 1995, in *United States v. Nichols*, the Second Circuit made it clear that *Tortora*’s balancing analysis must include a sufficient assessment of the public interest in proceeding under the circumstances of the case.<sup>135</sup> In that case, defendant Howard Mason had been convicted of federal crimes relating to his ordering the death of a police officer.<sup>136</sup> After having attended the proceedings for jury selection and only one day of the trial.<sup>137</sup> Mason refused to attend the remainder, wishing instead to return to his cell.<sup>138</sup> The trial court conducted a competency hearing, concluded that Mason was competent to stand trial, and proceeded in his absence.<sup>139</sup> On appeal, Mason argued that the court had not secured a knowing and voluntary waiver of his right to be present.<sup>140</sup> The Second Circuit found that the trial court did not err in finding both the defendant’s competency to stand trial and competency to waive his constitutional right.<sup>141</sup> It found Mason’s waiver of his right to be present under both Rule 43 and the Constitution to be knowing and voluntary, noting that “the district court took great pains . . . to inform Mason of the benefits of attending trial.”<sup>142</sup> The court continued:

On November 28, 1989, when Mason first declared his intention

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131. *Id.* at 1210.

132. *Id.*

133. *Id.*

134. *Id.*

135. *United States v. Nichols*, 56 F.3d 403, 417–18 (2d Cir. 1995).

136. *Id.* at 406.

137. *Id.* at 407–08.

138. *Id.* at 408.

139. *Id.*

140. *Id.* at 405–06.

141. *Id.* at 411, 416.

142. *Id.* at 417.

to remain in his holding cell, Judge Korman even went down to Mason's cell to convince him to reconsider his decision. There, he admonished Mason that a trial cannot stop just because a defendant does not wish to participate. He emphasized that by attending trial Mason could suggest questions to his lawyer for cross-examination of witnesses cooperating with the government. Judge Korman even indicated that, if at any time during trial Mason needed time to confer with his lawyers about witness cross-examination, the court would take a recess. . . . On November 29, Judge Korman added that Mason's lawyer was doing a competent job attacking the government's evidence, implying that Mason's aid might help tip the balance in his favor. On that day, Judge Korman also conveyed to Mason that he had a right to attend trial, stating that Mason was "entitled to the opportunity to participate."<sup>143</sup>

Proceeding to *Tortora's* balancing inquiry, the court noted that it had since clarified that a trial court "has 'broad discretion' to proceed with trial even in single-defendant cases."<sup>144</sup> After reiterating the specific issues to be considered under the language of *Tortora*, the court stated that "a district court generally acts within its discretion if it proceeds with trial when the defendant's absence is a product of sheer willfulness."<sup>145</sup> The court also noted that "[w]hile there are circumstances in which it would be impermissible for a court to proceed with trial,"<sup>146</sup> there is "usually sufficient justification to do so . . . if the court finds the defendant to have engaged in 'stonewalling and other misconduct' . . . or if 'there is no reasonable likelihood that the trial could soon proceed with the defendant present.'"<sup>147</sup> Giving "due regard to the circumstances of the waiver,"<sup>148</sup> the court then observed that the district court had viewed Mason as "defiant and uncooperative," itself adding that "Mason's only explanation for his nonattendance was

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143. *Id.*

144. *Id.* at 418.

145. *Id.*

146. *Id.* As an example, the court cited *United States v. Fontanez*, 878 F.2d 33, 37 (2d Cir. 1989), which it characterized parenthetically as "holding it impermissible to proceed in a single-defendant case where [the] court was informed that defendant's absence because of police detention would likely be brief." *Nichols*, 56 F.3d at 418.

147. *Nichols*, 56 F.3d at 418 (quoting *United States v. Sanchez*, 790 F.2d 245, 250–51 (2d Cir. 1986)).

