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## Constitutional Law - Pennsylvania Constitution - Defendant's Right to Be Present at Criminal Prosecution - Right to Be Present When Defendant Voluntarily Absents

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# Recent Decisions

CONSTITUTIONAL LAW—PENNSYLVANIA CONSTITUTION—DEFENDANT'S RIGHT TO BE PRESENT AT CRIMINAL PROSECUTION—RIGHT TO BE PRESENT WHEN DEFENDANT VOLUNTARILY ABSENTS—The Pennsylvania Supreme Court held that Article I, Section 9, of the Pennsylvania Constitution is not violated when a defendant voluntarily absents himself from the trial and that the judge is at his discretion to proceed.

*Commonwealth of Pennsylvania v. Wilson*, 712 A.2d 735 (Pa. 1998).

On April 13, 1990, James Wilson was arrested by the Philadelphia police and charged with possession of a controlled substance,<sup>1</sup> possession of a controlled substance with intent to deliver,<sup>2</sup> possession of drug paraphernalia,<sup>3</sup> and criminal conspiracy.<sup>4</sup> Wilson

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1. *Commonwealth v. Wilson*, 712 A.2d 735, 736 (Pa. 1998). Pennsylvania's law concerning possession of a controlled substance is found in 35 Pa. Stat. § 780-113(a)(16):

Knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.

*Id.* (citing 35 Pa. Stat. § 780-113(a)(16)).

2. *Wilson*, 712 A.2d at 736. Pennsylvania law concerning possession with intent to deliver is found in 35 Pa. Stat. § 780-113(a)(30):

Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance. *Id.* (citing 35 Pa. Stat. § 780-113(a)(30)).

3. *Id.* Pennsylvania law on possession with intent to deliver is found at 35 Pa. Stat. § 780-113(a)(32):

The use of, or possession with intent to use, drug paraphernalia for the purpose of

was released on bail.<sup>5</sup> On April 15, 1991, Wilson was present for a pretrial hearing on his motion to suppress evidence seized by police; the court denied the motion.<sup>6</sup> On April 17, 1991, Wilson appeared and participated in plea negotiations outside the courtroom.<sup>7</sup> As his defense attorney entered the courtroom, Wilson fled.<sup>8</sup> Following an exchange held at side bar,<sup>9</sup> the court issued a bench warrant<sup>10</sup> and decided to resume in Wilson's absence. The parties presented their evidence after the jury was sworn.<sup>11</sup> Wilson

planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this act.

*Id.* (citing 35 PA. STAT. § 780-113(a)(32)).

4. *Id.* Pennsylvania law dealing with criminal conspiracy is located at 18 Pa. Cons. Stat. § 903:

A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

*Id.* (citing 18 PA. CONS. STAT. § 903).

5. *Id.*

6. *Id.* Wilson appeared before the Court of Common Pleas of Philadelphia County. *Id.* A jury was selected and the court announced it would proceed the following day. *Id.*

7. *Wilson*, 712 A.2d at 736. Wilson, accompanied by his attorney, participated in plea negotiations. *Id.* The parties failed to accomplish a plea agreement. *Id.*

8. *Id.* The court determined that Wilson had fled the courthouse. *Id.* Wilson, who actively participated in plea negotiations outside the courtroom, fled after a plea could not be reached and defense counsel had returned to the courtroom. *Id.* Defense counsel offered no knowledge of Wilson's whereabouts or whether he would return. *Id.*

9. *Id.* A side bar refers to the area at the side of the judge's bench where trial counsel and the judge discuss matters out of hearing of the jury. BLACK'S LAW DICTIONARY 962 (6th ed. 1991). The following is the conversation that took place at side bar:

[PROSECUTOR]: I would like to place on the record that the defendant was present yesterday when the jury was selected. The jury had not been sworn and the defendant was present this morning. THE COURT: He was present this morning? [PROSECUTOR]: He was present this morning. He had conversations with his attorney. In fact, we discussed working out a plea to this particular case. THE COURT: Right. [PROSECUTOR]: When [defense counsel] was in the courtroom and defendant was outside in the hallway, he absented himself. . . . There is nothing that would make us believe that this is anything other than a willful absenting of himself. There is nothing to make us think that there was any particular harm in the courtroom, outside the courtroom of City Hall. THE COURT: He was participating in the plea negotiations and then absented himself. [DEFENSE COUNSEL]: On the other hand, Your Honor, perhaps the Court would consider continuing the matter until there is an attempt to find the defendant. THE COURT: No.

