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TRIAL IN ABSENTIA: RESCUING THE "PUBLIC NECESSITY" REQUIREMENT TO PROCEED WITH A TRIAL IN THE DEFENDANT'S ABSENCE

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I. INTRODUCTION

It is a requirement of any legal system to decide its cases quickly. Very important issues are involved in this necessity. First, punishments must be applied close to the time of the commission of the crime for which the punishment is administered. If the punishment serves any purpose (deterrence, rehabilitation or retribution), it makes no sense to postpone its application without a sound reason. The sooner it is applied, the more efficient it becomes.

Second, the trial, which is the only legal way to apply a punishment, would not function properly if the cases are decided long after the criminal conduct. Witnesses tend to forget about past actions, some of them move out of the city, and records get lost. In sum, it becomes more difficult for both the government and the defendant to collect evidence.

Finally, if society has a legitimate interest in the resolution of criminal cases, it is obvious that a delay in trial and punishment does not help to fortify the confidence of the people in the judicial system. One way to avoid these negative consequences is a trial in absentia because it helps to prevent the defendants from manipulating the judicial system by deciding with their presence whether or not a case can by tried.

Still, there are some rules to respect in order to proceed with a trial in such a manner, and there are some practical reasons for doing so. This paper analyzes the requisite established by the *Tortora* test[2] that there must be a public necessity to proceed with a trial in absentia even when the defendant has waived his right to be present. First, it will give a brief explanation about the historical reasons for the necessary presence of defendant at trial in common law and the current federal regulation in criminal procedure. Next, it will explain the content of this "public necessity" according to the Federal Courts of Appeals and the standard set up by the Supreme Court decision in *Crosby*[3]. Finally, it will explain the necessity of the public interest to proceed with a trial in absentia and it will highlight, in the conclusion, the importance of this balancing test in order to prevent any arbitrary application of trials in absentia by the courts.

1. J.D., University of Buenos Aires, Argentina (2000); L.L.M., University of Pittsburgh (2006); Public Defender in Buenos Aires, Argentina.
2. United States v. Tortora, 464 F.2d 1202 (2d Cir.1972).
3. Crosby v. United States, 506 U.S. 255 (1993).

II. BRIEF HISTORY OF THE DEFENDANT'S NECESSARY PRESENCE AT TRIAL

The notion that a person can be tried without his presence is quite shocking, especially in an adversarial legal system such as the common law. The exigency of the defendant's presence at his trial has historical roots, but fortunately, this exigency no longer exists.

At early common law, the presence of both parties was necessary. This necessity was required because the trial resembled a civil suit in which one individual personally accused another.[4] One of the most common methods by which to seek justice was the trial by ordeal; by which the guilt or innocence of the defendant was determined according to the water or fire test.[5] Consequently, only the defendant who was present was able to be tested.[6] After the Norman Conquest in 1066, the trial by battle replaced the former.[7] The new method also required the defendant's presence as one of the combatants.[8] As time went by and the system of proof changed, the defendant's presence became a necessity, "[t]o put his case before a judge, vest that judge with authority and choose between trial by battle or 'suit of witnesses'."[9] Finally, when trial by jury replaced the systems mentioned above, the rule was retained and the presence of the defendant was still required.[10]

III. CURRENT REGULATION

The Federal Rule of Criminal Procedure 43 establishes the principle that the defendant must be present for trials involving felonies. There are some exceptions though. Rule 43[11] provides:

> (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 empanelment and the return of the verdict; and
>
> (3) sentencing.

4. Neil P. Cohen, *Trial in Absentia Re-Examined*, 40 TENN. L. REV. 155, 167 (1973).

5. *Id.* The defendant would have to personally subject himself to water or fire tests to determine his innocence. Under the water test, the defendant would be bound and thrown into water, if he sank to the bottom he was presumed to be innocent. Under the fire test, the defendant would walk through a fire, and any burns sustained would be indicative of guilt.

6. *Id.*; James G. Starkey, *Trial in Absentia*, 54 N.Y. ST. B.J. 30, 30 (1982).

7. Cohen, *supra* note 4, at 168; Starkey, *supra* note 6, at 30. Trial by battle required the defendant to wage battle against another; if he were innocent, it was assumed that God would help him win the battle.

8. Starkey, *supra* note 6, at 30; *see also* Cohen, *supra* note 4, at 168.

9. Cohen, *supra* note 4, at 168.

10. Starkey, *supra* note 6, at 30.

11. FED. R. CRIM. P. 43.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) Organizational Defendant. The defendant is an organization represented by counsel who is present.

(2) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.

(3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.

(4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(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

(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.

