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## Right to Be Present

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forfeit “his right to be present during the delivery of the additional instructions [to the jury] by leaving the courthouse during deliberations despite instructions to remain in the building.”<sup>903</sup>

Under both the federal and state constitutions, the defendant has a right to be present during supplemental jury instructions by the court. However, this right may be forfeited if the defendant deliberately absents himself from the proceedings. Thus, before the court may proceed with the supplemental jury instructions it must make a finding, based on the surrounding circumstances, that the defendant’s absence is, in fact, deliberate.

#### FOURTH DEPARTMENT

People v. Williams<sup>904</sup>  
(decided February 1, 1991)

A criminal defendant claimed that his right to be present at all material stages of his trial, pursuant to the confrontation clauses of the federal<sup>905</sup> and state<sup>906</sup> constitutions, was violated when his trial was held in his absence. The court held that the “defendant’s non-appearance constituted a waiver of his right to be present at trial.”<sup>907</sup> Thus, the defendant’s conviction of grand larceny in the third degree was affirmed.<sup>908</sup>

On May 5, 1988, the trial court informed the defendant, Albert Williams, that his trial would be conducted eleven days later.<sup>909</sup> The court further informed Williams that his presence was required, but that the trial would proceed in his absence should he

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defendant’s absence before proceeding with trial), *appeal denied*, 76 N.Y.2d 852, 561 N.E.2d 891, 560 N.Y.S.2d 991 (1990).

903. *People v. Watson*, 121 A.D.2d 487, 487, 503 N.Y.S.2d 584, 585 (2d Dep’t 1986).

904. 170 A.D.2d 968, 566 N.Y.S.2d 135 (4th Dep’t), *appeal denied*, 77 N.Y.2d 968, 573 N.E.2d 590, 570 N.Y.S.2d 502 (1991).

905. U.S. CONST. amend. VI.

906. N.Y. CONST. art. I, § 6.

907. *Williams*, 170 A.D.2d at 969, 566 N.Y.S.2d at 136.

908. *Id.* at 968, 566 N.Y.S.2d at 137.

909. *Id.* at 968, 566 N.Y.S.2d at 136.

fail to appear.<sup>910</sup> The court cautioned that due to the possible unavailability of three prosecution witnesses, of which two were nonresidents, no adjournments would be granted.<sup>911</sup> Williams acknowledged that he understood the court's warning.<sup>912</sup>

On the day his case was called for trial, Williams did not appear. His counsel informed the court that she received a message that Williams was sick, but her attempts to contact him proved fruitless. An adjournment was granted until the following day.<sup>913</sup> When the defendant failed to appear the following day, and his counsel noted that she received no replies to the messages she left, the court proceeded with the trial in Williams' absence. The court reasoned that since Williams had been previously informed of the trial date and the consequences of his nonappearance, it could proceed with his trial.<sup>914</sup>

The fourth department, in a brief decision, affirmed the trial court's conviction.<sup>915</sup> The court acknowledged that under the confrontation clauses of the state and federal constitutions the defendant "has a fundamental right to be present at all material stages of a trial."<sup>916</sup> The court, relying primarily on *People v. Parker*,<sup>917</sup> also noted that the right may be waived. However, in order for such waiver to be effective, it must be made voluntarily, knowingly and intelligently.<sup>918</sup> In order to effectuate such a waiver, the court stated that the defendant "must, at a

910. *Id.*

911. *Id.*

912. *Id.* (The court inquired: "Of course, the trial could be held without you, you understand that?" The defendant readily acknowledged that he understood.)

913. *Id.*

914. *Id.*

915. *Id.*

916. *Id.* at 968-69, 566 N.Y.S.2d at 136; *see also* *People v. Mehmedi*, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1987).

917. 57 N.Y.2d 136, 440 N.E.2d 1313, 454 N.Y.S.2d 967 (1982).