148. *Id.* at 418.

indifference to and disdain for the proceedings.”<sup>149</sup> Consequently, it found that the trial court’s decision to proceed was within its discretion.<sup>150</sup>

*Tortora*’s supervisory balancing-of-interests analysis has been endorsed by the First,<sup>151</sup> Fourth,<sup>152</sup> Fifth,<sup>153</sup> Eighth,<sup>154</sup> Tenth,<sup>155</sup> and Eleventh<sup>156</sup> Circuits, and has been rejected by the Ninth.<sup>157</sup> Contrary to *Nichols*’s description of a trial court’s “broad discretion,”<sup>158</sup> the Fifth Circuit has emphasized the narrowness of the trial court’s discretion.<sup>159</sup> In *United States v. Benavides*,<sup>160</sup> the Fifth Circuit’s most influential opinion, the court stated that a trial judge “has ‘only a narrow discretion’ in deciding whether to proceed with a trial when the defendant is voluntarily *in absentia* because the right to be present at one’s own trial must be carefully safeguarded.”<sup>161</sup> This characterization has been repeatedly reaffirmed in the Fifth Circuit.<sup>162</sup> In *Beltran-Nunez*, while agreeing with *Tortora*’s “cogent” enumeration of the issues to be considered and expressly adding an assessment of the inconvenience to

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149. *Id.*

150. *Id.*

151. *United States v. Latham*, 874 F.2d 852, 857–58 (1st Cir. 1989) (adoption of *Tortora*).

152. *United States v. Rogers*, 853 F.2d 249, 252 (4th Cir. 1988) (endorsing *Tortora* and its footnote about multiple-defendant trials, but noting that an erroneous trial court decision may be harmless).

153. *See United States v. Davis*, 61 F.3d 291, 302–03 (5th Cir. 1995) (applying *United States v. Benavides*, 596 F.2d 137 (5th Cir. 1979)); *United States v. Krout*, 56 F.3d 643, 646 n.5 (5th Cir. 1995) (inquiry on the record required); *United States v. Beltran-Nunez*, 716 F.2d 287, 290–91 (5th Cir. 1983) (applying *Benavides*); *Benavides*, 596 F.2d at 139–40 (adoption of *Tortora*).

154. *United States v. St. James*, 415 F.3d 800, 803–04 (8th Cir. 2005) (factual findings required); *United States v. Wallingford*, 82 F.3d 278, 280 (8th Cir. 1996) (district court should make a record inquiry to attempt to ascertain the explanation for absence).

155. *United States v. Wright*, 932 F.2d 868, 879 (10th Cir. 1991) (endorsement of *Tortora* reiterating its footnote about multi-defendant trials), *overruled on other grounds by United States v. Flowers*, 464 F.3d 1127 (10th Cir. 2006).

156. *United States v. Bradford*, 237 F.3d 1306, 1312–14 (11th Cir. 2001) (application of *Tortora* and *Nichols*).

157. *United States v. Houtchens*, 926 F.2d 824, 827 (9th Cir. 1991) (review limited to factual finding that defendant knowingly and voluntarily failed to appear).

158. *United States v. Nichols*, 56 F.3d 403, 418 (2d Cir. 1995).

159. *See, e.g., United States v. Benavides*, 596 F.2d 137, 139–40 (5th Cir. 1979).

160. *Id.* at 137.

161. *Id.* at 139 (quoting *Smith v. United States*, 357 F.2d 486, 490 (5th Cir. 1966)).

162. *See United States v. Bone*, 43 F.3d 669, 1994 WL 10119, at \*5 (5th Cir. 1994); *United States v. Beltran-Nunez*, 716 F.2d 287, 291 (5th Cir. 1983).

jurors as a factor,<sup>163</sup> the court also observed,

Of course, had an inquiry before the trial proceeded established for the record that the defendant had deliberately absented himself and that there was no reasonable probability he could be located shortly, we would be loath to say that the district court would have abused its discretion by failing to delay or reschedule the trial.<sup>164</sup>

As in *Nichols*, the reasonable prospect that the defendant may soon participate often weighs heavily in the balance.<sup>165</sup> In *United States v. Bradford*,<sup>166</sup> the Eleventh Circuit discussed *Nichols* and observed that “[w]hether the district court’s discretion is characterized as broad or narrow,” it agreed with the Second Circuit “that a defendant’s obstructionist and willful behavior, and its effect on the orderly administration of the court’s docket and the trial at hand, implicate a compelling public interest.”<sup>167</sup>

While parallels between the supervisory and prudential *Tortora–Nichols* balancing test and *Allen*’s forfeiture-like analysis at times rise to the surface in Court of Appeals’ consideration of the nature of the public interest, the two inquiries are of course quite different. Judicial characterizations of the *Tortora–Nichols* test emphasize the weight to be afforded a defendant’s right to be present far more expressly than did *Allen*, and require a particularized assessment of the interests involved. *Allen*’s methodology nevertheless provided an influential backdrop against which this independent supervisory analysis developed.