According to the Advisory Committee Notes, the adoption and later amendments of the Federal Rule tend to reflect the case law that existed on this topic. [12]

12. FED. R. CRIM. P. 43 advisory committee's notes.

IV. CASE LAW

Diaz v. United States,[13] was the first non-capital case in which the Supreme Court addressed a trial in absentia claim. In *Diaz*, the defendant was on bail and voluntarily absented himself from the trial on two occasions during the testimony of two witnesses for the government.[14] The defendant consented to the trial proceeding in his absence, in the presence of his counsel, which it did.[15] The Court concluded that in non-capital cases where the accused was not in custody, his voluntarily absence after the trial has begun in his presence operates as a waiver of his right to be present, and leaves the court free to proceed with the trial as if he were present.[16]

The Court stated that the Constitution guarantees a defendant's right to confront the witnesses against him, but it, "[d]oes not guarantee an accused person against the legitimate consequences of his own wrongful acts."[17] The Court remarked that it was a voluntary decision and if it had decided in a different way the possibility of convicting a defendant would depend upon the defendant's entire willingness to be present at the time the verdict is rendered.[18]

The Supreme Court addressed the problem again in *Illinois v. Allen.*[19] In *Allen*, the accused had been removed from the courtroom because of misconduct after he had been warned by the trial judge.[20] Following his conviction, the defendant raised a claim based on the rights guaranteed by the Confrontation Clause.[21] The Court concluded that the defendant's behavior justified either his removal from the courtroom or his total physical restraint, and it was within the judge's discretion to do as he did.[22] Under these circumstances, the defendant lost his right guaranteed by the Sixth and Fourteenth Amendments to be present throughout his trial.[23] The language used by the court led some law professors to talk about forfeiture rather than a waiver of a constitutional right.[24] The decision stated that it was neither proper for the American judicial system to be treated disrespectfully, "[n]or can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him."[25]

A few years later, in *Taylor v. United States*,[26] the Supreme Court decided a case where the defendant had been present at the morning session of his trial but failed to return for the afternoon session and was consequently tried and convicted

13. Diaz v. United States, 223 U.S. 442 (1912).
14. *Id.* at 444.
15. *Id.* at 454.
16. *Id.* at 455.
17. *Id.* at 452.
18. *Id.* at 456 (citing Barton v. State, 67 Ga. 653 (Ga. 1881)).
19. Illinois v. Allen, 397 U.S. 337 (1970).
20. *Id.* at 340–41.
21. *Id.* at 339.
22. *Id.* at 346–47.
23. *Id.* at 346.
24. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1093 (West Group ed., West Publishing 3d ed. 2000).
25. *Allen*, 397 U.S. at 346.
26. Taylor v. United States, 414 U.S. 17 (1973).

in absentia. Taylor claimed that his mere voluntary absence could not be construed as an effective waiver of his right to be present during trial, unless it was demonstrated that he knew or had been warned that he had a right to be present and that the trial would continue in his absence.[27] Under Rule 43 and *Diaz*, the Court concluded that the defendant waived his right to be present by his voluntary absence.[28] It is unbelievable, "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."[29] As a consequence of the defendant's actions, the implicit waiver of his right to be present was set forth.

The language used by the Court referring to the waiver of a right was supported by *Johnson v. Zerbst,*[30] which explains the two elements of a waiver of fundamental constitutional rights: *intention* of relinquishment or abandonment and, *knowing* that the person has a right or privilege.[31] The waiver must be intelligent and competent.[32] The federal courts of appeal moved forward to the possibility of trying a person in absentia even though he had been absent from the beginning of the trial. In *United States v. Tortora,*[33] the Second Circuit court of appeals upheld the holding that if a defendant had plead to the charges against him and knew that the trial was to begin on a certain day but failed to appear without sound reason, then he had waived his constitutional right to be present, knowingly and voluntarily, so the trial could start in his absence. Pleading to the charges was essential in *Tortora* because it was clear that the defendant had been advised when the proceedings were to commence.[34] Furthermore, there was no element to justify his failure to appear.[35] Thus, it was without question that his absence was voluntary and knowing.[36]

In addition, the court invoked the policy that underlies the precedents on the subject by expressing that there was a public interest demanding that criminal proceedings be prosecuted with dispatch.[37] However, the court went further on this issue and stated another element to determine when the trial judge should exercise his discretion to proceed with the trial: "[w]hen the public interest clearly outweighs that of the voluntarily absent defendant."[38] This "public interest" is a complex of issues and includes:

> [T]he likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in mul-

27. *Id.* at 19.
28. *Id.* at 20.
29. *Id.*
30. Johnson v. Zerbst, 304 U.S. 458 (1938).
31. *Id.* at 464 (emphasis added).
32. *Id.* at 464–65.
33. *Tortora*, 464 F.2d 1202.
34. *Id.* at 1208.
35. *Id.*
36. *Id.* at 1209.
37. *Id.* (citing *Allen*, 397 U.S. at 349 (Brennan, J., concurring)).
38. *Id.* at 1210.

> tiple-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.[39]

Indeed the court explained that it was difficult to conceive this exercise of discretion other than in a multiple-defendant case.[40] Thus, the "*Tortora* test" is composed of two prongs: 1) whether or not the defendant waived voluntarily and knowingly his constitutional right to be present at trial; and 2) whether or not there is any public interest that advises starting with the trial even though he is not present.[41]

A. What has been Considered Sufficient to Constitute "Public Necessity"?

As stated before, this paper will focus on the second prong of the *Tortora* analysis, in order to determine and classify what has been considered sufficient "public interest" to justify a trial in absentia. Material about what can be considered a waiver of the right to be present can be found in the United States Code Annotated[42] .

