Fall 1980

**Criminal Trials in Absentia: A Proposed Reform for Indiana**

Myra L. Willis  
*Indiana University School of Law*

---

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj  
Part of the Criminal Law Commons, and the Criminal Procedure Commons

**Recommended Citation**  
Available at: https://www.repository.law.indiana.edu/ilj/vol56/iss1/5

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Criminal Trials in Absentia:  
A Proposed Reform for Indiana

The right of the accused to be present at trial has been a basic principle of Anglo-American criminal justice for centuries. Although the right could never be waived under English common law, American law permits waiver of the right under certain circumstances. The United States Supreme Court has upheld lower court decisions which have held that the defendant waived the right by refusing to attend the trial, by disrupting the trial with misconduct and by voluntarily failing to return to a trial in progress. Although the Supreme Court has declined to decide whether a defendant who is released on bail and then fails to appear at the commencement of trial thereby waives the right to be present, it has stated in dictum that trial courts must conduct a sufficient inquiry to establish that the defendant is in fact voluntarily absent before conducting any part of the trial in absentia.

Indiana appellate courts have recently affirmed three cases in which the trial courts had proceeded in absentia from the commencement of trial, after conducting only minimal inquiries into the reasons for the defendant’s absence. This note will first review the constitutional basis for the right to be present at trial and the Indiana position on waiver of that right. It will then argue that the Indiana appellate courts have unconstitutionally granted discretion to trial judges to try defendants in absentia without first establishing that the absence at the commencement of the trial is voluntary. Finally, it will conclude that the Indiana courts should adopt a standard higher than the minimum constitutional

---

3 Diaz v. United States, 223 U.S. 442 (1912).
standard of voluntary absence which would require that even defendants who are voluntarily absent at the commencement of trial could be tried in absentia only if the state could establish a compelling need for an immediate trial.

THE CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL

Early Constitutional Analysis

Under English common law, the right of a criminal defendant to be present at trial was absolute; it was not subject to waiver by the court, the accused or the accuser. At the time of the founding of the American colonies, the common law right was accepted without question into the American system of criminal justice.

Although the right was not mentioned explicitly in the Constitution, the sixth amendment confrontation clause implicitly protected the right to be present at federal criminal trials. The confrontation clause did

---

* Goldin, supra note 2, at 20. The right to be present at trial has roots in medieval criminal proceedings which were private actions instituted by the injured party or his representative. As criminal proceedings evolved to include a public representative, the defendant was still required to personally represent his interests since there was no representation by counsel. The accused's presence was also a jurisdictional prerequisite which no party could waive. Cohen, supra note 1, at 167-68; Goldin, supra note 2, at 18-20.

A further reason for requiring a defendant's presence was a developing concept of criminal justice:

[A] pronounced characteristic [of the early common law criminal system] is the absence of any procedure by which to condemn an accused who fails to appear. . . . The reason for this principle must be found, if at all, in a rather sound conception of justice even among the early peoples. . . . Even the primitive sense of justice could not tolerate a system by which a person should have a verdict passed upon him in his absence . . . .

Id. at 19-20 (footnotes omitted).

10 One commentator has noted that "[t]he old English cases on this subject were very strictly followed in the early jurisprudence of America . . . ." Lehman, A Critical Survey of Certain Phases of Trial Procedure in Criminal Cases, 63 U. PA. L. REV. 609, 619 (1915). Supreme Court cases also relied heavily on English cases and commentary to determine the scope of the right to be present at trial. See, e.g., Lewis v. United States, 146 U.S. 370 (1892). Lewis succinctly restated the English concept of the right in its discussion of the right under American law:

A leading principle that pervades the entire law of criminal procedure is that, after indictment is found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial.

Id. at 372. There is no indication in the case that the Constitution might have changed the right as it had existed for centuries under English law.

not protect the right to be present at state criminal trials,\textsuperscript{12} so it re-
mained for the Supreme Court to decide whether another provision,
such as the fourteenth amendment due process clause,\textsuperscript{13} provided pro-
tection in the state courts. Before a body of constitutional authority on
the subject developed, many state legislatures passed statutes codifying
the common law right to be present at criminal trials.\textsuperscript{14}

The first Supreme Court case to discuss the right to be present at
trial, \textit{Hopt v. Utah},\textsuperscript{15} relied on one such statute to conclude that the
defendant had a right to be present from the beginning of the jury voir
dire.\textsuperscript{16} The decision was based on the Court's interpretation of a Utah
statute which required that "the defendant must be personally present
at the trial."\textsuperscript{17} Justice Harlan's discussion in the majority opinion of the
Utah statute's requirement of presence concluded with the observation
that if a defendant were deprived of life or liberty without being pres-
ent at all phases of the trial, "such deprivation would be without that
due process of law required by the Constitution."\textsuperscript{18}

Justice Harlan's brief comment in \textit{Hopt} did not reveal whether the
fourteenth amendment due process clause was an independent source of
the right to be present at state criminal trials and whether the right
was protected in its common law form.\textsuperscript{19} In a subsequent case involving
the right in a state trial, \textit{Howard v. Kentucky},\textsuperscript{20} the Court elaborated on
the scope of protection guaranteed by the due process clause. The trial
judge in \textit{Howard} had questioned a juror out of the presence of the

