REPORT OF SUBCOMMITTEE ON
TRYING FUGITIVE DEFENDANTS IN ABSENTIA

Last December, the Philadelphia Inquirer reported on the deplorable state of the Philadelphia courts' bail system and the high number of fugitives: "The court's bail system is broken. Defendants skip court with impunity, further traumatizing victims who show up for hearings that never take place. There are almost 47,000 Philadelphia fugitives on the streets. Philadelphia is tied with Essex County, NJ – home of Newark – for the nation's highest fugitive rate. To catch them, the city court system employs just 51 officers – a caseload of more than 900 fugitives per officer." When the reporters asked court officials how much in forfeited bail was owed by fugitives, they had a difficult time responding, initially saying that the debt was approximately $2 million. Finally, after looking into it, they reported back that it was "a staggering $1 billion."[1] The purpose of this report is to discuss under what circumstances it is legally acceptable to try in absentia defendants who fail to appear for their trial; and to suggest a way that trial courts should advise defendants in advance of trial of the consequences of skipping bail and not showing up for trial. We believe that if our suggestion is followed, it would result in a dramatic drop in Philadelphia's fugitive statistics.

A. Pennsylvania law.

In Pennsylvania, a criminal defendant's right to be present at his trial derives from three sources: 1) the Sixth Amendment to the U.S. Constitution which guarantees the defendant's right to confront the witnesses against him in all criminal prosecutions;[2] 2) Article 1, Section 9 of the Pennsylvania Constitution which also guarantees a defendant's right to confront witnesses against him and guarantees the right to be heard in all criminal

prosecutions;[3] and 3) Pennsylvania Rule of Criminal Procedure 602(A) which provides that "[t]he defendant shall be present at every stage of the 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." Rule 602 also provides that "[t]he defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict and the imposition of sentence."[4]

Case law in Pennsylvania has established that a defendant's right to be present at trial may be waived in a non-capital case.[5] The waiver may be either express or implied, but in either case it must be knowing and voluntary,[6] and the Commonwealth has the burden to prove a knowing and intelligent waiver by a preponderance of the evidence.[7] An express waiver arises when a defendant makes it clear that he does not wish to be present during trial, but even then there are standards that must be met in order to find that such an expression constitutes a knowing and voluntary waiver.[8] An implied waiver arises if a defendant exempts himself from trial, *i.e.,* never shows up on the date the trial is scheduled to begin, or exempts himself during trial after it has commenced.[9] Again, the evidence must show that the defendant had ample notice of the trial and was willfully absent without cause. It is always within the Court's discretion whether to proceed with a trial in absentia.[10]

Pennsylvania case law draws no distinction between whether the defendant was present at the beginning of trial and then either became disruptive or absented himself, or never showed up for trial at all. In 1992, the Pennsylvania Supreme Court explicitly refused to draw this distinction in *Commonwealth v. Sullens*.[11] In that case, a defendant failed to appear at his trial without cause, despite a finding by the Court that the

defendant was aware of the trial date. The Court held that it was not improper for the lower court to try the defendant in absentia.[12] The explanation of the Court's reasoning contained a quote from the Third Circuit Court of Appeals that foreshadowed the current fugitive crisis in Philadelphia:

> A contrary rule [preventing trial in absentia when the defendant never appears]... would be a travesty of justice. It would allow an accused at large upon 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.[13]

Since *Sullens*, Pennsylvania law has refined the legal requirements governing trial in absentia of fugitive defendants. The leading Pennsylvania Supreme Court case for trying a defendant in absentia is *Commonwealth v. Vega,*[14] a 1998 case where a defendant made it clear on the record before trial that he did not wish to be present at trial. The Court upheld the trial judge's decision to go forward with the trial when the defendant did not appear, but it also set forth the minimum standards needed to ensure that the defendant's Sixth Amendment rights were not violated. In a plurality opinion, the Court held that although a waiver of the Sixth Amendment right of confrontation does not require a "rote dialogue" by the Court, like other waivers of constitutional rights require, certain standards must be met.[15] Specifically,