1. The "Public Necessity" Where the Defendant was Absent at the Beginning of the Trial

The "public necessity" prong was applied in several opportunities to conduct trials in absentia where the defendant was not present at the onset of the trial. In a situation where the defendant did not appear at the appointed time of his trial, but did appear later that day, offering no explanation for his absence, the court ruled that this was a voluntary absence because he had been released on bond, and one of the conditions was his voluntary appearance for trial.[43] In addition, the defendant had been served with a subpoena ordering him to appear in court.[44] This case was decided in *Government of the Virgin Islands v. Brown*, where the court said that there were no, "[t]alismanic properties which differentiate the commencement of a trial from later stages".[45] It quoted *Tortora*, only in relation to the possibility of waiving the right to be present at the commencement of his trial.[46] The court did not say anything about the public necessity prong.[47]

39. *Id.*
40. *Id.* at 1210 n.7.
41. *Id.* at 1210.
42. 28 U.S.C.A. §§ 1651, 1654–57 (2006); U.S. CONST. Amend. VI.
43. Government of the Virgin Islands v. Brown, 507 F.2d 186 (3d Cir.1975).
44. *Id.* at 189.
45. *Id.*
46. *Id.*
47. *Id.*

United States v. Peterson involved six defendants who had been jointly indicted.[48] All of the defendants were present and prepared for trial except one.[49] The court concluded that since the likelihood of defendant's speedy return was remote because he was released on bond, and over twenty government witnesses had been assembled, it would be prejudicial for the government to seek a continuance.[50] The court also pointed out that the government's chief witness and potential accomplice in the crime had already proved to be recalcitrant, so a delay would provide her with an additional opportunity to abscond.[51] The fact of undertaking two trials, or the substantial risk that delay might prejudice the government's case outweighed the interests of the voluntarily absent defendant.[52]

United States v. Pastor involved a defendant who used his chronic angina pectoris as an excuse to frustrate and delay the commencement of his trial.[53] The defendant's actions resulted in his trial starting without his presence.[54] The court took into account the fact that more than fifty veniremen had been called and kept waiting at considerable trouble and expense, and that another courtroom had to be borrowed by special arrangement for the selection of the jury, due to the small size of the original one.[55] The court pointed out that in the event of a severance, the government would have been obligated to try the case twice (which took 12 days of trial), and that two of the government's witnesses were one elderly and an enfeebled material witness.[56] The District Court judge had arranged her schedule and time for the trial, and it was unlikely to find another case ready for immediate trial.[57] Moreover, the court also mentioned that the co-defendant, Weiner, was entitled to proceed with trial rather than face the indefinite adjournment that would probably have otherwise occurred.[58]

In a single defendant case, *Wilson v. Harris*, the court took into account, "[t]he public interest in an orderly system of justice and conservation of judicial resources" to continue with the trial.[59] The defendant was in custody, but refused to come to court the first day of trial.[60] The next day he was persuaded to attend, but he claimed that the handcuffing, mandatory because of a state regulation when defendants were en route from the courthouse detention room to the courtroom, would violate his constitutional rights at the time that he fired his second assigned attorney.[61] The court found that the defendant's behavior only attempted to disrupt

48. United States v. Peterson, 524 F.2d 167, 172 (4th Cir.1975).
49. *Id.* at 182–83.
50. *Id.* at 185–86.
51. *Id.* at 186.
52. *Id.*
53. United States v. Pastor, 557 F.2d 930, 937 (2d Cir.1977).
54. *Id.* at 937–38.
55. *Id.* at 938.
56. *Id.*
57. *Id.*
58. *Id.*
59. Wilson v. Harris, 595 F.2d 101, 104 (2d Cir.1979).
60. *Id.* at 103.
61. *Id.*

the processes of justice, by one means or another, and chose to continue with the trial.[62]

United States v. Benavides involved a situation where the jury was selected a few weeks before trial.[63] Although the two defendants were present during jury selection and also when the trial judge instructed the jury to return for the trial on a specific day, they failed to show up in court on that date.[64] The trial court continued the case overnight.[65] When the defendants did not appear in court the next day, the judge proceeded with the trial without them and without making any inquiry into whether or not the trial could soon be rescheduled with the defendants in attendance.[66] The court followed *Tortora's* "complex of issues" and added a new element: the inconvenience to jurors.[67] Nevertheless, the appellate court vacated the convictions on the grounds that other than the possibility of juror inconvenience, the record demonstrated no great difficulty in rescheduling the trial.[68] Indeed, there was no evidence indicating that a continuance would have unduly inconvenienced any person who had actually been selected as a member of the jury.[69] The government did not argue that it could not have produced its three witnesses had the trial been rescheduled to a later date.[70] Only these two people were charged in this trial, so it was not a big multiple defendant case.[71] Finally, there was no suggestion that the government's witnesses would be jeopardized or unavailable if the trial was delayed for a short time.[72]

In *United States v. Muzevsky*,[73] the court once again extended the public necessity prong to single defendant cases.[74] The court distinguished *Muzevsky* from *Peterson* affirming that these cases did not compel a per se rule that single defendant trials cannot proceed in a defendant's absence.[75] It noted that even when the difficulty in rescheduling and the possibility of prejudice to the government and other co-defendants is exacerbated in multiple defendant cases, the likelihood of the trial soon taking place with the defendant present and the preservation of testimony are more likely to be affected by circumstances other than the number of defendants.[76] The reason to proceed with the trial was triggered by the court's concern that delay would lead accomplices testifying against Muzevsky to change their testimony and that the other witnesses, mostly transient hotel employees, would not be available for a second trial.[77] The court also considered that, at the time of the trial, no in-