\textsuperscript{12} The sixth amendment confrontation clause was eventually held applicable to state
\textsuperscript{13} The Court did not actually hold that the fourteenth amendment due process clause ap-
plied to the right to be present at trial until \textit{Snyder v. Massachusetts}, 291 U.S. 97, 106
(1934).
\textsuperscript{14} \textit{See, e.g., Utah Crim. Proc. Code} \textsection{} 218 (1884):
If the indictment is for a felony, the defendant must be personally present at
the trial; but if for a misdemeanor, the trial may be had in the absence of the
defendant; if, however, his presence is necessary for the purpose of identifica-
tion, the court may, upon application of the prosecuting attorney, by an order
or warrant, require the personal attendance of the defendant at the trial.
\textsuperscript{15} 110 U.S. 574 (1884).
\textsuperscript{16} \textit{See id. at} 576-77.
\textsuperscript{17} \textit{Id. at} 577-78. For the entire text of the statute, see note 14 supr.
\textsuperscript{18} 110 U.S. at 579.
\textsuperscript{19} The Court again stated in dictum that the due process clause protected the right to be
present at trial in \textit{Schwab v. Berggren}, 143 U.S. 442 (1892), and \textit{Fieldden v. Illinois}, 143 U.S.
452 (1892). The defendant in \textit{Schwab} objected to the practice in Illinois of having the appel-
late court repass the death sentence upon a defendant who was not physically present at
the appeal. The right to be present at the sentencing on the trial level was discussed in
order to define the defendant's right to be present on appeal. The Court concluded that the
right to be present at the sentencing in state courts was protected by a "liberal inter-
pretation" of the phrase "due process of law." 143 U.S. at 451.
\textsuperscript{20} 200 U.S. 164 (1906).
defendant during the voir dire. On appeal to the Supreme Court the defendant argued that his court-enforced absence during the questioning violated the fifth, sixth and fourteenth amendments. The Court rejected the fifth and sixth amendments as inapplicable to state court proceedings. In applying the due process clause of the fourteenth amendment, the Court concluded that brief absences which did not injure the defendant's substantial rights and which were permitted under state law were constitutionally permissible. established two themes which formed the basis for subsequent constitutional analysis of the right in state courts: first, the due process clause does not forbid state courts from modifying the common law right if the modification has only a minor impact on the defendant's substantial rights; and second, the scope of constitutional protection is determined partially by reference to prevailing state practice, rather than by reference to common law. The relevance of prevailing state practice and the Court's willingness to allow states to modify the common law right were reiterated in which upheld the conviction of a defendant who twice verbally waived his right to be present during his trial. Even though such a waiver would have been impermissible under common law, the Court approved the practice of most states of upholding voluntary verbal waivers at trials when the defendant was not held in custody and was not charged with a capital crime.

21 Id. at 171-72.
22 Id. at 172.
23 Id.
24 Id. at 175.
25 223 U.S. 442 (1912).
26 Id. at 459. rose on appeal from the Philippine Islands. The Court noted that the applicable Philippine constitutional clauses were analogous to the sixth amendment confrontation clause of the United States Constitution; consequently, the Court used previous analysis from confrontation clause cases to determine whether the defendant was permitted to waive the right to be present by authorizing the trial court to proceed in his absence. Id. at 455.
27 See notes 2, 9 & accompanying text supra.
28 223 U.S. at 455-56. The Court clearly distinguished between waiver of the right to be present when the accused is charged with a capital offense and waiver when the accused is charged with an offense which is not capital:

As the offense in this instance was a felony, we may put out of view the decisions dealing with this right in cases of misdemeanor. In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction. But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has
Howard and Diaz did not provide lower courts with a clearly articulated constitutional standard to use in determining what limitations the due process clause imposed on modification of the right to be present at state criminal trials. This problem was remedied twenty-two years later in Snyder v. Massachusetts, the first Supreme Court case to thoroughly analyze the constitutional dimensions of the right to be present at state criminal trials. Speaking for the majority, Justice Cardozo concluded that the sixth amendment privilege to confront one's accusers, which protected the right to be present in federal courts, was "reinforced" by the fourteenth amendment.

He then went on to reject any inferences in previous cases that the right to be present at state criminal trials might be broader than the right to be present as guaranteed by the confrontation clause of the sixth amendment. Finally, he concluded that, under the fourteenth amendment, "the presence of the 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."

Under the constitutional analysis of Snyder, the due process clause protects the right of the defendant to be present at trial when the defendant's presence is required for a fair and just hearing. Thus, the right to be present at trial is equivocal and may be limited by state courts, depending on the circumstances of the case and the effect of the absence on the defendant. In Snyder, the static concept of the common

\[\text{id. at 455.}\]

As Goldin, supra note 2, at 28, comments, it is not clear how the American courts arrived at the position that waiver should be permitted if the charged crime was not capital. Apparently, the distinction was not derived from English common law, which would not permit a judgment to be rendered against an absent defendant even in a civil action. 2 F. Pollack & F. Maitland, The History of English Law 592-93 (2d ed. 1898). The reason for the distinction in American law is probably the reluctance of the courts to impose the death sentence on an absent defendant. Nevertheless, courts have not shown the same reluctance to impose a prison sentence and thereby restrict the liberty of an absent defendant.

\[\text{id. at 107-08.}\]
law right was fully rejected as a basis for constitutional analysis. Instead, state courts must assess the effect of an absence from trial on the defendant's right to a fair and just hearing.