*Id.*

10. *Wilson*, 712 A.2d 736. A bench warrant is a process issued by the Court itself for the arrest of a person. BLACK'S LAW DICTIONARY 107 (6th ed. 1991).

11. *Id.* Even though both Wilson and the commonwealth assert that Wilson fled after

was found guilty on all counts and sentencing was postponed until Wilson was apprehended.<sup>12</sup>

Wilson was apprehended and retained new counsel, who filed post-trial motions *nunc pro tunc*.<sup>13</sup> The trial court concluded that the police violated the “knock and announce” rule when executing the original search warrant.<sup>14</sup> The trial judge granted a new trial and suppressed the evidence that had been seized.<sup>15</sup> The court also found that Wilson’s original counsel was ineffective for failing to call a witness who may have been able to testify as to the invalidity of the execution of the search warrant.<sup>16</sup> The commonwealth filed a motion for reconsideration, which was denied.<sup>17</sup> The commonwealth then filed an appeal to the Pennsylvania Superior Court.<sup>18</sup> The superior court reversed the order for a new trial, reinstated the convictions, and remanded for sentencing.<sup>19</sup> The superior court held that the trial court did not abuse its authority in conducting the trial in Wilson’s absence or in permitting his post-verdict motions *nunc pro tunc*.<sup>20</sup> It also held that the police search was conducted properly and that the evidence should not have been suppressed.<sup>21</sup>

On appeal, the supreme court addressed the issue of whether a trial court may conduct a trial in absentia when the defendant flees without an explanation and after trial has commenced.<sup>22</sup> The court first noted that a person accused of a crime has a constitutional right under the Sixth Amendment of the United States Constitution

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the jury was sworn, it is clear from the record that he left after the jury was empaneled but before the jury was sworn. *Id.*

12. *Id.* at 737. Defense counsel filed no post-trial motions. *Id.*

13. *Id.* Wilson remained a fugitive until September of 1991, when he was arrested on unrelated charges. *Id.* “*Nunc pro tunc*” signifies a thing done now that shall have the same legal effect as if done at the time when it ought to have been done. BLACK’S LAW DICTIONARY 737 (6th ed. 1991).

14. *Id.* The “knock and announce” rule requires the police to knock and announce their authority and purpose before entering a home in the execution of a search warrant. BLACK’S LAW DICTIONARY 603 (6th ed. 1991).

15. *Wilson*, 712 A.2d at 736. The police seized cocaine, a large sum of cash, and packaging materials.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Wilson*, 712 A.2d at 737.

21. *Id.*

22. *Id.* Wilson filed a petition for allowance of appeal. *Id.* The order granting allocatur phrased the limited issue as follows: “[W]hether the trial in absentia violated [Wilson]’s federal and state constitutional rights.” *Id.* Wilson’s brief argued only that the commonwealth should adopt the federal standard for trials in absentia. *Id.*

and Article I, Section 9, of the Pennsylvania Constitution to be present at every stage of a criminal trial.<sup>23</sup> However, the court noted that, in noncapital cases, a defendant can waive this right through his or her own actions, either expressly or implicitly.<sup>24</sup> The defendant's waiver must be knowing and voluntary.<sup>25</sup> The court reasoned that when a defendant, such as Wilson, is initially present when the trial commences, then leaves or fails to attend further proceedings, he is deemed to have knowingly and voluntarily waived his right to be present.<sup>26</sup> The court relied on Pennsylvania precedent that a trial court may, in its discretion, conduct a trial in absentia when the defendant absconds without cause after the trial commences.<sup>27</sup>

The court then looked to the United States Supreme Court's reasoning in support of trials in absentia.<sup>28</sup> The court pointed out that a defendant who is released on bail before trial gives the court his or her assurance that he or she will be present to stand trial and submit to sentencing if found guilty.<sup>29</sup> The court emphasized that, unless the defendant is prevented from attending the proceedings for reasons beyond his or her control, he or she is expected to be present at all stages of trial and owes the court an

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23. *Id.* U.S CONST. amend. VI. provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

PA. CONST. art. I, § 9 provides, in part, that "[i]n all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him. . . ."