#### *B. Consideration of Similar Approaches Among the States*

Reaction to the federal balancing test among state courts has been generally unreceptive. Among those states expressly considering its adoption as a prudential constraint upon judicial discretion, a clear majority has rejected it. Constitutional waiver analysis, inquiring as to whether a defendant’s absence is voluntary, has remained the principal

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163. *Beltran-Nunez*, 716 F.2d at 290. *Tortora*’s list of issues did not purport to be exhaustive, and the First Circuit has also expressly included a “co-defendant’s right to a speedy trial.” See *United States v. Latham*, 874 F.2d 852, 858 (1st Cir. 1989) (quoting *United States v. Lochan*, 674 F.2d 960, 967–68 (1st Cir. 1982)).

164. *Beltran-Nunez*, 716 F.2d at 291.

165. *Id.* at 290.

166. *United States v. Bradford*, 237 F.3d 1306 (11th Cir. 2001).

167. *Id.* at 1314.

focus. For example, in *State v. Thomson*, the Supreme Court of Washington considered the continuation of the drug trial of Thomson and his codefendant after the former's midtrial flight.<sup>168</sup> The trial court had predicated its decision to proceed upon Thomson's voluntary absence and its inability to locate him.<sup>169</sup> The Supreme Court of Washington stated that, in contrast to *Tortora's* balancing analysis, Washington's "voluntary waiver approach" governed a trial court's exercise of discretion in continuing the proceedings following a defendant's midtrial flight.<sup>170</sup>

Under the voluntary waiver approach, the court only need answer one question: whether the defendant's absence is voluntary. A voluntary absence operates as an implied waiver of the right to be present. If the court finds a waiver of the right to be present after trial has begun, the court is free to exercise its discretion to continue the trial without further consideration.<sup>171</sup>

The court emphasized the need for a sufficient inquiry and a "preliminary finding of voluntariness," as well as the requirement that a defendant must be afforded "an adequate opportunity to explain his absence" when he is in custody and before sentence is imposed.<sup>172</sup> As Thomson's absence remained unexplained, the trial court had not abused its discretion.<sup>173</sup> Decided before *Nichols*, *Thomson* noted that it regarded the federal approach as permitting the continuation of trial "only in extraordinary circumstances."<sup>174</sup>

Both before and after *Nichols's* augmentation of *Tortora*, a significant number of state courts have declined to require balancing because of their view that its restraints upon judicial discretion are inappropriate or even unauthorized. A recent case reaching the latter conclusion was decided by the Supreme Court of Minnesota in 2010.<sup>175</sup> In *State v. Finnegan*, while observing that "the issue of whether [Minnesota] should

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168. *State v. Thomson*, 872 P.2d 1097, 1099 (Wash. 1994).

169. *Id.* Although the codefendant had expressed concern about a continuance because his speedy trial date had expired, the court did not appear to regard this fact as significant in its analysis. *Id.*

170. *Id.* at 1100–01.

171. *Id.* at 1100. Continuation of the trial is not required, however. *Id.* at 1101.

172. *Id.*

173. *Id.*

174. *Id.*

175. *State v. Finnegan*, 784 N.W.2d 243 (Minn. 2010).

adopt the federal balancing approach” was not before it,<sup>176</sup> that court nevertheless disagreed in detail with the dissent’s suggestion that it do so, stating,

[W]e have addressed this issue before and have never directed district courts to consider a second prong after they make a determination that a defendant is voluntarily absent from trial. The Second Circuit adopted its balancing approach only after determining that the trial court had the discretion to decide whether proceedings should be held even where the court had determined the defendant was voluntarily absent. We have never held that a district court is to address a second prong involving a “complex of issues” after determining a defendant is voluntarily absent from trial. Rather, under our precedent, a determination that a defendant was voluntarily absent from trial ends the analysis of whether the trial must continue.<sup>177</sup>

Although Rule 26.03 of the Minnesota Rules of Criminal Procedure<sup>178</sup> was worded similarly to federal Rule 43, and the dissent urged that the state rule be interpreted as affording a trial court similar discretion as to whether to proceed,<sup>179</sup> the court replied, “Regardless of how federal courts have interpreted federal rules, our precedent gives effect to the word ‘shall’” by mandating that a trial court continue after its determination that a defendant “is voluntarily absent.”<sup>180</sup> The Supreme Courts of New Jersey,<sup>181</sup> Pennsylvania,<sup>182</sup> Hawaii<sup>183</sup> and

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176. *Id.* at 248 n.3.