Present Constitutional Analysis

After Snyder, the Court did not discuss the issue of constitutional limitations on the defendant's right to be present at state criminal trials for thirty-six years. In 1970 the Court held in Illinois v. Allen\textsuperscript{34} that a defendant who is unruly and disruptive may lose the right to be present at his own trial.\textsuperscript{35} That conclusion emerged by balancing the defendant's right to be present at trial against society's need for the "proper administration of criminal justice."\textsuperscript{36}

The defendant's conduct in Allen made it impossible for the trial judge to conduct the trial; therefore, after repeated warnings, the judge removed the defendant until he promised to behave.\textsuperscript{37} On appeal, the Court noted that a defendant such as Allen could indefinitely postpone his trial by misbehaving, thereby obstructing the orderly progress of the entire criminal justice system.\textsuperscript{38} Since the trial judge had adequately protected the defendant's rights,\textsuperscript{39} the potential for abuse by the defendant was sufficient, in the Court's opinion, to find that the defendant had "lost" his right to be present at trial.

The holding that the defendant lost his right to be present at trial represented a significant change in the law of waiver of criminal constitutional rights. For the first time, the Court held that a criminal defendant could constructively waive a constitutional right by his conduct, rather than by verbally requesting that the right be waived.\textsuperscript{40} Previous

\textsuperscript{34} 397 U.S. 337 (1970).
\textsuperscript{35} Id. at 343, 346.
\textsuperscript{36} Id. at 343.
\textsuperscript{37} Id. at 339-41.
\textsuperscript{38} Id. at 346.
\textsuperscript{39} Id. at 347.
\textsuperscript{40} For a critical discussion of the Court's development of the theory of constructive waiver in Allen, see Tigar, Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1 (1970). Tigar describes how Allen and subsequent criminal procedure cases have moved away without adequate explanation or justification from the Johnson v. Zerbst, 304 U.S. 458 (1938), standard of an express waiver by an informed defendant. Tigar, supra, at 9. The terms "forfeiture of a constitutional right" and "non-consensual waiver" are used in the article to describe the loss of constitutional rights by misconduct on the part of the defendant. Id. at 10-11.

Other commentators have also described the results in cases such as Allen as a "forfeiture" of constitutional rights. See, e.g., Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1214 (1977); Note, 46 N.Y.U. L. Rev. 120 (1971).

Similarly, the advisory committee on criminal rules submitted a proposed amendment of rule 43 which retitled part (b) "Forfeiture of Right to Be Present." Preliminary Draft of
cases dealing with waiver had relied on the standard announced by *Johnson v. Zerbst*\(^4\) that a waiver of a constitutional right was valid only if it was “an intelligent relinquishment or abandonment of a known right or privilege.”\(^42\) Although the Court cited *Johnson* to support its decision,\(^43\) no attempt was made to explain how the defendant had intelligently waived a known constitutional right by his inability to control his conduct during the trial.\(^44\)

The position taken in *Allen*, that a defendant could forfeit the right to be present at trial through his conduct, was extended further in *Taylor v. United States*.\(^45\) The defendant in that case argued that he could not have waived his constitutional right to be present at trial because he had not been told that he had such a right or that he would lose it if he

---

\(^{4}\) Proposed Amendments to the Federal Rules of Criminal Procedure, FED. R. CRIM. P. 43(b), 77 F.R.D. 507, 587 (1978). The committee note clearly describes the reason for the proposed change from “waiver” to “forfeiture” in language which echoes the reasoning of Tigard:

Subdivision (b) is amended so as to deal with the situations included therein in terms of forfeiture rather than waiver. Although waiver terminology is commonly found in the cases, a defendant who absents himself or who engages in disruptive conduct does not really “agree” to be tried in his absence or “intentionally relinquish” his right to be present. Rather he loses or forfeits his right to be present by way of a penalty for violating certain obligations or conditions... This is more than a matter of semantics. In *Illinois v. Allen*, 397 U.S. 337 (1970), holding that a disruptive defendant may be excluded from his trial, the Court did not conclude that the defendant had waived his right to be present, but rather than [sic] he “lost his right” by virtue of his behavior “of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint.” The court of appeals had reached the opposite result by analyzing the case in terms of waiver and concluding that so long as *Allen* [sic] insisted upon his right to be present, which he clearly did, he could not be held to have waived it because “the insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver.” 413 F.2d 232 (7th Cir. 1969).

\(^{43}\) at 588-89. For the text of the proposed amendment of FED. R. CRIM. P. 43(b), see note 48 infra.

\(^{44}\) 304 U.S. 458 (1938).