24. *Wilson*, 712 A.2d at 737 (citing *Commonwealth v. Ford*, 650 A.2d 433, 440 (1994)).

25. *Id.*

26. *Id.* The court considered three cases: *Commonwealth v. Sullens*, 619 A.2d 1349 (1992); *Commonwealth v. Diehl*, 107 A.2d 543 (1954); and *Commonwealth v. Graham*, 375 A.2d 161 (1977).

27. *Id.* (citing *Commonwealth v. Clark*, 407 A.2d 28 (1979) (holding that trial in absentia was proper where defendant was present for empanelling of the jury, then absconded); *Graham* 375 A.2d at 161 (allowing trial in absentia where defendant was present during the morning session when jury selection took place, but failed to return after the lunch break)). *Id.*

28. *Id.* The United States Supreme Court reasoned that common sense should not allow an accused person who is on bail to withdraw himself from the Courts and break up a trial already in progress. *Id.* "Neither in criminal or civil cases will the law allow a person to take advantage of his own wrong." *Id.* at 738. (citing *Diaz v. United States*, 223 U.S. 442, 457-58 (1912)).

29. *Wilson*, 712 A.2d at 738 (citing *United States v. Tortora*, 464 F.2d 1202, 1208 (2d Cir. 1972)).

affirmative duty to advise it when he or she will be absent.<sup>30</sup>

The court then analyzed the longstanding rule that permits trials to take place in a defendant's absence.<sup>31</sup> The court addressed the defendant's argument that the commonwealth should weigh certain factors before deciding to proceed with a trial in absentia.<sup>32</sup> These factors were set forth by the United States Court of Appeals for the Second Circuit.<sup>33</sup> These factors include the likelihood that the trial could soon thereafter take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; and the burden on the government in having to undertake two trials, especially in multiple-defendant trials in which the evidence against the defendants is often overlapping and more than one trial might place the government's witnesses in substantial jeopardy.<sup>34</sup> The *Wilson* Court analyzed the *Tortora* factors, such as whether the defendant was advised when proceedings were to commence and whether he or she voluntarily, knowingly, and without justification failed to be present.<sup>35</sup> The *Tortora* Court also advised that before a trial court decided to proceed in the defendant's absence it should look to the likelihood that the defendant would soon return and the difficulty of rescheduling the trial; however, it stressed that the decision to continue ultimately remains within the discretion of the trial judge.<sup>36</sup> The *Wilson* Court did not discount with the *Tortora* factors but noted that the list is not exhaustive and other factors may be taken into consideration.<sup>37</sup>

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30. *Id.* The court offered, as an example of a valid reason for failing to appear, a defendant who has a medical or family emergency. *Id.*

31. *Id.* at 738. This rule was codified in Pennsylvania in 1968 as Pennsylvania Rule of Criminal Procedure 1117 dealing with the presence of the defendant. Pennsylvania Rule of Criminal Procedure 1117 states, "The defendant shall be present at the arraignment, at every stage of trial including the empanelling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict." PA. R. CRIM. P. 1117.

32. *Id.* at 738. These factors were set forth and applied to trials in absentia pursuant to Federal Rule of Criminal Procedure 43(b). *Id.* (citing *Tortora*, 464 F.2d at 1206 (2d Cir. 1972)).

33. *Id.* (citing *Tortora*, 464 F.2d at 1206). In *Tortora*, a defendant failed to appear on the day of the trial. *Id.* The court determined that the defendant was aware of the date and time of the hearing and, when attempts to locate the defendant failed, the court proceeded without him. *Id.* The defendant was convicted in absentia. *Id.* at 739.

34. *United States v. Tortora*, 464 F.2d 1202, 1210 (1972).

35. *Wilson*, 712 A.2d at 739. The Second Circuit reasoned that by looking to these factors it could ensure that the defendant had an opportunity to be present at all stages of the trial and was afforded due process of law. *Id.* (citing *Tortora*, 464 F.2d at 1206).

36. *Tortora*, 464 F.2d at 1209.