> The inquiry must be calculated to ensure that a defendant is aware of the dangers and disadvantages of waiving his right to be present during trial. Such an inquiry would necessarily include, at a minimum, a discussion of whether

> the defendant understands that if trial proceeds without his presence: 1) he would be unable to participate in the selection of a jury; 2) he waives his right to confront and cross-examine witnesses; 3) he will not be present to testify in his own defense; and 4) any claim challenging effective assistance of counsel will be severely limited since the defendant has chosen not to participate in his defense and will be unable to aid counsel during trial. When the record contains no such inquiry there can be no valid waiver of the right to be present at trial.[16]

The purpose of establishing these standards is to make sure that the defendant made an informed choice not to participate in the trial.[17] There can not be a valid waiver of the right of confrontation absent an on-the-record colloquy showing that the defendant was advised by the Court of these rights and that he understood them.

The Pennsylvania Superior Court interpreted the standards set forth in *Vega* rather liberally in the case of *Commonwealth v. Faulk.*[18] In that case, decided in 2007, the Court found a valid waiver even where the trial court's colloquy did not satisfy the *Vega* requirements in all respects.[19] However, the facts favoring a waiver were far stronger than in *Vega.* The defendant had shown up on the day of trial and became abusive and disruptive, such that the trial judge called for his removal from the courtroom. Clearly, when a defendant appears for trial and then becomes abusive, disrupting the proceedings, it makes a stronger case for finding a valid waiver of the Sixth Amendment right than when a defendant never shows up at all.[20]

Even so, the Court in *Faulk,* noting that the *Vega* court had expressly decided not to mandate any specific language or dialogue to show a valid waiver, reviewed the trial transcript and determined that the lower court had adequately protected the defendant's rights.[21] The trial court had informed the defendant of the value of his participation in the proceedings, particularly with regard to his personal knowledge of the witnesses, and

advised the defendant that by not being present to aid his attorney due to his conduct, he was waiving any subsequent claim with respect to his attorney's strategic decisions. This too constituted a sufficient basis for finding that the defendant validly waived his right to be present at trial and hence his right of confrontation under the Sixth Amendment.[22]

Whereas *Vega* involved a defendant who made it clear he was not going to show up for trial, followed by a colloquy with the court, and *Faulk* involved a defendant who did show up but then became abusive, the issue in *Commonwealth v. Hill,*[23] decided a year after *Vega,* was whether a defendant who neither expressly waived his right of confrontation nor impliedly waived that right by becoming abusive, waived it by not showing up at all for trial. The defendant in *Hill* had signed several subpoenas that set forth the time and place when the trial was to commence. After he did not appear for trial, he was tried in absentia, convicted and sentenced. He was later apprehended, incarcerated and appealed. The Superior Court considered the totality of the circumstances, including the diligence of the Commonwealth to locate the defendant, the fact that the defendant had been properly served with several subpoenas advising him of the trial date and the fact that the defendant made no attempt to explain his absence.[24] The Court found that the defendant's absence from trial constituted a knowing, voluntary and intelligent waiver of his right of confrontation.[25]

Thus, under Pennsylvania law a defendant may waive the right to be present at his trial either by express waiver or by his own actions. While this report focuses on trials in absentia, it should be noted that other court appearances by the defendant, such as the preliminary hearing[26] and sentencing,[27] may be conducted without the defendant's presence as well. It should also be noted that Pennsylvania appellate courts have held that

a defendant who is a fugitive from justice during the appellate process may forfeit the right to appellate review.[28]

B. Federal law.

A federal court defendant's right to be present at trial is, of course, grounded in the Confrontation Clause of the Sixth Amendment to the United States Constitution. Rule 43 of the Federal Rules of Criminal Procedure addresses the issue of when a defendant can be tried in absentia.