\(^{45}\) Id. at 464. Although *Johnson v. Zerbst* dealt with the issue of waiver of the constitutional right to counsel, the holding was not limited to the facts of the case, but spoke broadly of waivers of “fundamental constitutional rights.” *Id.* This case has been cited subsequently in many other cases which address the waiver of other constitutional criminal rights. See, e.g., Barker v. Wingo, 407 U.S. 514, 525 (1971) (right to speedy trial); Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (right to stand trial on a criminal charge); McCarthy v. United States, 394 U.S. 459, 466 (1969) (same); Barber v. Page, 390 U.S. 719, 725 (1967) (right to confrontation); Green v. United States, 335 U.S. 184, 191 (1948) (right to be free from double jeopardy); Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942) (right to trial by jury and assistance of counsel).

\(^{46}\) 397 U.S. at 343.

In a separate opinion, Justice Douglas discussed the defendant’s behavior and concluded that it was probably caused by an apparent mental illness. He described as the real issue of the case the appropriate constitutional treatment of the mentally ill at criminal trials, rather than the right to be present at trial. *Id.* at 351-57 (Douglas, J., separate opinion).

\(^{44}\) 414 U.S. 17 (1973).
did not return after a recess in the trial. The argument was rejected because the Court found it "incredible" that a defendant who had been present for part of his trial did not know that he had a constitutional right to be present and that, once begun, the trial would continue despite his absence. Under the analysis of Taylor, the defendant's presence at part of the trial results in a presumption that he knows he has a

4 Id. at 19.
4 Id. at 20. The Court cited Fed. R. Crim. P. 43 in support of the decision. 414 U.S. at 20.

The pertinent parts of the rule provide:

(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 impanelling 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 his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he had been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being removed from the courtroom.

Fed. R. Crim. P. 43(a)-(b).

The rule is essentially a codification of existing federal case law. For a discussion of the passage of the rule and annotations of various cases interpreting the rule, see L. Orfield, Criminal Procedure Under the Federal Rules § 43 (1967 & Supp. 1979). In addition to the federal rule, most states have similar rules regarding presence at trial. For a compilation of the state laws, see Cohen, supra note 1, at 157-58 n.5. Indiana no longer has such a rule. See An Act concerning public offenses, ch. 169, §§ 222-223, 1905 Ind. Acts 584 (repealed 1978).

In 1978 the advisory committee on criminal rules submitted a revised version of part (b) of the rule for comment by members of the bench and bar. If it had been adopted the section would have read:

(b) FORFEITURE OF RIGHT TO BE PRESENT. The progress of a trial to and including the return of a verdict shall not be prevented by defendant's absence and the defendant shall be considered to have forfeited his right to be present whenever a defendant,

(1) absents himself from the trial, unless it is thereafter shown that his absence was for good cause ....

Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure 43(b), 77 F.R.D. 507, 587 (1978). The suggested changes would have recognized that the defendant forfeits, rather than waives, the right to be present at trial and would have permitted absentia trials even if the defendant was absent at the commencement of trial. See note 40 supra.

The proposed revision to the rule was not adopted by the Supreme Court in 1979 when it adopted others of the proposed amendments and sent them to Congress for consideration. See Amendments to Federal Rules of Criminal Procedure, 47 U.S.L.W. 4488, 4488-91 (April 30, 1979).

Subsequently, when the advisory committee submitted a new preliminary draft of proposed amendments to the Federal Rules of Criminal Procedure it did not include any revision to rule 43. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 85 F.R.D. 379, 385-416 (1979). Thus, it appears that the present rule with its "waiver" language and implied prohibition against holding a trial in absentia when the defendant is absent at the commencement of trial remains intact.
constitutional right to be present at trial and that he waives the right by failing to return during the course of the trial.

*Taylor* adopted the reasoning of the District of Columbia Circuit Court of Appeals' opinion in *Cureton v. United States*, which held that a trial may proceed in a defendant's absence if the court establishes that the absence is voluntary. Under *Cureton*, an absence is considered voluntary if the defendant knows that his trial is taking place, that he has a right and an obligation to be present, and if there is no sound reason for his absence. While *Taylor* adopted the *Cureton* requirements, it did not apply them to the facts since the defendant had failed to allege that his absence was involuntary.

The reasoning of *Taylor* has not been further developed because subsequent cases have contained only passing references to the right to be present at trial. In *Drope v. Missouri*, a defendant who attempted suicide during his trial objected to the trial court's decision to proceed in absentia. While *Drope* did not decide the issue of the right to be present at trial, it did note in dictum that the trial court had not conducted a sufficient inquiry to decide the issue of waiver. That statement implies that a trial court cannot constitutionally decide the issue of voluntary waiver by merely stating on the record that the defendant is found to be voluntarily absent.

Thus, under recent analysis of the right to be present at trial, the trial judge does have a duty to receive sufficient evidence to make a factual determination that the defendant's absence is voluntary before he decides to continue a trial in absentia. While the Court has not yet so held, a trial judge should have the duty to meet the *Cureton* requirements when the defendant is absent at the commencement of trial.