62. *Id.* at 104.
63. United States v. Benavides, 596 F.2d 137, 138 (5th Cir. 1979).
64. *Id.*
65. *Id.*
66. *Id.* at 140.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*; United States v. Beltran-Nunez, 716 F.2d 287, 291 (5th Cir. 1983).
73. United States v. Muzevsky, 760 F.2d 83 (4th Cir. 1985).
74. *Id.* at 84.
75. *Id.*
76. *Id.*
77. *Id.*

formation was available that would have allowed the court to predict if the defendant would appear within a reasonable time.[78]

In *United States v. Sanchez*, the defendant failed to appear on the trial day, even though he had been present during pre-trial conference when his trial date was set.[79] In addition, his co-defendant was present for the trial.[80] After a one-day continuance with notification to the defendant's attorney and the issuance of a bench warrant for Sanchez, the district judge granted the government's application for Sanchez to be tried in absentia.[81] The court stated that:

> [I]n a case with more than one defendant, Sanchez waived his right to be present by failing to appear without explanation and while on bail; that some reasonable steps, including a one-day continuation with notification to his attorney and the issuance of a bench warrant, were taken unsuccessfully in response to his non-appearance; that there was no reason to believe that the trial could likely soon be held with Sanchez present; and that severance would impose on the Government the burden of prosecuting two separate trials that would involve substantially the same evidence.[82]

Although the trial was brief, it was not clear at the beginning that this would be the case.[83] Even assuming it was known to be brief beforehand, a severance would have required the government to preserve records and other evidence and retain witnesses for a possible second trial sometime in the indefinite future.[84] Moreover, postponing the co-defendant's trial would have burdened both the government and the co-defendant, who had his own right to a speedy trial.[85]

In *United States v. Burnett*, one defendant was indicted with eight other individuals on several charges.[86] He attended a pre-trial conference where he was notified that there would be a final pre-trial conference and the date of the trial.[87] Subsequently, he left the community treatment center that he was attending and never returned.[88] At the time of the final pretrial conference he was still missing.[89] The government moved for him to be tried in absentia and the trial court, after a hearing, concluded that the defendant had waived his right to be present.[90] The court of appeals upheld the lower court's decision to try the defendant in absentia on the grounds that at the time of the hearing he was missing for more than three weeks,

78. *Id.* at 85.
79. United States v. Sanchez, 790 F.2d 245, 248 (2d Cir. 1986).
80. *Id.*
81. *Id.*
82. *Id.* at 251.
83. *Id.*
84. *Id.*
85. *Sanchez*, 790 F.2d at 251.
86. United States v. Burnett, 961 F.2d 1579 (6th Cir. 1992).
87. *Id.* at 1579.
88. *Id.*
89. *Id.*
90. *Id.*

and there was no indication of where the defendant was located or when he would be found.[91] The other defendants were waiting and the government would have been put to unnecessary expense had it been required to try the defendant separately.[92]

2. The "Public Necessity" Element was also Followed in Cases Where the Defendant had Fled After the Commencement of Trial

The First Circuit considered in *United States v. Lochan*, that once voluntary absence is found, a district court must determine whether a severance would be nevertheless appropriate.[93] Among the factors to consider are, "[t]he likelihood that a joint trial could take place in the future with the absent defendant present, the present codefendant's right to a speedy trial, the difficulty of rescheduling the trial, and the burdens on the government and the court in running two trials where the evidence is overlapping."[94] The court determined that the two defendants had been properly joined under Federal Rule of Criminal Procedure 8(b) and that a second trial of Lochan alone would duplicate the co-defendant's, including the same facts and witnesses.[95] Also, it weighed the burden on the government, the court and the jurors.[96]

In *United States v. Latham*,[97] the only defendant did not return to court for the second day of his trial.[98] The U.S. Marshal's office was informed that defendant had boarded an airplane bound for Chicago, and was expected to be in Chicago's airport to connect with a flight leaving for Arkansas.[99] Nevertheless, it was later found that this information was false and the reason for defendant's absence was cocaine intoxication.[100] The trial court denied the defense's motion for a continuance and a significant part of the trial was conducted in defendant's absence.[101] The court of appeals contemplated that among the factors to consider for a trial court to proceed with a trial in absentia were the likelihood that a joint trial could take place in the future with the absent defendant present, the present co-defendant's right to a speedy trial, and the burdens on the government and the court in running two trials where the evidence was overlapping.[102]

However, the court of appeals did not find any public interest to proceed with the trial in the defendant's absence.[103] Even if the airplane issue were true, there was a high likelihood that the trial could soon take place with the defendant

91. *Id.* at 1580.
92. *Id.*
93. United States v. Lochan, 674 F.2d 960, 967 (1st Cir. 1982).
94. *Id.* at 967–68.
95. *Id.* at 968.
96. *Id.*
97. United States v. Latham, 874 F.2d 852 (1st Cir. 1989).
98. *Id.* at 854.
99. *Id.* at 854–55.
100. *Id.* at 855.
101. *Id.*
102. *Id.* at 858.
103. *Latham*, 874 F.2d at 858–59.

present.[104] The defendant could have been apprehended at Chicago's airport within a few hours and returned for the trial.[105] In addition, the information received from the airline company could have been checked almost immediately and the majority of courts have waited much longer than one and a half hours before recommencing the trial without the defendant.[106] What is more, the government had already presented its evidence.[107] Consequently, the "complex[ity] of issues" which must be balanced even if the defendant was willingly absent, led to affirming that the district court should not have proceeded with the trial in defendant's absence after a short delay.[108]