177. *Id.* (citation omitted).

178. The version of Rule 26.03 of the Minnesota Rules of Criminal Procedure in effect at the time of Finnegan’s trial, according to Justice Meyer’s dissent in *Finnegan*, provided, in pertinent part, for the following:

(2) *Continued Presence Not Required.* The further progress of a trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to waive the right to be present whenever:

1. a defendant voluntarily and without justification absents himself or herself after trial has commenced.

*Id.* at 258 n.1 (Meyer, J., dissenting).

179. *See id.* at 258–59.

180. *Id.* at 248 n.3 (majority opinion).

181. *See State v. Hudson*, 574 A.2d 434, 442–43 (N.J. 1990) (voluntary and unjustified absence permits proceeding with trial).

182. *See Commonwealth v. Wilson*, 712 A.2d 735, 739 (Pa. 1998). *Wilson* implicitly declined to follow the Second Circuit’s approach, and the court noted that “even if we were to adopt the *Tortora* test,” the defendant could not demonstrate that the trial should have been

Connecticut,<sup>184</sup> in considering and rejecting a balancing requirement, have found a voluntary waiver inquiry to be adequate. Intermediate appellate courts in Idaho<sup>185</sup> and Texas<sup>186</sup> have agreed.

In contrast, the high courts of New York, Delaware, and Maryland have required balancing-of-interests analyses. In *People v. Parker*, considering the matter under the federal and state constitutions, the New York Court of Appeals initially concluded that there had been an insufficient showing that the defendant's rights had been knowingly, voluntarily and intelligently waived.<sup>187</sup> The court then added,

We consider it appropriate to emphasize that even after the court has determined that a defendant has waived the right to be present at trial by not appearing after being apprised of the right and the consequences of nonappearance, trial *in absentia* is not thereby automatically authorized. Rather, the trial court must exercise its sound discretion upon consideration of all appropriate factors, including the possibility that defendant could be located within a reasonable period of time, the difficulty

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delayed. *Id.* *Wilson* did agree, however, that the matters discussed in *Tortora*, while not exhaustive, presented "reasonable and logical issues for a trial court to weigh." *Id.*

183. *See* *State v. Caraballo*, 615 P.2d 91, 100 (Haw. 1980). In *Caraballo*, the court adopted what it characterized as "the majority rule set out in *Diaz*," stating that "where defendant has voluntarily absented himself after the trial has begun, this operates as a waiver of his right to be present and the trial may continue as if he were present." *Id.* *Caraballo* distinguished the court's earlier use of the *Tortora* balancing test in *State v. Okumura*, 570 P.2d 848, 852 (Haw. 1977), on the ground that Okumura had not been absent voluntarily because he required immediate medical treatment as the result of injuries incurred during an attempt to escape from the courtroom. *Caraballo*, 615 P.2d at 100.

184. The disfavor with which a balancing requirement has been regarded by the Supreme Court of Connecticut is reflected in its statement in *State v. Durkin*, that "we previously have declined an invitation to adopt the *Tortora* test in this state" and "[t]he defendant has offered no persuasive reason why the test should be embraced now." *State v. Durkin*, 595 A.2d 826, 832 n.10 (Conn. 1991). *Durkin* had involved a probation revocation hearing, and the court cited *State v. Drakeford*. *Id.* (citing 519 A.2d 1194 (Conn. 1987)). In *Drakeford*, the court had found *Tortora's* balancing to be inappropriate when the criminal defendant had been present in the courtroom at the time that he elected to leave. *See id.* at 1198.

185. *See* *State v. Elliott*, 882 P.2d 978, 983 (Idaho Ct. App. 1994) (expressing a preference for Washington's analysis in *State v. Thomson*).

186. *See* *Moore v. State*, 670 S.W.2d 259, 261 (Tex. Crim. App. 1984) (stating that analysis of *Benavides* is not required with regard to trial court's exercise of discretion).