Specifically, Rule 43 allows trial in absentia only when the defendant was present initially at trial or had pleaded guilty or *nolo contendere* and: 1) where the defendant voluntarily absents himself after trial has begun; 2) in a non-capital case where the defendant is voluntarily absent for sentencing; and 3) where the defendant becomes disruptive in the courtroom after a warning from the court and is removed from the courtroom as a result.[29] What distinguishes this rule from Pennsylvania law is the requirement of a defendant being present at trial initially before he or she can be tried in absentia, something that Pennsylvania case law does not require.

The one time the United States Supreme Court considered the issue of the requirement of the defendant being present at the beginning of trial before there could be a valid waiver under Rule 43 was in *Crosby v. United States*,[30] decided in 1993. The defendant in that case never showed up for trial and became a fugitive. Circumstantial evidence the government presented confirmed that the defendant's failure to show was deliberate. The district court allowed the trial to go forward in the defendant's absence; he was convicted and subsequently arrested and sentenced. The Court of Appeals affirmed the conviction, rejecting the defendant's argument that Rule 43 forbids a trial in

absentia of a defendant who is not present at the beginning of trial. The Supreme Court reversed.

Justice Blackmun, writing for a unanimous court, quoted from various scholars opining on the fundamental right of confrontation that a defendant has under the Sixth Amendment and the inadvisability of conducting criminal trials in a defendant's absence.[31] The reasoning of the Court in reversing the conviction was predicated on the fact that in drafting Rule 43, the Advisory Committee explicitly refrained from including a defendant who never shows up for trial as a basis for trial in absentia.[32] Justice Blackmun found, as he put it, "practical reasons for distinguishing between flight before and flight during trial."[33] Among other things, a "defendant's initial presence serves to assure that any waiver is indeed knowing."[34] In addition, Justice Blackmun made it clear that the Court views a defendant who shows up at the beginning of trial and then decides to disappear if he thinks the case is not going well as warranting less deference than a defendant who doesn't show up at all.[35] Since the Court of Appeals had decided the case based solely on Rule 43, which makes no mention of allowing a case to go forward where a defendant never shows up at the beginning of trial, the Court reversed the Circuit Court's decision on that basis and did not address *Crosby's* claim that his trial in absentia was prohibited by the Confrontation Clause of the Sixth Amendment. This could be troubling when coupled with Justice Blackmun's ruminations on defendants not showing up at all versus those that do and then skip. It suggests that if a defendant never showed up for trial, was convicted in absentia and argued later strictly that it was a violation of his Sixth Amendment right of confrontation, instead of Rule 43, to try him in absentia, the Court might be inclined to agree and reverse on that basis.

However, the Second Circuit Court of Appeals has ruled since *Crosby* that a defendant who is not present at the commencement of trial may be tried in absentia. In *Smith v. Mann,*[36] the Second Circuit had no difficulty in finding a knowing and voluntary waiver of the Sixth Amendment by a defendant who clearly had notice of his trial and simply had failed to show up at the start of trial. The court acknowledged that while presence at the commencement of trial conclusively shows a knowing Sixth Amendment waiver if the defendant thereafter flees, "in some situations the requisite knowledge can be found even if the defendant is not present when the trial begins."[37]

The leading case in Pennsylvania which discussed the *Crosby* holding is *Commonwealth v. Johnson*,[38] where the Pennsylvania Superior Court correctly noted that *Crosby* was decided strictly under the express language of Fed. R. Crim. P. 43.[39] The Court also said that federal courts have found Fed. R. Crim. P. 43 more limiting than the federal constitution and concluded that *Crosby* did not prevent Pennsylvania courts from trying a defendant in absentia if the defendant did not appear at the beginning of trial.[40]

While there has been little guidance from the Third Circuit Court of Appeals on this issue, there is one case decided by that court that highlights a related issue. In *Thomas v. Carroll,*[41] the defendant made it clear throughout the trial that he did not want to participate in or be present at trial, so he was excluded from the courtroom. The trial court did not appoint counsel to represent him, and this was the basis of a *habeas corpus* petition later. The Third Circuit held that the Delaware Supreme Court's decision affirming the trial judge's failure to appoint counsel was not "contrary to" Supreme Court precedent, which is the standard for ruling on *habeas corpus* petitions under AEDPA. However, the Court's opinion made it clear that the appointment of counsel is essential,

because "`a criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself.'"[42] Judge Pollak, in his concurring opinion, went even further, suggesting that a trial judge might be required under the Fourteenth Amendment's due process clause to appoint counsel to represent an absent defendant. It is our understanding that judges in Philadelphia who try defendants in absentia do make it a practice to appoint trial counsel for those absent defendants, so as long as that practice continues, this issue should not arise.