In *United States v. Fontanez*, the trial commenced and ran with the defendant present.[109] Two days later, when jury deliberations had already initiated, the defendant was taken into police custody due to a crime unrelated to that for which he was being tried.[110] The jury requested a read-back of certain testimony, and the trial court, over defense counsel's objection and against the government's advice, allowed it, explaining that the defendant was "unavoidably detained".[111] As the jury was unable to reach a verdict, the court delivered a modified *Allen* charge, without waiting for the defendant.[112]

The court of appeals determined that defendant's custody lasted only a few hours, in which the government had informed the judge that he would be available shortly and, in fact, the defendant entered the courtroom at the time the jury was exiting after the *Allen* charge.[113] As a consequence, there was no apparent likelihood of a prolonged delay or need to reschedule.[114] The court also remarked that since Fontanez was a lone defendant, none of the *Tortora* multiple defendant factors apply to this case.[115]

In *Polizzi v. United States*, a trial also known as "the RICO megatrial",[116] thirty five defendants were charged.[117] Defendant Polizzi contended on appeal constitutional violations from the absence of any knowing and voluntary waiver of this right to be present at trial during a five-week absence for medical-related reasons.[118] As the trial lasted seventeen months, consumed approximately 265 trial days, and involved the introduction of thousands of exhibits and the testimony of more than 274 witnesses, the appellate court found that the district court had not

104. *Id.* at 859.
105. *Id.*
106. *Id.*
107. *Id.* at 855.
108. *Id.* at 860.
109. United States v. Fontanez, 878 F.2d 33, 34 (2d Cir. 1989).
110. *Id.*
111. *Id.*
112. *Id.* at 34–35 (citing Allen v. United States, 164 U.S. 492 (1896)). An *Allen* charge is a supplemental jury instruction given by the court to encourage a deadlocked jury, after prolonged deliberations, to reach a verdict. BLACK'S LAW DICTIONARY 74 (8th ed. 2004).
113. *Id.* at 35.
114. *Id.*
115. *Fontanez*, 878 F.2d at 37.
116. Polizzi v. United States, 926 F.2d 1311, 1313 (2d Cir. 1991).
117. *Id.* at 1312.
118. *Id.* at 1318.

abused its discretion in concluding that there was a public interest in continuing the trial in defendant's absence.[119]

B. A New Supreme Court's Decision: *Crosby*

The situation changed in 1993 when the Supreme Court held that Federal Rule of Criminal Procedure 43 prohibited a trial in absentia of a defendant who was not present at the beginning of a trial.[120] In *Crosby v. United States*, the defendant pled not guilty and was released on bail after promising to remain in the state.[121] He attended pretrial conferences and hearings and was told of the date of his trial.[122] Nevertheless, he did not appear on that day nor could he be found.[123] After several days of delay and fruitless search for the defendant, the trial court rescheduled the date of the trial.[124] The court concluded that he had voluntarily waived his right, and the public interest in proceeding with the trial in his absence outweighed his interest in being present during the proceedings.[125] As a consequence, he was tried and convicted in absentia.[126]

The Supreme Court analyzed the defendant's claim strictly under Rule 43, determining that its language, structure and logic, supported a straightforward interpretation rejecting the possibility of trial in absentia.[127] The court emphasized the express use of a limiting phrase in Rule 43, the fact that the rule was a restatement of the existing law and the fact that case law since *Diaz* has allowed trials in absentia only when the defendant was present at the beginning of the proceedings.[128] The decision affirmed that the distinction between flight before and flight in the middle of the trial is logical, since the costs of suspending a proceeding already under way would be greater than the cost of postponing a trial that has not yet begun.[129] Moreover, the court highlighted the fact that the defendant's initial presence serves to assure that any waiver was indeed known.[130]

The court was very careful to say that it was not analyzing the case under a constitutional parameter but just under Rule 43.[131] It left a door open that was used later by the intermediate courts of appeals to decide cases arising from claims of violation of the constitutional right to be present at trial. The question that arises is what has changed and what has remained intact after *Crosby*. Is it still necessary to have a "public interest" to proceed with a trial or is that requisite, the intention of

119. *Id.* at 1313, 1323.
120. *Crosby*, 506 U.S. at 256.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 257.
125. *Id.*
126. *Id.*
127. *Id.* at 262.
128. *Id.* at 259–60.
129. *Id.* at 261.
130. *Id.*
131. *Id.* at 261–62.

which was to expand the possibility of trying someone in absentia when the defendant had not attended the commencement of the proceedings, also brushed aside?

According to some, in *Crosby* the Supreme Court unanimously invalidated *Tortora* and its progeny,[132] defining that case as a "bombshell" that invalidated more than twenty years of federal case law that allowed trial to commence against absent defendants under many circumstances.[133] Nevertheless, subsequent decisions have demonstrated the contrary, as it will be explained in the next section. Not only is the *Tortora* analysis still being applied, but also trials in absentia where the defendant is not present from the beginning are a possibility under the Constitution. Hence, the question here is whether or not *Tortora* is still a valid law. If the answer is positive, it has to be explained to what extent it is valid law. In other words, what are the requisites to try someone in absentia in the federal jurisdiction?