187. *People v. Parker*, 440 N.E.2d 1313, 1316 (N.Y. 1982). Charged with the sale of drugs, the defendant had failed to appear before trial began. *Id.* at 1314. The court stated that "the record . . . is devoid of any evidence indicating that defendant was ever apprised or otherwise aware that her trial would proceed in her absence." *Id.* at 1316.

of rescheduling trial and the chance that evidence will be lost or witnesses will disappear. In most cases the simple expedient of adjournment pending execution of a bench warrant could provide an alternative to trial *in absentia* unless, of course, the prosecution can demonstrate that such a course of action would be totally futile.<sup>188</sup>

In *Bradshaw v. State*,<sup>189</sup> the Supreme Court of Delaware followed a similar approach after noting that there was insufficient evidence of waiver<sup>190</sup> during the defendant's absence when his unauthorized counsel agreed to permit the court to give an *Allen* charge<sup>191</sup> and when the charge was given.<sup>192</sup> Observing that Rule 43 of the Delaware Superior Court Rules of Criminal Procedure "was modeled after Federal Rule of Criminal Procedure 43, so precedent regarding that rule is germane,"<sup>193</sup> the court added,

[W]e cannot say that Bradshaw's absence prevented "[t]he further progress of the trial. . . ." When a defendant is voluntarily absent, federal courts have considered a list of factors in determining whether the trial should proceed without a defendant, including "the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling; . . . [and] the burden on the Government." There was no evidence that the trial judge or counsel on either side even touched upon these commonsense considerations.<sup>194</sup>

The Court of Appeals of Maryland has repeatedly required a balancing of the interests of the defendant and the state,<sup>195</sup> while

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188. *Id.* at 1317 (citation omitted).

189. *Bradshaw v. State*, 806 A.2d 131 (Del. 2002).

190. *Id.* at 136. The court addressed the issue of waiver solely under Delaware's rules. *Id.* at 134.

191. *Id.* *Allen v. United States* permits a supplemental charge encouraging a deadlocked jury to arrive at a verdict. *See* 164 U.S. 492, 501 (1896).

192. *Bradshaw*, 806 A.2d at 134.

193. *Id.* at 135 (footnote omitted).

194. *Id.* at 136 (footnote omitted) (citing *United States v. Tortora*, 464 F.2d 1202, 1210 (2d Cir. 1972)).

195. *See Collins v. State*, 829 A.2d 992, 1001–03 (Md. 2003) (noting that trial court's discretion to proceed was properly exercised when it "had no idea when [defendant] would become available and expressed concern that jury's term might expire"); *Pinkney v. State*, 711 A.2d 205, 216–17 (Md. 1998) (noting that both the trial court's waiver inquiry and its consideration of respective interests were inadequate); *see also State v. Clements*, 765 P.2d 1195, 1201 (N.M. Ct. App. 1988) (endorsing balancing).

“declin[ing] to mandate any particular list” of factors to be considered.<sup>196</sup>

The mixed reaction to the imposition of a prudential balancing-of-interests approach underscores the constitutional ability of state and federal courts to forego any inquiry beyond that of a defendant’s waiver, and to proceed to trial in his or her absence.<sup>197</sup> A question remains as to whether this constitutional state of affairs provides a standard that is commensurate with the critical importance of the right to be present.

#### IV. REFINING THE CONSTITUTIONAL STANDARD

While it is evident that courts have implemented a criminal defendant’s constitutional right to be present by assessing its relinquishment as a knowing, voluntary and intelligent waiver, the issue of the voluntariness of a defendant’s absence has thus often occupied center stage. Conspicuously absent from these constitutional analyses has been the need for any inquiry as to when a defendant’s presence might be secured.<sup>198</sup> Courts have seemingly been comfortable with consigning the issue to the discretion of the trial court.<sup>199</sup> *Tortora–Nichols*’ prudential balancing does provide some framework for those courts employing it. As for the constitutional standard, however, the Washington Supreme Court’s articulation of its “voluntary waiver” approach is generally descriptive: “If the court finds a waiver of the right to be present after trial has begun, the court is free to exercise its discretion to continue the trial without further consideration.”<sup>200</sup> The Minnesota Supreme Court’s approach, actually foreclosing judicial inquiry beyond the question of voluntariness, remains unusual.<sup>201</sup> Its analysis does, however, highlight the absence of a perception of any constitutional need for the use of judicial discretion in addressing such matters as a defendant’s availability.

Perhaps the widely-used waiver standard is now as it should be. We are, after all, quite comfortable with traditional constitutional waiver analysis, and, as there does not appear to be a trend towards Minnesota’s view, we are also quite comfortable with the exercise of judicial discretion. A defendant’s voluntary, knowing and intelligent

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196. *Collins*, 829 A.2d at 1003.