37. *Wilson*, 712 A.2d at 739. The court does not give any additional factors. *Id.*

The court next addressed Wilson's argument that, before a through inquiry into defendant's whereabouts can be conducted, a recess or continuance is proper.<sup>38</sup> The court again emphasized that the decision to proceed with the trial remains within the trial court's discretion.<sup>39</sup> The court also noted the numerous difficulties that would exist if a trial court were required to delay a trial and conduct a hearing on the issue of whether a defendant would reappear.<sup>40</sup> The court reasoned that the time and resources required for a separate hearing would put the pace and timing of the trial into the defendant's hands.<sup>41</sup> The court envisioned that flight by a defendant could be used as a defense tactic to obtain continuances that otherwise would not be granted.<sup>42</sup> The court considered the difficulty and hardship such a situation would place on the court, jury, and witnesses.<sup>43</sup>

The court concluded by noting that Wilson was present for the suppression hearing and for jury selection and had participated in plea negotiations.<sup>44</sup> Wilson fled only after the parties were unable to reach a plea agreement.<sup>45</sup> The court found that it was clear from the record that Wilson was fully aware of the date and time of trial, was not detained beyond his control, and could have appeared the day of the trial.<sup>46</sup> The court noted that it was reasonable for the trial court to conclude that Wilson fled without cause and voluntarily waived his right to be present.<sup>47</sup> Therefore, the court concluded that the trial court did not abuse its discretion of power in deciding to proceed in Wilson's absence.<sup>48</sup> As a result, the

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38. *Id.* The court emphasized that, even pursuant to *Tortora*, the trial court is not required to postpone the trial to weigh the likelihood of the defendant returning or the inconvenience to the parties that a continuance would cause. *Id.*

39. *Id.* The court reasoned that a trial court can conduct an inquiry on the record and make a determination of whether to continue without a hearing on the issue or unnecessary delay. *Id.*

40. *Id.*

41. *Id.* The court stressed that judicial economy would be lost and the flow of the trial would be disrupted. *Id.*

42. *Wilson*, 712 A.2d at 739. This could be used as a defense tactic because it would delay the trial from proceeding to an ultimate conclusion of guilt. *Id.*

43. *Id.* The court noted that everyone would be held in limbo while waiting for the defendant. *Id.*

44. *Id.* The suppression hearing, jury selection, and plea negotiations took place separately on three consecutive days. *Id.*

45. *Id.*

46. *Id.* The court noted that Wilson did appear on the day of the trial but later fled. *Id.*

47. *Wilson*, 712 A.2d at 739.

48. *Id.* The trial court did not abuse its discretion under Pennsylvania Rule of Criminal Procedure 1117(a). *Id.*

Pennsylvania Supreme Court affirmed the Pennsylvania Superior Court decision reinstating the conviction and remanding for sentencing.<sup>49</sup>

Justice Nigro filed an opinion concurring in part and dissenting in part.<sup>50</sup> Justice Nigro agreed with the majority that trial may proceed in absentia when a defendant voluntarily absents himself or herself, however, Justice Nigro believed an on-the-record inquiry is required to determine whether the defendant's absence was "without cause."<sup>51</sup> Justice Nigro explained that Pennsylvania Rule of Criminal Procedure 1117(a) requires an inquiry into the circumstances surrounding a defendant's departure to determine whether a defendant's departure is without cause.<sup>52</sup> Justice Nigro suggested that if a defendant disappears, defense counsel should be afforded a twenty-four hour period to find the client or produce a legitimate reason for his or her absence.<sup>53</sup> He explained that this short adjournment ensures that a defendant's absence is compelling without permitting him to benefit from deliberate flight.<sup>54</sup> He also opined that such an adjournment would place little inconvenience upon the commonwealth because the jury and witnesses need be recessed for only twenty-four hours.<sup>55</sup> Because the trial court failed to conduct an inquiry into Wilson's whereabouts before proceeding to trial in absentia, Justice Nigro dissented.<sup>56</sup> He relied on the fact that defense counsel requested a continuance to allow an inquiry into the reason for Wilson's disappearance but the trial court refused to continue the case.<sup>57</sup>

A defendant's right to be present at trial is a longstanding guarantee. "The Sixth Amendment to the United States Constitution; Article I, Section 9, of the Pennsylvania Constitution;

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49. *Id.*

50. *Id.* at 740.

51. *Id.*

52. *Wilson*, 712 A.2d at 740. Pennsylvania Rule of Criminal Procedure 1117(a) provides:

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict.