C. The Situation in the Federal Courts after *Crosby*

1. The "Public Necessity" was still Applied in Some Cases in Which the Defendant was Not Present at the Beginning of the Trial

United States v. Arias was a case involving three defendants, one of whom failed to appear in court on the morning trial was to begin.[134] After a recess the trial proceeded.[135] The court of appeals reversed on the grounds of *Crosby* without further specifications, and remanded for a new trial.[136] In *Kirk v. Dutton*,[137] a case about a habeas corpus petition, the court held that an obligation to provide a speedy trial for six other co-defendants and that trial could not safely be conducted with the defendant at large and untried, was sufficient ground to start the trial without one defendant.

In *United States v. Deeb*, the court extended *Crosby*'s protection concluding that a waiver of being present did not include a waiver of a right recognized by statute to cross-examine witnesses against the defendant in the second trial.[138] In a seven defendant indictment, one of the defendants, Deeb, failed to appear at trial on the date scheduled.[139] The district court severed the charges and proceeded with the trial against the remaining defendants.[140] Neither Deeb nor his attorney were present at that trial.[141] Seven months later, Deeb was apprehended and the government disclosed that one of the defendants who had agreed to cooperate was ter-

132. Christopher T. Igielsky, *Washington Defendant's New Right of Pre-Trial Flight*, 19 SEATTLE U. L. REV. 633, 641 (Spring 1996).
133. *Id.* at 643.
134. United States v. Arias, 984 F.2d 1139, 1141 (11th Cir. 1993).
135. *Id.*
136. *Id.* at 1141–42.
137. Kirk v. Dutton, 38 F.3d 1216 (6th Cir.1994).
138. United States v. Deeb, 13 F.3d 1532, 1535–36 (11th Cir. 1994), *aff'g on other grounds*, 987 F.2d 773 (11th Cir. 1993).
139. *Id.* at 1533–34.
140. *Id.* at 1534.
141. *Id.*

minally ill with AIDS, and was suffering progressive memory deterioration.[142] The court authorized the witness' deposition on videotape for the purpose of introducing the tape at Deeb's trial.[143] During Deeb's trial, the government showed the videotape which included direct examination of the witness to the jury.[144] Cross-examination was not requested by either the government or Deeb.[145] Under *Crosby*, the court affirmed that it would be impossible to impute to a defendant the knowledge that by fleeing before trial, he had waived his right recognized by Rule 804(b)(1) to cross-examine the witnesses against him.[146] In a footnote, the court remarked its refusal to express any opinion if the defendant had fled to gain a strategic advantage from the death of an ailing witness.[147]

United States v. Nichols[148] was a single defendant case where the defendant was in custody and appeared in court for jury selection but refused to attend afterwards. Later, during one government witness's testimony, the defendant stood up causing the court to call a recess.[149] The court found that if a defendant has engaged in "stonewalling and other misconduct" or if there is no reasonable likelihood that the trial could soon proceed with the defendant present, this is sufficient justification to proceed with trial in the defendant's absence.[150] This requisite was satisfied because the defendant was defiant and uncooperative, and his only explanation for his nonattendance was indifference to and disdain for the proceedings.[151]

2. The "Public Necessity" was Followed in Many Cases in which the Defendant Fled During the Trial

In the five defendant case *United States v. Davis*, defendant McBride attended the first week of trial but he checked into the emergency room of a hospital as a result of ingesting fifty antidepressant pills and could not continue to attend in the courtroom.[152] Following the *Benavides* test, a test similar to *Tortora*, but used for single defendant cases, the court concluded that the burden of having to indefinitely postpone or possibly retry this trial with numerous out-of-state witnesses and a district-wide jury clearly outweighed the defendant's non-existent or feeble excuse for declining to attend the trial.[153]

In *United States v. Bradford,* the court held that a consideration of the relevant factors, including the defendant's contumacious conduct, in certain circumstances may support a district court's decision to proceed with a trial in a single-defendant

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 1535–36.
147. *Id.* at 1536, n. 1.
148. United States v. Nichols, 56 F.3d 403, 407 (2d Cir.1995).
149. *Id.*
150. *Id.* at 418.
151. *Id.*
152. United States v. Davis, 61 F.3d 291, 300 (5th Cir. 1995).
153. *Id.* at 303.

case.[154] Specifically, it considered that the defendant had refused to attend court twice before, the first time being the original trial date when a jury venire had been impaneled at a cost of $2,000.[155] This time, a second jury venire had been impaneled and a jury selected, which was waiting to fulfill its obligations.[156] In addition, both the government and the defense had witnesses who would have been greatly inconvenienced by a sudden postponement.[157] The court also considered the nature of the charges against the defendant, two counts of assaulting federal corrections officers,[158] and the safety of others in the courtroom when concluding that the decision to proceed with a trial in absentia was correct.[159]

United States v. Edwards involved a long, complex trial against the former governor of Louisiana, his son, and several of his associates.[160] One of the defendants suffered cardiac problems, but refused any severance of mistrial, in order to permit him to undergo surgery because he believed it was in his best strategic interest to proceed with the trial along with the rest of the defendants, particularly Edwards.[161] Finally, an operation was performed and the government moved for trial in absentia which was granted.[162] The court denied the defendant's motion for mistrial but offered certain accommodations, which, among others, included audio, video, or computer communication, having a nurse present at all times to monitor Johnson's blood pressure and check on his overall health, as well as instituting longer and more frequent breaks in the trial.[163] Johnson did not return to court until after the jury delivered its verdict.[164] The court of appeals affirmed the judgment on the basis that the trial was entering its third month and that the burdens on the witnesses, jurors, defendants and the district court far exceeded the public interest in postponing the proceedings or conducting a separate trial with Johnson present.[165]