918. *Williams*, 170 A.D.2d at 969, 566 N.Y.S.2d at 136; *see also Parker*, 57 N.Y.2d at 139, 440 N.E.2d at 1315, 454 N.Y.S.2d at 969; *People v. Epps*, 37 N.Y.2d 343, 349-50, 334 N.E.2d 556, 571, 372 N.Y.S.2d 606, 612, *cert. denied*, 423 U.S. 999 (1975); *People v. Quamina*, 161 A.D.2d 1110, 1111, 555 N.Y.S.2d 973, 974 (4th Dep't), *appeal denied*, 76 N.Y.2d 943, 564 N.E.2d 682, 563 N.Y.S.2d 72 (1990).

minimum, be informed in some manner of the nature of the right to be present at trial and the consequences of failing to appear for trial.”<sup>919</sup> This, the court found, “requires that defendant simply be aware the trial will proceed even though he or she fails to appear.”<sup>920</sup>

However, trial by *absentia* is not automatically authorized once the court finds that the defendant has waived his or her right to be present. The *Parker* court laid out “appropriate factors” that the trial court must consider before the trial may proceed without the defendant: “[T]he possibility that defendant could be located within a reasonable period of time, the difficulty of rescheduling the trial and the chance that evidence will be lost or witnesses will disappear.”<sup>921</sup> Comparing the record to these factors, the court found that the trial court acted within its discretion in proceeding in Williams’ absence.<sup>922</sup> The court noted: that the trial court delayed the trial for one day to allow Williams the opportunity to be present; that Williams’ attorney offered no reasonable explanation for his absence; and that there was the possibility of lost prosecution witnesses should further delay occur.<sup>923</sup>

Under federal law, it has long been recognized that “[o]ne of the most basic rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”<sup>924</sup> However, this right, like any other constitutional

919. *Williams*, 170 A.D.2d at 969, 566 N.Y.S.2d at 136 (quoting *Parker*, 57 N.Y.2d at 141, 440 N.E.2d at 1316, 454 N.Y.S.2d at 970).

920. *Id.*; see also *Quamina*, 161 A.D.2d at 1111, 555 N.Y.S.2d at 974 (record must show defendant was aware trial would proceed even if defendant failed to appear); cf. *People v. Sanchez*, 65 N.Y.2d 436, 443-44, 482 N.E.2d 56, 59-60, 492 N.Y.S.2d 577, 580-81 (1985) (if “defendant deliberately leaves the courtroom after his trial has begun, he forfeits his right to be present at trial regardless of whether he knows that the trial will continue in his absence”).

921. *Parker*, 57 N.Y.2d at 142, 440 N.E.2d at 1317, 454 N.Y.S.2d at 970.

922. *Williams*, 170 A.D.2d at 968, 566 N.Y.S.2d at 136.

923. *Id.*

924. *Illinois v. Allen*, 397 U.S. 337, 338 (1970); see *United States v. Mera*, 921 F.2d 18, 20 (2d Cir. 1990); *United States v. Pastor*, 557 F.2d 930, 933 (2d Cir. 1977).

guarantee, may be waived.<sup>925</sup> As a general rule, in order for a waiver to be effective it must be made knowingly, voluntarily, and intelligently.<sup>926</sup> This may be accomplished when a defendant “deliberately absent[s] himself from the trial without good cause.”<sup>927</sup> In *United States v. Tortora*,<sup>928</sup> the Second Circuit

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925. See *Taylor v. United States*, 414 U.S. 17, 18 & n.1-2 (1973). In *Taylor*, the Court upheld the constitutionality of Rule 43 of the Federal Rules of Criminal Procedure, which provides, in pertinent part: “In prosecutions for offenses not punishable by death, the defendant’s voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.” *Id.* Consequently, the Court affirmed the lower court’s holding, finding that the petitioner knew that he was entitled to be present in court and that he voluntarily chose not to attend. *Id.* The *Taylor* Court relied on the earlier holding of *Diaz v. United States*, 223 U.S. 442 (1912), in which the court stated:

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

*Diaz*, 223 U.S. at 455 (emphasis added); accord *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (“No doubt the privilege may be lost by consent . . . .”); *United States v. Tortora*, 464 F.2d 1202, 1208 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972) (“[w]ithout this obligation on the accused the disposition of criminal cases would be subject to the whims of defendants who could frustrate the speedy satisfaction of justice by absenting themselves from their trials.”). In fact, the *Tortora* court was one of the first to apply the *Diaz* waiver rule when the defendant had absented himself after a not guilty plea, but before the impanelment of the jury. *Tortora*, 464 F.2d at 1208.

926. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”); see also *Tortora*, 464 F.2d at 1208 (“[w]aiver of a constitutional right must be both ‘knowing’ and ‘voluntary’”).