*Id.*

53. *Id.* Justice Nigro suggested that this procedure acknowledges the defendant's affirmative duty to advise the court of a valid reason for failing to appear and gives counsel, the defendant, or a family member an opportunity to do so. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 741.

57. *Wilson*, 712 A.2d at 740.

and Pennsylvania Rule of Criminal Procedure 1117(a) guarantee the right of a defendant to be present at court in every stage of a criminal trial.<sup>58</sup> Notwithstanding this right, in *Diaz v. United States*, the United States Supreme Court in held that, when a defendant who is not charged with a capital offense voluntarily absents himself or herself after the trial has begun, he or waives the right to be present and leaves the court free to proceed with the trial in like manner and like effect as if he were present.<sup>59</sup> In *Diaz*, the defendant was charged with the crime of noncapital homicide.<sup>60</sup> On two occasions, the defendant, who was at large on bail but present for the trial, voluntarily absented himself from the trial but consented that it should proceed in the presence of his attorney.<sup>61</sup> The defendant later objected that he could not waive his right to be present and that the court was without power to proceed in his absence.<sup>62</sup> The Court found that the defendant voluntarily absented himself at the latter phase of the trial and Philippine law (the applicable forum law) does not make the defendant's presence indispensable at this stage.<sup>63</sup> The Court explained that courts have regarded an accused who is in custody and one who is charged with a capital offense as being incapable of waiving the right to be present; the one, because his or her presence or absence is not within his or her own control and the other, because, in addition to being in custody, he or she is deemed to suffer the constraint naturally incident to an apprehension of the

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58. *Commonwealth v. Ford*, 650 A.2d 433, 440 (1994). U.S. CONST. amend. VI provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." PA. CONST. art. I, § 9 explains: "In all criminal prosecutions, the accused hath a right . . . to meet the witness face to face." PA. R. CRIM. P. 1117(a) provides:

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict.

59. *Diaz v. United States*, 223 U.S. 442, 455 (1912). The Court cited a long history cases from various jurisdictions including *Flight v. State*, Ohio pt. 1, 181; *Wilson v. State*, 2 Ohio St. 319; *McCorkle v. State*, 14 Ind. 39; *Hill v. State*, 17 Wis. 675; *Stoddard v. State*, 132 Wis. 520; *Shalinger v. People*, 102 Ill. 241. *Id.* A capital offense is one which may be punishable by death. BLACK'S LAW DICTIONARY 143 (6th ed. 1991).

60. *Diaz*, 223 U.S. at 444. *Diaz* was charged with the crime of noncapital homicide and was not eligible for the death penalty. *Id.*

61. *Id.* at 445. These absences were in the latter part of the trial when two witnesses for the United States were both examined and cross-examined. *Id.* at 453.

62. *Id.* at 453.

63. *Id.* at 454.

awful penalty that would follow conviction.<sup>64</sup> However, in a case in which the offense is not capital and the accused is not in custody, the prevailing rule has been that a defendant's act of voluntarily absenting himself or herself after the trial has begun in his or her presence does not nullify what has been done or prevent the completion of the trial; rather, it operates as a waiver of the right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he or she were present.<sup>65</sup> The Court distinguished *Diaz* from earlier cases in which it reached the opposite result because, in each of these former cases, the accused was in custody, charged with a capital offense, and sentenced to death.<sup>66</sup> The Court reasoned that, in *Diaz*, there was no infraction of the law and, once the defendant absented, the trial court could proceed without him.<sup>67</sup>

The commonwealth has long recognized that, in capital cases, the defendant's presence is necessary at every stage of the trial, whether he or she is at liberty on bail or in custody.<sup>68</sup> As early as 1851, in *Commonwealth v. Prine*, the Pennsylvania Supreme Court held that the same was true in the case of noncapital felonies.<sup>69</sup> In *Prine*, the defendant was a prisoner indicted for burglary and larceny.<sup>70</sup> Prine's counsel waived the presence of the defendant; the jury was called, empaneled, and sworn and returned a verdict of guilty.<sup>71</sup> On appeal, it was assigned for error that the defendant was not present during the trial, when the verdict was rendered by the

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64. *Id.* at 455. The Court refers to the fact that most defendants charged with a capital felony are not given bail and, thus, have no opportunity to be voluntarily absent. *Id.*

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

66. *Id.* at 458. The Court cited several cases, including *Hopt v. Utah*, 110 U.S. 574; *Lewis v. United States*, 146 U.S. 370; *Schwab v. Berggren*, 143 U.S. 442; and *Thompson v. Utah*, 170 U.S. 343.