The best way to avoid potential problems is to ensure that the defendant's rights are safeguarded. This means two things: (1) there should be a pretrial colloquy similar to what we have attached here, and (2) the trial court should appoint counsel to stand in at the trial in absentia, even where a defendant makes clear his desire to not participate in the trial. Just as all constitutional rights can be waived, we believe that a thorough colloquy prior to trial between the court and the defendant would satisfy beyond any question the issue of whether there has been a knowing and intelligent waiver by a defendant of his right of confrontation should he deliberately fail to appear at trial. As to the appointment of counsel, an attorney cross-examining witnesses and making objections to evidence would be strong evidence that a fair trial took place in the defendant's absence.

C. Other States.

Most states allow a defendant to be tried in absentia where there has been a clear waiver by the defendant to be present, but there are splits among the states concerning several details of the waiver procedure. For example, when an express waiver is at issue

some courts allow defense counsel to waive the defendant's right to be present under certain conditions,[43] while other courts require that the defendant personally waive the right to be present.[44] Some courts require that any colloquy be on the record, whereas others do not.[45] Some courts may refuse to accept the defendant's waiver of his right to be present at trial, particularly, for example, where identity is at issue.[46] At least one state allows a trial in absentia for capital cases.[47]

New York state offers an interesting model. In New York, for felonies or misdemeanors, the court may not find a valid waiver of the defendant's right to be present without there having been given what is known as "Parker warnings."[48] Named after the defendant whose case led to the creation of the rule, a Parker warning is merely an on-the-record warning to the defendant that the trial will proceed in his absence if he does not appear.[49] The Parker warning does not authorize trial in absentia by itself, but rather, serves as a minimum basis on which a court may find a voluntary waiver of the right to be present.[50] What makes the Parker warnings critical is that they serve as a uniform prerequisite to finding a waiver of the right to be present at trial – something that is lacking in Philadelphia. New York's appellate courts have upheld trials in absentia where the Parker warnings have been given, but not where they have not been given. Interestingly, New York City's fugitive rate is one of the lowest of any major urban areas in the country, at 16% or about one half of that of Philadelphia's.[51] There are obviously multiple factors that contribute to the fugitive rate in a given city, and the subcommittee believes that the Parker warnings are a significant factor contributing to New York City's low fugitive rate.

D. Current Practice in Philadelphia.

A small sampling of Philadelphia Common Pleas judges by the subcommittee found no uniform view on trying fugitive defendants in absentia. Some judges are reluctant to attempt it, either because of a fear of being reversed or because it's impractical (having counsel unable to consult with their client when tactical decisions have to be made, *e.g.,* whether to stipulate to expert reports, is awkward). Some do it routinely, taking the position that defendants who are fugitives are not likely to be picked up within 30 days of their conviction when all appellate rights become exhausted. Knowing that the Philadelphia Common Pleas Court has such an uneven practice clearly emboldens defendants to skip bail and worry later about the consequences, figuring that the odds of beating the rap are better if they never show than if they appear, testify and have to face tough cross-examination. The way to change those odds, we believe, is to let defendants know in advance what lies ahead if they fail to appear.

Currently, the only notice given to defendants in Philadelphia of their trial is simply a piece of paper known as a subpoena setting forth the date and place of the scheduled trial. What is not contained in the subpoena is any reference to the consequences the defendant faces should he fail to show up for trial other than that a bench warrant *may* issue for his arrest. There is nothing about the Sixth Amendment rights he or she will be giving up by failing to appear; or that the trial will likely go forward in their absence and that the jury will be allowed to consider their absence as evidence of guilt.