---

48 396 F.2d 671 (D.C. Cir. 1968).
49 *Id.* at 676.
50 *Id.*
54 *Id.* at 167.
55 *Id.* at 182.
56 A similar procedure was used by the trial court in *Drope*. See *id.* at 166.
57 *Tacon v. Arizona*, 410 U.S. 351 (1973), is the only case which has presented the Supreme Court with a state trial held totally in absentia. The defendant was financially unable to return to Arizona for his trial on a marijuana charge. He was convicted in absentia and later sentenced to at least five years imprisonment. Because the defendant did not raise the issue below, the Court refused, despite strenuous objections from the dissenting Justices, to determine the constitutional limits on a state's authority to try a defendant who is unable to return for trial. *Id.* at 352.

The Court dismissed the writ of certiorari on the ground that the "related issue" of whether a defendant's conduct amounted to a "knowing and intelligent" waiver of the right to be present at trial was primarily a factual issue which did not justify jurisdiction. *Id.* The usage of a knowing and intelligent waiver test is puzzling, if not erroneous, since *Taylor*,...
CRIMINAL TRIALS IN ABSENTIA IN INDIANA

As a result of the limited discussion in recent Supreme Court cases of the right to be present at trial, state and federal courts have adopted a variety of positions on the issue of whether a judge may proceed in absentia against a defendant who fails to appear at the commencement of trial. Several courts do not permit absentia trials when the defendant has not been present in court. Others permit such trials in a limited number of cases, primarily those involving multiple defendants in which the state would be prejudiced by a delay. Other jurisdictions, including Indiana, have given the trial judge almost total discretion to conduct an absentia trial when the defendant fails to appear.

Recently, the Indiana appellate courts have upheld three lower court decisions to try defendants who were absent at the commencement of trial. The appellate cases rest solely on the proposition that a defendant should not be permitted to delay the trial by failing to appear at the time the trial was scheduled. Thus, the reasoning echoes the Supreme Court's public policy determination in Illinois v. Allen and Taylor v. United States that a defendant may not disrupt or delay a trial by misconduct. However, the Indiana courts have disregarded the Supreme Court analysis which weighs the defendant's right to be present at trial under the circumstances of each case.

Indiana Case Law on Absentia Trials

The current emphasis of the Indiana courts on preventing the defendant from interfering with the administration of justice originated in Broecker v. State, the first Indiana case to consider the effect of a

414 U.S. 17 (1973), speaks only in terms of a voluntary waiver. See notes 45-51 & accompanying text supra.


See note 8 supra.


See notes 38, 47 & accompanying text supra.

See notes 55-56 & accompanying text supra.

defendant’s absence at the commencement of trial. According to the trial record, the defendant in *Broecker* was aware that his trial was taking place since he was in custody, but he verbally refused to attend the trial and instructed the judge to proceed without him. On appeal, the court held that a defendant may waive his right to be present at trial by a verbal refusal to attend, provided that the state has no need for his presence. The appellate court in *Broecker* relied on the Second Circuit Court of Appeals’ reasoning in *United States v. Tortora* that a defendant has an obligation to appear in court on his trial date and may not frustrate “the speedy satisfaction of justice” by refusing to appear when the state has a need for his presence. *Broecker* was also concerned with the defendant’s right to be present at trial, noting: “In all cases, the trial judge should exercise his sound discretion so as to protect the defendant’s interest in a fair trial.” The court stated that the trial judge did an “excellent job” of protecting the defendant’s rights, and that, under the circumstances, the defendant’s verbal refusal to attend the trial was a knowing and voluntary waiver. The case was thus decided under the traditional *Johnson v. Zerbst* standard for waiver of constitutional rights in criminal cases.

Subsequent Indiana cases have broadened the scope of *Broecker* to include waivers of the right through misconduct, rather than by a verbal refusal to attend the trial. The first case to so extend the concept of waiver was *Taylor v. State,* in which a defendant was two hours late for one day of the trial. The judge waited one hour and then, upon being informed that the defendant had transportation problems, decided to resume the trial. The defendant appeared one hour later.

The constitutional analysis in *Taylor v. State* was limited to the brief statement that *Snyder v. Massachusetts* established that the constitutional right to be present at trial could be waived. Although the

---

44 Previous cases in Indiana had discussed the right to be present at trial in the context of defendants who were present for part of the trial. See, e.g., Harris v. State, 249 Ind. 681, 231 N.E.2d 800 (1968); Dean v. State, 234 Ind. 568, 130 N.E.2d 126 (1955); Miles v. State, 222 Ind. 312, 53 N.E.2d 779 (1944); Roberts v. State, 111 Ind. 340, 12 N.E. 500 (1887); State v. Wilson, 50 Ind. 487 (1875).
45 168 Ind. App. at 233, 342 N.E.2d at 887.
46 Id. at 237, 342 N.E.2d at 889.
48 Id. at 1208, quoted in 168 Ind. App. at 235, 342 N.E.2d at 888.
49 168 Ind. App. at 238, 342 N.E.2d at 890.
50 Id.
51 Id. at 237, 342 N.E.2d at 889.
52 See notes 41-43 & accompanying text supra.
54 Id. at ___, 383 N.E.2d at 1070.
55 Id.
56 291 U.S. 97 (1934). See generally notes 30-33 & accompanying text supra.
57 ___ Ind. App. at ___, 383 N.E.2d at 1070.
Supreme Court case closest to *Taylor v. State* factually was *Taylor v. United States*, in which the defendant fled the courtroom during a break in the trial, the Indiana court failed to cite it or consider its adoption of the *Cureton* requirement that the trial judge clearly establish that the defendant's absence was voluntary. Instead, the Indiana court ruled that while a defendant's mere failure to appear on time would not constitute waiver, a continued absence would. The trial judge's decision that an unexplained absence permitted the trial to proceed in absentia was held to be discretionary and reviewable only for abuse. Since the trial judge made the decision to proceed in absentia after waiting only one hour, with no hearing, and despite an explanation for the absence, the court of appeals' finding of no abuse granted wide discretion to trial judges. In addition, the court did not give any guidance to trial judges as to what would constitute an abuse of discretion when proceeding in absentia.