197. *See supra* notes 151–57 and accompanying text.

198. *See supra* note 129 and accompanying text.

199. *See supra* note 129 and accompanying text.

200. *State v. Thomson*, 872 P.2d 1097, 1100 (Wash. 1994).

201. *State v. Finnegan*, 784 N.W.2d 243, 248 n.3 (Minn. 2010).

absence from the carefully constructed legal process that society has developed to afford fairness might, in fact, provide an appropriate beginning and end to the constitutional inquiry.

This might be an appropriate perspective if the presence of the defendant at a criminal trial were a characteristic of our criminal justice system that accrued to the benefit of the defendant alone. That view of a defendant's right to be present is, however, clearly at odds with widely-acknowledged properties of the right. There are reasons why a criminal trial *in absentia* is so jarring to American sensibilities. The constitutional status of a defendant's right to be present furthers basic and profound societal values. These interests demand a more searching standard for the relinquishment of the right than a waiver analysis alone. The task of refining a standard is also made more difficult by the need to acknowledge at the outset that the implicated values of society are multifaceted. Society's interests in affording a criminal defendant a right to be present are of course accompanied by the imperative that justice be administered in an appropriate and orderly manner.<sup>202</sup> The challenge of refining the constitutional standard for assessing a relinquishment of the right is the challenge of adequately accommodating both interests.

Common law discussion of the right to be present at trial appears to have focused primarily upon the benefits that the right provided to the defendant. For example, the Supreme Court of Pennsylvania's 1851 observation in *Prine v. Commonwealth*,<sup>203</sup> quoted in *Crosby*,<sup>204</sup> that the defendants' presence "inclin[ed] the hearts of the jurors to listen to his defence with indulgence,"<sup>205</sup> was supplemented by observations that the personalization of the process afforded by a defendant's presence required that he or she be available to discuss questions of law and fact,<sup>206</sup> to "point out and argue objections to the actions of the jury,"<sup>207</sup> to be heard,<sup>208</sup> to confront accusers,<sup>209</sup> to hear and observe jury

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202. See *supra* note 129 and accompanying text.

203. *Prine v. Commonwealth*, 18 Pa. 103 (1851).

204. See *supra* note 109 and accompanying text.

205. *Prine*, 18 Pa. at 104.

206. See *State v. Hughes*, 2 Ala. 102, 104 (1841) (Alabama Constitution was "affirmatory of the common law").

207. See *id.*

208. See *id.*

209. See *People v. Restell*, 3 Hill 289, 294 (N.Y. Sup. Ct. 1842).

instructions,<sup>210</sup> and to poll the jury.<sup>211</sup> Broad Supreme Court characterizations of the significance to the defendant of the constitutional right to be present have ranged from the Court's description in *Allen* of the right to be present as "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause"<sup>212</sup> to its statement in *Diaz* that "[i]n cases of felony our courts, with substantial accord, have regarded it . . . as being scarcely less important to the accused than the right of trial itself."<sup>213</sup>

Extending well beyond the fundamental ability of a defendant to avail him or herself of the attributes of the trial process, two societal values served by a criminal defendant's constitutional right to be present stand out most prominently. Most significant are society's interest "in an accurate determination of guilt" and society's need for "public confidence in the judiciary as an instrument of justice."<sup>214</sup> These characterizations of the State's interests were set forth by the Court of Appeals of Maryland in quite a different context, when it considered the factors to be weighed in the implementation of a prudential *Tortora* analysis.<sup>215</sup> They aptly describe the societal values served by the constitutional right itself. The right to defend, personal in nature<sup>216</sup> and so obviously furthered by the defendant's presence, ultimately serves the critical ability of our adversarial system to determine truth.<sup>217</sup> While the determination of the defendant's culpability of course remains central, the authors of one commentary have added that a trial's ascertaining of the truth also serves other societal goals, such as the identification and condemnation of wrongs that "should attract a public, formal response."<sup>218</sup> The value of public confidence in the fairness of

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210. See *O'Connor v. Guthrie & Jordan*, 11 Iowa 80, 80 (1860).

211. See *People v. Perkins*, 1 Wend. 91 (N.Y. Sup. Ct. 1828). See generally 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 635-36 (1847) ("[V]erdict . . . must, in all cases of felony and treason be delivered in the presence of the defendant, in open court, and cannot be either privily given, or promulgated while he is absent . . .").

212. *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

213. *Diaz v. United States*, 223 U.S. 442, 455 (1912).