The subcommittee believes strongly that an on-the-record colloquy wherein the court sets forth exactly what will happen should the defendant fail to show for trial should be an essential part of the process of trying defendants in absentia. It would

eliminate any doubt that the defendant was voluntarily and knowingly waiving his or her Sixth Amendment right of confrontation by failing to appear. If a person in custody can knowingly waive their Fifth Amendment right against self-incrimination after being given their Miranda warnings by making a full confession that is admissible at trial, surely a defendant who is fully advised of their Sixth Amendment confrontation right can be deemed to have knowingly waived it by deliberately not appearing for trial.

The subcommittee also believes that a detailed colloquy between the court and the defendant in the presence of counsel would itself act as a deterrent to skipping bail and becoming a fugitive. A full explanation from a judicial figure as to the consequences for not showing up for trial would undoubtedly leave a far more lasting impression on a defendant than just reading a brief written instruction as to when and where to appear, and that a bench warrant *may* issue if they don't show up for trial. In other words, the colloquy alone, if it became universal practice among Common Pleas judges, should result in a dramatic reduction in the fugitive rate in Philadelphia.

CONCLUSION

Pennsylvania appellate courts have upheld trying defendants in absentia who skip bail and don't show up for their trial. The practice, however, has obviously not deterred defendants from being no-shows. Worse, many Philadelphia Common Pleas judges are reluctant to go forward with a trial in absentia, whereas some do hold such trials. This haphazard approach in dealing with fugitives may well explain why Philadelphia has one of the highest fugitive rates in the country, and why so many defendants thumb their nose

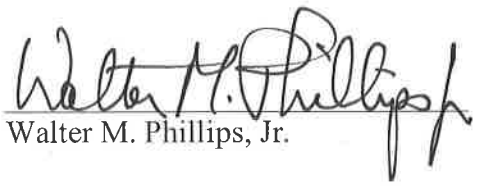
at the system. It also breeds disrespect generally for the criminal justice system, making victims and witnesses more reluctant to cooperate with the police.

The subcommittee feels strongly that Philadelphia Common Pleas Court should institute a system of having defendants being advised immediately upon being given a trial date, and perhaps also in an abbreviated form upon the completion of the preliminary hearing when the defendant is held for court, of the full consequences they can expect should they fail to appear at trial. This advice should come from a judge in open court and on the record, as demonstrated in the attached sample colloquy. A stern warning alone from a judge of the consequences of not appearing would undoubtedly make defendants think twice about skipping bail.

While a statewide rule issued directly by the Pennsylvania Supreme Court or through its Rules Committee mandating such a procedure would make sense, at the very least there should be a local rule promulgated in Philadelphia directing that the colloquy procedure be followed. Either way, such a rule would not be unduly burdensome. Only the assignment judge (and the Municipal Court judge if also done in abbreviated form at the preliminary hearing stage) would need to engage in the procedure. It would simply be part of the routine trial assignment procedure. The trial court would need only to know that the colloquy has taken place. The upshot of such a rule would be to let those judges concerned about reversal know they are on solid ground if they try a defendant in absentia. It should also clear up any doubt that federal courts might have when considering *habeas corpus* petitions filed by state prisoners as to whether the Sixth Amendment right of confrontation has been knowingly and voluntarily waived.

Perhaps most importantly, should it become common practice in the Philadelphia Court of Common Pleas to engage defendants in the colloquy we suggest, word will unquestionably get out on the street that the courts mean business when it comes to skipping bail and that the consequences are far more serious should defendants not show up for trial than if they do. The result should be a dramatic drop in the fugitive rate in Philadelphia and greater respect on the part of the public for the criminal justice system.[52]

Respectfully submitted,



Walter M. Phillips, Jr.