The scope of discretion granted to trial judges quickly became apparent in *Brown v. State*. The defendant, who was free on bail, failed to appear at the commencement of his trial. Despite the refusal of both the prosecutor and the defense counsel to try the case during the defendant's absence, the trial judge ordered the trial to begin. The judge proceeded to empanel the jury by himself. Then, in a brief inquiry about the defendant's absence, the bondsman testified that the defendant's parents had been told of the trial date within the past five days and the defense attorney testified that he had reminded the defendant about the trial the night before. The judge ruled that his absence was voluntary.

On appeal, the judge's ruling was affirmed with no constitutional analysis beyond the broad assertion that "[i]t is established that a defendant by his conduct may waive both his statutory and constitutional right to be present at his own trial." The court stated that it was

---

51 396 F.2d 671, 676 (D.C. Cir. 1968).
52 ___ Ind. App. at ___, 383 N.E.2d at 1071.
55 ___ Ind. App. ___, 390 N.E.2d 1060.
56 ___ Ind. App. ___, 390 N.E.2d 1061.
57 The Court has, and again finds that, the defendant has voluntarily absented himself and that is based on the testimony of Mr. Maguire [defense counsel] that he talked to him last night. He agreed to be here and here it is this morning and he is not here. Now the Appellate Court may hold that that is inadequate evidence. They may speculate that maybe a flock of gremlins caught him and tied him up to an oak tree out here someplace or fence post so that he couldn't get here.
58 ___ Ind. App. ___, 390 N.E.2d at 1061 n.2 (quoting trial transcript at 250).
59 ___ Ind. App. ___, 390 N.E.2d at 1061.
better to delay the proceedings during the defendant's absence, but failure to delay was not necessarily error. 9

Taylor and Brown flatly reject the concern for adequate protection of the defendant's right to be present at trial expressed in Illinois v. Allen and Drope v. Missouri. 10 Both Supreme Court cases focused on the need for the trial court to make an informed judgment based on evidence that the defendant was voluntarily absent before proceeding in absentia. 11 By holding that an unexplained absence is equivalent to a voluntary absence, Taylor and Brown grant trial judges unconstitutionally broad discretion to conduct in absentia criminal trials without holding a prior hearing.

Shortly after Brown, an Indiana appellate court, in Gilbert v. State, 12 adopted the Cureton requirements and endorsed the use of a hearing before trial to decide the waiver issue. 13 Since the defendant was absent at the commencement of trial, the judge delayed the trial for half an hour and then questioned the bondsman and the defense attorney concerning the defendant's whereabouts. Both had reminded Gilbert the night before the trial, but the defense counsel stated that he was not certain if Gilbert, who was an alcoholic, had been sober during their conversation. 14

Based on this hearing the trial judge began the trial, even though the defense counsel refused to conduct voir dire, make an opening statement or cross-examine witnesses during his client's absence. When Gilbert was finally brought into court on a bench warrant, he testified that he knew it was the day of his trial and he did not want to miss it, but he was sick in bed from drinking. Although a doctor corroborated Gilbert's claim that he could not control his drinking, the trial judge refused to grant the defendant's motion for a mistrial. 15

The facts of Gilbert were analyzed on appeal under the Cureton requirements: that the defendant may not be presumed to have voluntarily waived his right to be present unless the evidence establishes that he knew the trial was taking place, knew that he had a right and an obligation to be present and had no sound reason for remaining away. 16 The court concluded that a knowing and voluntary waiver standard was the appropriate test since the Cureton trial court on remand had used the standard. 17 In addition, the court approved the Gilbert trial court's

---

9 Id. at —, 390 N.E.2d at 1062.
10 See notes 39-55 & accompanying text supra.
11 Id.
13 Id. at —, 395 N.E.2d at 431-32.
14 Id. at —, 395 N.E.2d at 430.
15 Id.
16 Id.
17 Id. at —, 395 N.E.2d at 431.
procedure of first holding an initial hearing when the defendant's absence is discovered, then issuing a bench warrant and finally, if the defendant later appears, hearing additional evidence. While the court adopted the *Cureton* standard for deciding voluntary waiver of the right to be present at trial and outlined the procedure for trial courts to follow before conducting absentia trials, it ultimately dismissed Gilbert's claim by stating that it was "not willing to conclude that [he] was totally incapable of insuring his own presence at trial despite his alleged condition."