927. *Pastor*, 557 F.2d at 933; see also *Diaz*, 223 U.S. at 455. Waiver may also be implied from a defendant’s conduct. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court reversed the lower court’s holding that defendant had been deprived of his constitutional right when the trial court removed him from his own trial because of his disruptive conduct, and continued the trial in his absence. *Allen*, 397 U.S. at 345-47. The *Allen* Court held that, under the circumstances, Allen waived his “right guaranteed by the sixth and fourteenth amendments to be present throughout his trial.” *Allen*, 397 U.S. at 346.

928. 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972).

Court of Appeals held that when a defendant deliberately fails to appear in court his absence will be considered a knowing waiver.<sup>929</sup> Thus, “[w]hen a trial judge designates a date for trial the defendant’s obligation is to appear ready in the court on that date.”<sup>930</sup> However, before the trial may proceed in the defendant’s absence, the judge must determine that the defendant had “adequate notice of the charges and proceedings against him.”<sup>931</sup>

Still, the *Tortora* court refused to lay down as a general rule that the judge should proceed with the trial where a defendant has voluntarily absented himself from the proceedings. Instead, the judge should use his or her discretion, which should be exercised, to hold the trust in defendant’s absence, “only when the public interest clearly outweighs that of the voluntarily absent defendant.”<sup>932</sup> In doing so, the judge should consider factors such as “the likelihood that the trial could soon take place with the defendant present[,] the difficulty of rescheduling [and] the burden on the Government [and the witnesses].”<sup>933</sup>

Therefore, under both the federal and state constitutions the defendant’s right to be present at all material stages of his or her trial may be waived. However, a trial may not automatically be tried *in absentia* once waiver is established. The decision to hold a trial *in absentia* is committed to the discretion of the trial judge. In order to determine whether a trial *in absentia* is appropriate, the judge should consider factors which weigh the rights of the defendant against the need to proceed with the trial as scheduled. If satisfied, only then does a trial *in absentia* comport with the re-

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929. *Id.* at 1208 (“The deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly processes of justice.”). *Id.*

930. *Id.* (“No defendant has a unilateral right to set the time of circumstances under which he will be tried.”). *Id.*

931. *Id.* at 1209. The record should show that the defendant was “advised when the proceedings were to commence and that he voluntarily, knowingly, and without justification failed to be present at the designated time and place . . . .” *Id.*

932. *Id.* at 1210.

933. *Id.*

spective state and federal constitutional guarantees afforded the defendant.

People v. Ortega<sup>934</sup>  
(decided July 12, 1991)

A criminal defendant contended that his right to be present with counsel under the federal<sup>935</sup> and state<sup>936</sup> constitutions, as well as his state statutory rights, were violated when the court held an in chamber conference with the prosecution's key witness absent the defendant and all counsel.<sup>937</sup> The appellate division held that the trial court's *ex parte* conference with Officer Fritzen, a key witness for the prosecution, violated the defendant's right to be present with counsel at all important stages of the trial.<sup>938</sup> The court stated that since the defendant's guilt or innocence was at issue, "the decision whether [an] informant's identity should be disclosed must not be resolved in an *ex parte* proceeding."<sup>939</sup>

The defendant, Ortega, was convicted by a jury, of second and third degree criminal sale of a controlled substance as well as two counts of possession of a controlled substance in the third degree. The conviction resulted from a sale of cocaine to an undercover police officer introduced to the defendant by a confidential informant. During the trial, the defendant's repeated requests for disclosure of the informant's identity were denied. Upon cross-examination by defense counsel, police officer Fritzen, chief witness for the prosecution, refused to disclose the identity of the informant who accompanied him when he purchased the cocaine from the defendant. The court, in an attempt to resolve the issue, conducted an *in camera* conference in chambers with Officer Fritzen without the knowledge or consent of either side. Again, Fritzen refused to identify the informant. Subsequently, the court

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934. 572 N.Y.S.2d 241 (4th Dep't), *aff'd*, 78 N.Y.2d 1101, 585 N.E.2d 372, 578 N.Y.S.2d 123 (1991).

935. U.S. CONST. amend. VI.

936. N.Y. CONST. art. I, § 6.

937. *Ortega*, 572 N.Y.S.2d at 242.

938. *Id.* The court's holding was based on *People v. Insogna*, 28 A.D.2d 771, 773, 281 N.Y.S.2d 124, 128 (3d Dep't 1967).

939. *Ortega*, 572 N.Y.S.2d at 242 .