Sample Colloquy

Commonwealth v. Alan Chambers

By the Court:

Mr. Chambers you are charged with robbery and aggravated assault, and your trial is scheduled to commence on October 24, 2010 at 9:00 a.m. in Courtroom 805. Do you understand that?

The Defendant: Yes.

The Court: It is now my duty to explain to you what would happen if you fail to appear in Courtroom 805 on October 24, 2010 at 9:00 a.m. for your trial. First, rest assured that the trial will likely go on without you. Do you understand that?

The Defendant: Yes.

The Court: This means that you will be giving up certain rights you have under the United States Constitution, in particular the right to confront the witnesses against you. The right of confrontation means that you may confront the witnesses against you through your attorney who can cross-examine them. If you fail to appear for trial, you will not be able to assist your attorney in his cross examination of those witnesses. Do you understand that?

The Defendant: Yes.

The Court: In addition, you have a right to participate in the selection of a jury if you wish to be tried by a jury. But if you fail to appear at trial, you obviously will not be able to participate in the selection of a jury. Do you understand what I have just said?

The Defendant: Yes.

The Court: You also have a right to testify at your trial, but if you fail to appear obviously you will not be able to testify. Do you understand that?

The Defendant: Yes.

The Court: Finally, any claim you might have that your counsel was ineffective in representing you at trial will be severely limited if you choose not to participate by not showing up for trial. Do you understand that?

The Defendant: Yes.

The Court: At trial, with you absent, the District Attorney will be allowed to introduce evidence that you had in fact skipped bail and had become a fugitive. The reason for this is that evidence of flight is admissible to show consciousness of guilt and the jury will be so instructed. Do you understand that?

The Defendant: Yes.

The Court: If you are convicted by the jury, the fact that you never showed up for trial and became a fugitive will be an important consideration in the determination of what the sentence should be. Do you understand that?

The Defendant: Yes.

The Court: If you have a valid reason for not being able to show up for court on October 24th, such as the fact that you're in a hospital, the first person you should call is your attorney so that he can communicate that fact to the court. However, you better be prepared to have someone vouch for the fact that you're in the hospital, as your word through your attorney alone will not be sufficient. Do you understand that?

The Defendant: Yes.

The Court: I think I have made clear to you the risks you will be taking should you skip bail and fail to show up for trial on October 24, 2010. Do you have any questions or is there anything that I have said that you do not understand?

The Defendant: No, Your Honor.

ENDNOTES

[1] Craig R. McCoy, Nancy Phillips, and Dylan Purcell, *Justice: Delayed, Dismissed, Denied - With Philadelphia's court system in disarray, cases crumble as witnesses fear reprisal and thousands of fugitives remain at large*, PHILA INQUIRER, Dec. 13, 2009, at A-01.

[2] U.S. CONST. AMEND. VI. Some courts have found the right to be present at trial also grounded in the due process clause of the Fifth Amendment. *E.g.*, *U.S. v. Nichols*, 56 F.3d 403, 413 (2nd Cir. 1995) (noting right to be present at trial derives from Fifth and Sixth Amendments).

[3] "In 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, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself." PA. CONST. ART. I § 9.

[4] PA. R. CRIM. P. 602.

[5] *See Illinois v. Allen*, 397 U.S. 337 (1970) (holding that the right to be present at trial under Sixth Amendment of United States Constitution may be waived); *Com. v. Diehl*, 107 A.2d 543 (Pa. 1954) (holding that the right to be present at trial under Article I, Section 9, of Pennsylvania Constitution may be waived); *Com v. Johnson*, 734 A.2d 864, 866 (Pa. Super. Ct. 1999) (noting that principle of waiver of the right to be present at trial is embodied in former PA. CRIM. P. 1117, the precursor to modern PA. CRIM. P. 602).

[6] *Com. v. Vega*, 719 A.2d 227, 230 (Pa. 1998) (plurality opinion); *Com. v. Sullens*, 619 A.2d 1349, 1351 (Pa. 1992).

[7] *Vega*, 719 A.2d at 230 (citing *Com. v. Scarborough,* 421 A.2d 147 (Pa. 1980)).