Despite the adoption of the *Cureton* requirements in Indiana, the defendant's right to be present at trial is still not adequately protected. After the *Gilbert* decision, it is possible for trial courts to try in absentia defendants who are too ignorant, ill or misinformed to be aware of the possible consequences of failing to appear for trial. Thus, in a case involving an absence at the commencement of trial, Indiana's application of the *Cureton* standard to the facts falls short of the constitutional reasons for the standard.

The Supreme Court's approval of the *Cureton* requirements implied that the defendant's right to be present at trial should be weighed against the public's interest in an effective criminal justice system under the particular facts of each case. The Indiana application of *Cureton* does not weigh the competing interests, because the defendant's waiver of his right to be present at trial is always presumed at the trial level from an unexplained absence. Since the automatic presumption does not adequately protect the defendant's right to be present at trial, the Indiana courts should develop a new approach to trials in absentia.

*A Proposed Balancing Test*

A new approach to absentia trials in Indiana must reflect the fact that a defendant's absence at the commencement of trial should be treated differently from an absence after the trial has begun. When a defendant has been present during a portion of the trial and then fails to reappear, the Supreme Court has presumed that the defendant knew that he had a right to be present and that the trial would be concluded in his absence. The rationale underlying the presumption is that the defendant has been present in court and has seen the effort expended by the state and, therefore, should know that the trial will continue to its conclusion.

---

98 Id. at ____, 395 N.E.2d at 432.
99 Id.
100 See *Taylor v. United States*, 414 U.S. 17, 19 n.3 (1973).
103 Id.
When a defendant is not present at the commencement of trial, the reasons for presuming that the defendant knows he has a right to be present at trial and that the trial will be held in his absence disappear. It may be factually correct to presume that most defendants who have been arraigned know they have a right to be present at a future trial. But, unlike defendants who have been present for part of the trial, there is no basis to presume that defendants who have not been present at trial and have merely posted bail know that their trials may be conducted in absentia if they fail to appear on the date of the trial. It is possible that the defendant may believe that even a knowing failure to appear for trial will result only in a loss of bail money and the issuance of an arrest warrant.

Some states inform a defendant who posts bail that failure to appear in court may result in a trial being conducted in absentia, but Indiana law does not require any such warning.

There are a variety of public policy considerations which weigh strongly against presuming that a defendant who fails to appear at the commencement of trial is thereby waiving the right to be present. A defendant who is absent during trial loses many of the procedural safeguards which have developed to ensure fair prosecutions. Absent defendants are denied the opportunity to testify on their own behalf and to aid defense counsel in selecting the jury and cross-examining witnesses. In addition, absent defendants may be denied the assistance of counsel if the defense attorney refuses to participate in the trial during his client's absence.

Even if the defendant's rights are adequately protected, the defendant, who has not witnessed the trial, is likely to conclude that his rights were violated and that he was unfairly convicted. Such a perception of unfairness may impede rehabilitation by convincing the defendant that the system is unfairly punishing him. Since one of the goals of punish-

---

104 See United States v. MacPherson, 421 F.2d 1127, 1130 (D.C. Cir. 1969) (characterizing defendant's assertion that he was unaware of his right to be present as "dubious").
105 "[T]he question still remains whether the appellant was apprised that besides bail jumping penalties an additional consequence would be the continuation of trial in his absence, which was tantamount to a guilty plea," Id. at 1130.
106 See, e.g., State v. Thornburg, 111 Ariz. 254, 255, 527 P.2d 762, 763 (1974) (form stating in bold type that the defendant had a right to be present at trial, but if he failed to appear the proceedings would begin without him).
107 For an extensive discussion of the benefits and detriments to a defendant which arise from being physically present in court, see Cohen, supra note 1, at 176-89.
108 It appears that defense counsel frequently refuse to participate if the proceedings continue while the defendant is absent. See, e.g., Gilbert v. State, ___ Ind. App. ___ , 395 N.E.2d 429, 430 (1979); Brown v. State, ___ Ind. App. ___ , 390 N.E.2d 1058, 1060 (1979). The cases dealing with absentia trials do not discuss what action defense counsel should take when the client fails to appear. Similarly, the cases do not discuss whether defense counsel has any responsibility to make sure that the defendant is aware of the trial date and of the fact that the trial may be held in absentia if the defendant fails to appear.
109 Cohen, supra note 1, at 178.
110 Id. at 176-79.
ing convicted defendants is rehabilitation, the indiscriminate use of absentia proceedings should be restricted; to do otherwise would encourage defendants' perceptions that the system is unfair.

The defendant's belief that he was unfairly convicted is particularly justified if the jury concludes that the defendant was absent because of guilt and fear of conviction. To prevent such a conclusion, some jurisdictions require that the judge admonish the jury not to consider the defendant's absence as evidence of guilt. Indiana does not require such an instruction; in fact, the Indiana Supreme Court, in Skinner v. State, concluded that a jury could consider a defendant's failure to appear at the trial as evidence to "aid . . . in determining . . . guilt or innocence." The jury instruction under review was upheld under the rationale that it did not actually instruct the jury that they could draw an inference of guilt from the absence. The court did not explain why his absence from trial, which is not relevant to any element of the charged crime, may be considered by the jury at all.