67. *Id.* at 454. The Court quoted Justice Morris, who explained the reasoning behind proceeding without the defendant:

It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it . . . .

*Id.* at 457 (citing *Falk v. United States*, 180 U.S. 636 (1901)).

68. *Commonwealth v. Diehl*, 107 A.2d 543, 544 (1954).

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

70. *Prine*, 18 Pa. at 103. The defendant was one of several prisoners being tried. *Id.*

71. *Id.* The defense counsel also had the jury polled individually and the jurors answered that the defendant was guilty of burglary and larceny. *Id.*

jury, or when the sentence was pronounced against him.<sup>72</sup> The court noted that this was a case of first impression in Pennsylvania.<sup>73</sup> The *Prine* Court reasoned that a defendant's presence at every stage of the trial is a matter of substance not peculiar to trials for murder.<sup>74</sup> A defendant's presence at trial for a felony at common law is required because the mitigation of the punishment does not change the character of the crime.<sup>75</sup> The court noted that, in other felony cases, it is allowable to presume that constitutional safeguards were provided; but, when it is stated on the record positively that the prisoner was not present, the court cannot shut its eyes to that fact.<sup>76</sup> The court directed that the defendant be held to answer a fresh indictment.<sup>77</sup>

In 1878, the court changed its position on trials in absentia for noncapital felonies and held that a defendant on bail who leaves the courtroom and is absent when the verdict is returned cannot raise a motion in arrest of judgment.<sup>78</sup> *Lynch* involved a trial of a prisoner charged with larceny, who, while on bail, voluntarily left the courtroom during the jury's deliberation.<sup>79</sup> The Pennsylvania Supreme Court affirmed the lower court's overruling of Lynch's motion for arrest of judgment, reasoning that, historically, larceny was not a capital offense for which death could be imposed.<sup>80</sup> The court explained that the factual situation of *Lynch* was not analogous to *Prine*,<sup>81</sup> in *Prine*, the defendant was charged with burglary, a capital offense.<sup>82</sup> The court noted that larceny is in the category of misdemeanors for which the defendant may appear and plead by attorney; when such a misdemeanor is the crime charged, the voluntary absence of a defendant on bail waives his or her right

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72. *Id.*

73. *Id.* The court revisited precedent and could not find any case in which a prisoner on trial for a felony was not present at every stage of the trial. *Id.*

74. *Id.*

75. *Prine*, 18 Pa. at 105.

76. *Id.* The court refers to felonies that are not murder. *Id.* The court also questioned the authority of the defendant's attorney to waive the defendant's presence. *Id.*

77. *Id.* at 105.

78. *Lynch v. Commonwealth*, 88 Pa. 189 (1878). A motion for arrest of judgement is a motion that, if granted, has the effect of refusing to render the original judgement due to an intrinsic matter which renders the original judgement erroneous. BLACK'S LAW DICTIONARY 72 (6th ed. 1991).

79. *Lynch*, 88 Pa. at 189. The record showed that the defendant had been called when the jury returned a verdict of guilty but he failed to appear. *Id.*

80. *Id.* at 193. The court looked specifically to the Act of 31st May 1718. *Id.*

81. *Prine*, 18 Pa. at 103.

82. *Lynch*, 88 Pa. at 193-95.

to be present.<sup>83</sup>

In *Commonwealth v. Diehl*, the Pennsylvania Supreme Court reiterated that the defendant's right to be present can be waived if he or she has not been charged with a capital offense.<sup>84</sup> In *Diehl*, the defendant was convicted of seven criminal offenses, four of which were felonies.<sup>85</sup> The defendant raised an infringement of his constitutional rights under Article I, Section 9, of the Pennsylvania Constitution.<sup>86</sup> Specifically, the defendant complained that his rights were violated when additional instructions were given to the jury during deliberations in his absence.<sup>87</sup> The court held that, in a noncapital felony case in which competent counsel for the defendant is present during the giving of additional instructions to the jury, the defendant's absence will be construed as a voluntary waiver of his right to be present.<sup>88</sup>

In the recent case of *Commonwealth v. Sullens*,<sup>89</sup> the Pennsylvania Supreme Court first held that a defendant may be tried in absentia if he or she is absent without cause at the time his or her trial is scheduled to begin. In *Sullens*, the defendant was charged with escape and, after being arraigned, waived his right to a jury trial on the charge.<sup>90</sup> The defendant was notified of his nonjury trial date but failed to appear.<sup>91</sup> The superior court held that an accused cannot waive his right to be present at trial by failing to appear on the date scheduled for trial.<sup>92</sup> The superior

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83. *Id.* at 194. The court also required the defendant to be called for appearance. *Id.*

84. *Commonwealth v. Diehl*, 107 A.2d 543 (1954).