214. *Pinkney v. State*, 711 A.2d 205, 214 (Md. 1998).

215. See *id.* at 227.

216. See *Faretta v. California*, 422 U.S. 806, 819-20 (1975).

217. For a view of "the significance of truth as the goal of the [criminal] trial" see 3 ANTHONY DUFF ET AL., *THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* 79 (2007).

218. *Id.* at 82.

this process also continues to be of perennial importance.<sup>219</sup> These values are inadequately served by a bare inquiry into whether a defendant, as an individual, has voluntarily waived his right to be present. At a minimum, in addition to weighing the reasons for a defendant's absence, an examination of the possibility of expeditiously securing his presence is warranted.

While there is an evident need for a more refined constitutional standard for relinquishment, any suggested approach must afford a sufficiently clear framework for its implementation. The unstructured nature of the *Tortora–Nichols* “complex of issues” inquiry makes it unsuited for wholesale incorporation into a constitutional test. It is nevertheless possible to suggest a process for assessing the constitutional validity of a relinquishment, which is sufficiently structured and which takes into account important considerations highlighted by the *Tortora–Nichols* discussion. A trial court's consideration should of course begin with waiver analysis, and a focus on the voluntariness of a defendant's absence should continue to be its cornerstone. If the standards for waiver are satisfied, the court should be required to proceed to the question of whether there is a reasonable possibility that the defendant's presence can be secured. Some of the facts addressed during the waiver inquiry might well bear upon this issue. It is also possible that the prosecutor can demonstrate that there is no reasonable possibility that defendant's presence might be obtained. If this is the case, the constitutional standard for the relinquishment of the right should be deemed to be satisfied, and the trial court should be free to exercise its discretion as to whether to proceed *in absentia*. Such judicial discretion on the matter would remain undisturbed by any refinement of the constitutional standard.

It is of course probable that this inquiry into the feasibility of securing a defendant's presence would yield little information, and that the issuance of a bench warrant or another less formal procedure would be appropriate. Unless the prosecution can demonstrate its futility (as outlined above),<sup>220</sup> or can demonstrate the presence of a compelling

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219. A 1998 study by the American Bar Association revealed overall confidence in the American criminal justice system to be surprisingly low. See AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 49–50 (1999). Another has observed that perceptions of procedural fairness weigh heavily in the formulation of public confidence in state courts. See Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 699, 703–04 (2006).

220. *People v. Parker*, 440 N.E.2d 1313, 1317 (N.Y. 1982).

need (as discussed below),<sup>221</sup> the process of attempting to secure a defendant's presence should also be a prerequisite to affording a court the constitutional authority to proceed *in absentia*.

Recognition of limitations upon the effectiveness of bench warrants also compels the conclusion that this should not be an open-ended process. A period of forty-eight hours would seem to be sufficient in order to determine whether a bench warrant or other measure is productive, and if the defendant is not present within that time a court should be free to exercise its discretion in deciding to proceed without him. It is also evident from the *Tortora–Nichols* discussion that there may be unusual compelling circumstances in which the needs of the prosecution should permit proceeding *in absentia* without the delay occasioned by the process of attempting to secure a defendant's presence. An example would be a situation in which a witness is in danger. Such compelling needs would be rare and best determined on a case-specific basis. This process, as well as the court's affording the prosecution an initial opportunity to demonstrate that a defendant's presence cannot reasonably be obtained, provides a flexibility that should satisfy critics who would argue that this suggested approach is unworkable.

The principal characteristic of this suggested constitutional approach is to move beyond the current waiver and voluntariness analyses, which inquire into the reason for the defendant's absence, and require that attention be paid to the actual prospect of securing his appearance. A shift in this direction, making adequate accommodation for the need to proceed with the orderly administration of justice, is clearly needed if all of the values embodied in the right to be present are to be adequately served. While the current employment of a voluntary waiver analysis does present a seductive symmetry when compared with the standards for relinquishment of many other constitutional rights, a court's choice to proceed with a trial *in absentia* truly does present the singular considerations highlighted above. If the Supreme Court's previous characterizations of the importance of the right to be present have significance, and if the reliability and fairness of our adversarial system are to be adequately furthered, a modification of the currently prevalent constitutional relinquishment analysis would be both appropriate and feasible.

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221. *State v. Finnegan*, 784 N.W.2d 243, 258–59 (Minn. 2010).