A defendant who is convicted in absentia, therefore, may receive less effective legal representation and may be prejudiced by the jury's inference of guilt from his absence. The Supreme Court has ruled that it is constitutionally permissible for a defendant to suffer the procedural losses arising from absence if he has been present for part of the trial. This loss is permissible because the public's right to an efficient criminal justice system is considered to outweigh the defendant's right to be present at trial once the trial has begun. When the trial has not yet begun, however, the public's interest in the trial does not weigh as heavily since the jury has not been selected, witnesses have not testified and the judge and prosecutors have not wasted time at trial. In fact, if a trial is held completely in absentia and it is later discovered that the defendant was totally unable to be present, wasted time and expense are a certainty since a trial de novo must then be held. The Indiana

111 W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 5(c) (1972).
113 Id. at 383 N.E.2d 307 (1978).
114 Id. at 383 N.E.2d at 309 (DeBrueler, J., dissenting).
115 Id. at 383 N.E.2d at 308 (majority opinion). The most recent Indiana case to deal with the issue of jury instructions in absentia trials is McHenry v. State, Ind. App. at 401 N.E.2d 745 (1980). The defendant there claimed that the trial judge's admonishment to the jury not to infer anything from the defendant's absence was prejudicial. The court of appeals did not rule on the merits of the defendant's claim since he had not objected to the preliminary admonishment at trial. Id. at 401 N.E.2d at 748.
116 See notes 45-51 & accompanying text supra.
117 See id.
courts have not yet considered the potential added time and expense in approving broad discretion to trial judges to hold trials completely in absentia.

In other jurisdictions, courts have found that the state's interest in proceeding with a trial which has not yet begun is insufficient to permit a trial in absentia unless the state can prove the need for an immediate trial. One particularly well-reasoned example is the Second Circuit Court of Appeals' decision in United States v. Tortora. Although the court of appeals held that the defendant had waived his right to be present at trial by failing to appear at the commencement of trial, the holding was limited to the extraordinary circumstances involved in the case, which included a multi-defendant criminal conspiracy charge and threats of physical harm to several potential witnesses. The opinion instructed trial judges to conduct trials in absentia "only when the public interest clearly outweighs that of the voluntarily absent defendant."

In Tortora, the court described the variety of circumstances which the trial court should consider after concluding that the defendant was voluntarily absent under the Cureton standard. First, the judge should weigh the likelihood that the trial could soon proceed with the defendant present. Next, the court must consider the difficulties of rescheduling the trial, particularly when there are multiple defendants. Finally, in a multiple defendant case, the judge should weigh the burden on the state of conducting more than one trial, evaluating the possibility of overlapping evidence and extended periods of jeopardy for witnesses who must testify. Tortora concluded that it was difficult "to conceive of any case where the exercise of this discretion [to conduct trials completely in absentia] would be appropriate other than a multiple-defendant case."

The Tortora test attempts to equitably balance the defendant's right to be present at trial against the state's interest in criminal prosecution. The test requires trial judges to make a two-pronged analysis before exercising discretion to conduct trials completely in absentia. First, the court must determine that the evidence before it establishes that the defendant is voluntarily absent under the requirements of Cureton. Then, the court must determine that the government's interest in immediately trying the defendant outweighs the defendant's right to be

---

11 See text accompanying note 58 supra.
13 Id. at 1208-09.
14 Id. at 1210.
15 Id.
16 Id. at 1209.
17 Id. at 1210 n.7.
present at trial. Under the Tortora, test very few defendants absent at the commencement of trial could be tried in absentia.

Although the Tortora test is not constitutionally mandated, it is commensurate with the Supreme Court's requirement of a Cureton-like determination of voluntary absence which considers the circumstances of the defendant's absence. In addition, it properly balances the interests of the defendant and the state. It would thus be an improvement over the current Indiana position which totally fails to weigh the defendant's interest in being present at trial against the state's interest in fulfilling its prosecutorial duties. Finally, the Tortora test limits judicial discretion by describing the circumstances the court should weigh before deciding to try a defendant who is absent at the commencement of trial.

CONCLUSION

The Indiana courts should permit the trial of defendants who are absent at the commencement of trial only when the trial court concludes, based on clear evidence, that the defendant is voluntarily absent under the Cureton requirements and that the public's interest in immediately trying the defendant outweighs the defendant's interest in being present at trial. The current Indiana position, which permits trials to begin when the defendant is absent without explanation for even a brief period at the commencement of trial, inequitably deprives all absent defendants of the benefits of being present during trial, regardless of the reason for the absence. That broad grant of discretion to trial judges is unconstitutional because it allows them to completely ignore the defendant's right to be present at trial.

The right to be present at trial is a time-honored part of our system of criminal justice. It is a constitutionally protected right of criminal defendants which should not be denied because of an unexplained failure to appear in court. It is time for the Indiana courts to ensure that defendants meet justice in person, rather than in absentia.

MYRA L. WILLIS

126 See id. at 1210.
127 This is because absentia trials could only be held when there were multiple defendants and difficulties in rescheduling the trial or protecting witnesses from harrassment. See id. at 1210 & n.7.