D. The "Public Necessity" in the Case Law

According to the precedents mentioned, the public necessity prong was invoked to decide whether or not it was convenient to proceed with the trial when the defendant was not present, either when he assisted at the beginning of the trial or when he never attended the first day. Public necessity exists in three particular instances. First, if there is burden on the other participants in the trial. For the gov-

154. United States v. Bradford, 237 F.3d 1306, 1314 (11th Cir. 2001).
155. *Id.*
156. *Id.*
157. *Id.* at 1314, n.11 (one Government witnesses was a single mother from California who would need advanced notice of when she would need to be present in order to arrange for the care of her young children and one of defense witnesses was recovering from medical problems).
158. *Id.* at 1307.
159. *Id.* at 1314.
160. United States v. Edwards, 303 F.3d 606 (5th Cir. 2002).
161. *Id.* at 624-25.
162. *Id.*
163. *Id.* at 626.
164. *Id.*
165. *Id.* at 629.

ernment this means preserving the evidence until a new trial is possible, the risk of the evidence losing efficiency due to passage of time, eventual unavailability of witnesses, and unnecessary repetition of the trial. For the jurors and witnesses, the burden consists of a waste of time and any inconvenience to assist to the trial (i.e., because they live far away from the court). For the court, the burden lies in difficulties in rescheduling the trial (because of a busy agenda or even the unavailability of a courtroom), concerns about the docket and the expenses of ordering a new trial.

Second, co-defendant's right to a speedy trial (obviously only for multiple defendant cases). Finally, the likelihood that the trial takes place soon with defendant's presence. Indeed, the likelihood of a new trial with defendant's presence has been considered the most important element and those cases where the courts have vacated decisions to proceed with the trial despite defendant's absence were concerned about the lack of this likelihood. Many situations have been considered to be a burden on the other parties on the trial, and the list is not exhaustive.

V. WHAT HAPPENED TO THE "PUBLIC NECESSITY" PRONG?

Any appreciation of the role of a so-called "balancing test" according to the Constitution demands a determination of what constitutional clauses are involved in the right to be present at trial or, in other words, what rights may be affected by a trial conducted without the defendant's presence. What *Crosby* did not resolve was the key issue concerning trials in absentia; the constitutional possibility to try someone who has never appeared at his trial because he wanted to prevent the proceedings from continuing.[166] The holding in this case was based only on Rule 43, and the court expressly stated that it did not, "[r]each Crosby's claim that his trial in absentia was also prohibited by the Constitution."[167]

Generally, courts have found the right to be present in both the confrontation clause of the Sixth Amendment and in the due process clause of the Fourteenth Amendment.[168] The Sixth Amendment of the United States Constitution guarantees, *inter alia*, the right of an accused, "[t]o be confronted with the witnesses against him."[169] A few tribunals have also upheld the right to be present included in the due process clause of the Fifth Amendment. The Supreme Court considered in *Hopt v. Utah* that if in a capital case the defendant is deprived of his life or liberty without being present, such deprivation would be without the due process of law required by the Constitution.[170] The holding was reiterated in *Snyder v. Massachusetts*,[171] *Faretta v. Califorina*[172], *United States v. Gagnon*,[173] and *Kentucky v. Stinc-*

166. However there are cases in which the defendant's absence may be used as a defense against racial bias in the jury. In these cases the defendant may prefer to remain anonymous throughout the trial. *See* Current Development 2004-2005 *Trumping The Race Card: Permitting Criminal Defendants to Remain Anonymous and Absent From Trial To Eliminate Racial Jury Bias*, 18 Geo. J. Legal Ethics 1151 (2005).

167. *Crosby*, 506 U.S. at 262.

168. *Allen*, 397 U.S. at 338.

169. U.S. CONST. amend. VI.

170. Hopt v. Utah, 110 U.S. 574 (1884).

171. Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934).

er.[174] These cases involved the defendant's presence during a pre-screening of a jury venire, sidebar discussions with jurors during voir dire or challenges of jurors.

According to *Finney v. Rothgerber*, it is immaterial whether this right flows from the Sixth Amendment right of confrontation or the Fifth Amendment guarantee of due process.[175] In any case, the right exists in state felony trials by virtue of the Fourteenth Amendment.[176] Others affirmed that the constitutional right is rooted in both due process and confrontation clauses.[177]

Since *Diaz*, the first Supreme Court case involving trial in absentia in a non-capital case, the rule has been that the Constitution grants the defendant only the opportunity to confront the witnesses against him, but if he refuses that privilege, he cannot insist on it later.[178] As long as this chance is sufficiently guaranteed, there is no necessity under the Constitution to give any different protection based upon absconding either at the commencement of the trial or during it.