85. *Diehl*, 107 A.2d at 543. The defendant was involved in a shooting in a café and also exchanged gunfire with the police that pursued him. *Id.*

86. *Id.*

87. *Id.* at 545. Both the prosecution and defense admitted that defense counsel was present both during deliberations and when the additional instructions were charged to the jury. *Id.* The record also shows that no objections were made to the giving of additional instructions or to the giving of instructions in the defendant's absence and that no exception was taken to the instructions given. *Id.*

88. *Id.* The defendant's counsel also argued there was error because there was no stenographic record of the additional jury instructions given. *Id.* The court explained that, because counsel never requested the instructions be made part of the record, no constitutional rights were violated. *Id.*

89. 619 A.2d 1349, 1352 (1992). The defendant must be found to have been absent without cause as defined in Pennsylvania Rule of Criminal Procedure 1117(a). *Id.*

90. *Sullens*, 619 A.2d at 1350. The defendant escaped from custody on an unrelated charge, was apprehended, and charged with escape. *Id.*

91. *Id.* The defendant was granted bail on the subsequent escape charge. *Id.*

92. *Commonwealth v. Sullens*, 584 A.2d 1050 (1990). The superior court reversed the trial court's conviction and remanded for a new trial. *Id.* The superior court did not cite or discuss Pennsylvania Rule of Criminal Procedure 1117(a), which appears to authorize trial in absentia under the circumstances present. *Sullens*, 619 A.2d at 1351.

court relied on its precedent in *Commonwealth v. Felton*, in which it was held that, when a defendant fails to appear for the commencement of a trial, the trial could not begin in his or her absence.<sup>93</sup> The supreme court disagreed, holding that permitting a defendant to halt his or her trial by absconding before the trial commences encourages a defendant to ignore the summons to trial if he or she thinks a guilty verdict is likely, secure in the knowledge that he or she cannot be convicted until apprehended.<sup>94</sup> In *Sullens*, the supreme court placed much emphasis on the fact that the trial court found that the defendant knew of the trial date and that his absence was "without cause" under Pennsylvania Rule of Criminal Procedure 1117(a).<sup>95</sup>

The Pennsylvania Supreme Court, following a long history of precedent in the commonwealth, reached the correct decision in *Commonwealth v. Wilson*. The cases decided in Pennsylvania prior to *Wilson* clearly demonstrate that when a defendant absents himself or herself without cause from a trial proceeding, that defendant voluntarily waives the right to be present at every stage of a trial.<sup>96</sup> After reviewing the relevant precedent, the trial court's

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93. *Sullens*, 619 A.2d at 1351 (citing *Commonwealth v. Felton*, 307 A.2d 51 (1973)). The superior court rationalized that the situation in which a defendant is never present in the courtroom is distinguishable from a proceeding in which the defendant voluntarily absents himself or herself from the courtroom subsequent to the initiation of the proceeding. *Id.* The latter encourages a defendant to refuse to appear whenever he or she expects the judge or jury to render a verdict of guilty. *Id.* If the waiver rule were extended to include actions taken by an accused prior to trial, fugitives who are unaware of the charges against them could be tried in absentia. *Id.*

94. *Id.* The court quoted the late Justice McDermott: "No society on earth offers more than we do to preserve and protect the rights of those held for trial. It is more than simple discourtesy not to attend. It is an anarchical contempt of everything that so many have died to preserve." *Id.* at 1351-52 (citing *Commonwealth v. Jones*, 610 A.2d 439, 441 (1992) (McDermott, J., concurring)).