Even before *Crosby*, some courts had recognized that the right to be present under Rule 43, "[i]s broader than the confrontation protection of the sixth amendment."[179] The federal courts of appeals have still been applying *Tortora* and *Benavides* to allow trials when the person was not present from the beginning, but have refused to continue applying the balancing test alleging that it was not a constitutional requisite but a procedural rule to govern the trial court's exercise of its discretion.[180]

Of course, all these cases involved federal habeas petitions rather than direct appeals from a criminal conviction; as such only deprivations of federal rights could be raised.[181] In all of them the question involved only a constitutional claim. Considering that the courts of appeals have had the opportunity to address the issue of whether a trial in absentia is possible under the Constitution, they have given the step that the Supreme Court could not: "[n]othing in the Constitution prohibits a trial from being commenced in the defendant's absence as long as the defendant knowingly and voluntarily waives his right to be present."[182]

VI. "PUBLIC NECESSITY" IS NECESSARY

Notwithstanding the arguments presented so far to support trials in absentia, there are still many good reasons to consider that it is preferable to have a trial with the defendant present rather than without him. "It is obviously desirable that a

172. Faretta v. California, 422 U.S. 896, 819 n.15 (1975).
173. United States v. Gagnon, 470 U.S. 522, 526-27 (1985).
174. Kentucky v. Stincer, 82 U.S. 730, 745 (1987).
175. Finney v. Rothgerber, 751 F.2d 858 (6th Cir.1985).
176. *Id.* at 862.
177. *Latham*, 874 F.2d at 856; *Fontanez*, 878 F.2d at 35; United States v. Reiter, 897 F.2d 639, 642 (2d Cir. 1990).
178. *See Diaz*, 233 U.S. at 253.
179. United States v. Alikpo, 944 F.2d 206, 209 (5th Cir.1991); Clark v. Scott, 70 F.3d 386, 390 n.6 (5th Cir.1995).
180. *Scott*, 70 F.3d at 390 n.7; Smith v. Mann, 173 F.3d 73, 76 (2d Cir.1999).
181. Headley v. Tilgham, 53 F.3d 472, 474 (2d Cir.1995).
182. *Mann*, 173 F.3d at 76.

defendant be present at his own trial."[183] The best way to demonstrate that nothing suspicious happens during a trial is to have people present, in order to listen to the witnesses and understand the evidence that supports a conviction. This is also true for the defendant, the most interested person in a transparent trial. When the defendant is in the courtroom during his trial, he can see what is going on and participate in it. Cohen has explained the defendant's interest in being present during the trial as being: to prevent any coercion into waiving his right;[184] to prevent any prejudicial inference from his absence by the jury;[185] to let the jury observe him, which can be beneficial to his interests;[186] and because he plays an important role as a member of the defense team.[187]

It is clear according to the cases mentioned above that the Constitution does not require the defendant's presence during a trial. It is possible to try him without his presence, either when he is absent from the beginning of the trial or when he fails to appear on a subsequent day. Thus, even when the judiciary only has to consider that extreme, it would be advisable to include the 'balancing test' in order to prevent any arbitrary application. The negative effects that a trial in absentia supposedly tends to neutralize would be reinforced if the trial was wrongly conducted in absentia and afterwards a court of appeals vacated the conviction on that ground. Evidently, the penological purposes of the punishment would be seriously weakened if a prison term were imposed a considerable time after the offense as a consequence of an appeal process and a new trial. In addition, the evidence that supports an accusation or a defense would be gravely undermined for a new trial if the previous one was erroneously conducted in absentia. Witnesses would be more difficult to find or their memory probably would not be as precise as it had been during the former trial. In order to prevent these undesired effects, the trial should only proceed when it is absolutely necessary. In other words, it would continue only under extraordinary circumstances in which, "[t]he public interest clearly outweighs that of the voluntarily absent defendant."[188]

It would be better if the statute or rule provided a 'public necessity' requirement for the trial in absentia instead of focusing on the distinction between absconding before or after the commencement of the trial. As a matter of fact, the arguments evoked by the Supreme Court in *Crosby* are far from unquestioned: 1) it is not certain that the cost of suspending a proceeding already under way will be greater than the costs of postponing a trial that has not yet begun; 2) there are many other situations other than the defendant's initial presence that can serve to assure that the waiver was indeed done knowingly (i.e., arraignment); and 3) the option of gambling on an acquittal when the defendant knows that the verdict will go against him also exists prior to the beginning of the trial proceedings since the defendant knows the evidence against him before entering the courtroom.

183. *Tortora*, 464 F.2d at 1210.
184. Cohen, *supra* note 4, at 180.
185. *Id.* at 181.
186. *Id.*
187. *Id.*
188. *Tortora*, 464 F.2d at 1210.

VII. CONCLUSION

One way to keep the confidence of the people in its legal system is by conducting criminal trials as quickly as possible. As a principle, a defendant cannot decide the date and time of his trial, nor can he manipulate it in order to avoid being tried or to postpone it without sound reason. However, one legal tool that defendants have to manipulate their trials is by absconding before the commencement, because the federal rule and the case law forbid continuing with a trial if the defendant was not present at the beginning.

On the other hand, the United States Constitution does not go that far and only requires the possibility that the defendant confront the witnesses against him. This right can be waived as long as it was a voluntary and knowing waiver. Nevertheless, an abuse of trials without the defendant's presence or an arbitrary application of the trial in absentia can also undermine the principles supposedly safeguarded by a trial in absentia-the confidence of the people in the judicial system. For this reason, it is advisable to consider the "balancing test" which, in addition to a defendant's voluntary and knowing waiver of his right to be present, takes into account the "public interest" to continue with the proceedings of the trial.