95. *Id.* at 1350. The defendant admitted that he had notice of the trial date and stated that he had absented himself because he did not want to be found guilty. *Id.* The court stated:

A contrary rule . . . would be a travesty of justice. It would allow an accused at large on bail to immobilize the commencement of a criminal trial and frustrate an already overtaxed judicial system until the trial date meets, if ever, with his pleasure and convenience. It would permit a defendant to play cat and mouse with the prosecution to delay the trial in an effort to discourage the appearance of prosecution witnesses . . . . A defendant has a right to his day in court, but he does not have the right unilaterally to select the day and hour.

*Id.* at 1352 (citing *Government of Virgin Islands v. Brown*, 507 F.2d 186, 189-90 (3d Cir 1975)).

96. See *Lynch v. Commonwealth*, 88 Pa. 189 (1878); *Commonwealth v. Diehl*, 107 A.2d 543 (Pa. 1954); *Commonwealth v. Sullens*, 619 A.2d 1349 (Pa. 1992); *Diaz v. United States*, 223 U.S. 442 (1912).

reasoning behind its decision to proceed in the defendant's absence is clear. Wilson was charged with a felony, but he was not charged with a capital felony.<sup>97</sup> Wilson was present for a suppression hearing, jury selection, and plea negotiations and only fled the courthouse after plea negotiations.<sup>98</sup> It was clear to the trial court that the defendant was absent without cause.<sup>99</sup>

The facts of this case clearly show that Wilson voluntarily absented himself from the trial proceedings without cause. An accused in the American justice system is protected by many safeguards. To allow a defendant who is already heavily protected to hold a court at bay and bring the justice system to a standstill would allow the defendant to control the workings of the judicial system. To do so would be tantamount to allowing the accused to take advantage of his or her wrongdoing. Those who escape from prison or disappear while on bail could bring to a halt an already backlogged criminal justice system.

Nonetheless, Justice Nigro's dissent is worthy of analysis. Justice Nigro dissented on the grounds that an on-the-record inquiry was not performed to determine if in fact the defendant's absence was "without cause."<sup>100</sup> In *Wilson*, there was no official on-the-record inquiry into Wilson's whereabouts. There was a conversation at side bar regarding Wilson's absence; then the trial judge decided to proceed.<sup>101</sup> Defense counsel requested and was denied a continuance to find Wilson.<sup>102</sup> The trial court was justified in its decision to proceed in Wilson's absence. Wilson was present at the courthouse earlier in the day.<sup>103</sup>

However, an on-the-record inquiry should be performed before a court can proceed with a trial in absentia. Had Wilson been present for a full day of proceedings and failed to return the next morning, how would the court know whether his absence was "without cause?" It would be impossible for a court to discern this information accurately without an on-the-record inquiry into the defendant's whereabouts. The defendant could have health problems, familial problems, or a wide range of other serious

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97. *Wilson*, 712 A.2d at 736.

98. *Id.* at 739.

99. *Id.* at 736. It became apparent to the court that Wilson fled the courthouse during plea negotiations "without cause." *Id.*

100. *Id.* at 740 (Nigro, J., dissenting).

101. *Id.* at 736. The side bar conversation was on the record. *Id.*

102. *Wilson*, 712 A.2d at 736.

103. *Id.*

problems that arise in daily life. Pennsylvania Rule of Criminal Procedure 1117(a) requires an inquiry into the circumstances surrounding a defendant's departure to determine whether a defendant's departure is without cause.<sup>104</sup> The federal courts also require a record inquiry to ascertain an explanation for the absence of the accused; the court then balances the likelihood that the trial could take place with the defendant's presence against the undue convenience or prejudice occasioned by a slight delay or rescheduling of the trial.<sup>105</sup> This inquiry, as in *Wilson*, can be discerned from events taking place in the courthouse, yet often it requires a more in-depth inquiry.

Thus, Justice Nigro's suggestion of a twenty-four hour period for counsel to produce the client is both judicially sensible and economical.<sup>106</sup> Such an adjournment will not place a heavy burden on the court, but it would ensure that a defendant's constitutional right to be present at his or her trial is not violated.

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104. PA. R. CRIM. P. 1117(a).

105. *United States v. Krout*, 56 F.3d 643, 646 (5th Cir 1995), *cert. denied*, 516 U.S. 1076, *citing* *United States v. Beltran-Nunez*, 716 F.2d 287, 291 (5th Cir 1983).

106. *Wilson*, 712 A.2d at 740 (Nigro, J., dissenting).