[8] *See id.*

[9] *Com. v. Hill*, 737 A.2d 255 (Pa. Super. Ct. 1999).

[10] *Com. v. Wilson*, 712 A.2d 735, 739 (Pa. 1998).

[11] 619 A.2d 1349 (Pa. 1992).

[12] *Sullens*, 619 A.2d at 1352-53.

[13] *Id.* at 1352 (quoting *Gov't of Virgin Islands v. Brown,* 507 F.2d 186, 189-90 (3d Cir. 1975)).

[14] 719 A.2d 227 (Pa. 1998) (plurality opinion).

[15] *Vega*, 719 A.2d at 231.

[16] *Id.*

[17] *Id.* at 230 (citing *Com. v. Carey,* 340 A.2d 509, 511 (Pa. Super. 1975)).

[18] 928 A.2d 1061 (Pa. Super. Ct. 2007).

[19] *Faulk*, 928 A.2d at 1068-69.

[20] *Id.* at 1068.

[21] *Id.*

[22] *Id.* at 1068-69.
[23] 737 A.2d 255 (Pa. Super. Ct. 1999).
[24] *Hill* 737 A.2d at 261-62.
[25] *Id.* Implied waiver of the right to be present also applies to preliminary hearings. *Com. v. Brabham*, 309 A.2d 824 (Pa. Super. Ct. 1973) (noting that "a defendant who absents himself from the jurisdiction of our courts as a 'fugitive from justice' should not and is not to be afforded the 'right' of a preliminary hearing, as his actions should be viewed as a waiver.").
[26] Pursuant to Pa. Crim. P. 540(F)(2)(b), the issuing authority must warn the defendant that failure to appear at the preliminary hearing will constitute a waiver of the right to be present at the preliminary hearing, resulting in a bench warrant and the commencement of the preliminary hearing in the defendant's absence. *See also Com. v. Brabham*, 309 A.2d 824 (Pa. Super. Ct. 1973) (noting that "a defendant who absents himself from the jurisdiction of our courts as a 'fugitive from justice' should not and is not to be afforded the 'right' of a preliminary hearing, as his actions should be viewed as a waiver," citing *Com. v. Bunter*, 282 A.2d 705 (Pa. 1971)).
[27] Pa. Crim. P. 602(A) explicitly allows sentencing in absentia. The second line of the rule reads "The defendant's absence without cause shall not preclude proceeding with the trial *including the return of the verdict and the imposition of sentence.*" (emphasis added).
[28] *Com. v. Deemer,* 705 A.2d 827 (Pa. 1997) (holding that a fugitive who returns before the appeal deadline effectively regains the appellate right and may, therefore, file a timely appeal, but a fugitive who returns after the appellate deadline is not entitled to a direct appeal); *Com. v. Doty*, 997 A.2d 1184 (Pa. Super. Ct. 2010) (quashing defendant's appeal because defendant failed to return to the court's jurisdiction prior to the expiration of the appeal period). *See also Com. v. Hunter,* 952 A.2d 1177 (Pa. Super. Ct. 2008) (same).
[29] FED. R. CRIM. P. 43.
[30] 506 U.S. 255 (1993).
[31] *Crosby*, 506 U.S. at 259.
[32] *Id.* at 262.
[33] *Id.* at 261.
[34] *Id.* (Justice Blackmun further noted that "[i]t is unlikely . . . . 'that a defendant who flees from a courtroom in the midst of a trial – where judge, jury, witnesses and lawyers are present and ready to continue – would not know that as a consequence the trial could continue in his absence.'" (quoting from *Taylor v. United States,* 414 U.S. 17, 20 (1973).
[35] *Id.* at 262.
[36] 173 F.3d 73 (2nd Cir. 1999), *cert denied*, 528 U.S. 884 (1999).
[37] *Id.* at 75.
[38] 734 A.2d 864 (Pa. Super. Ct. 1999).
[39] *Johnson*, 734 A.2d at 868.
[40] *Id.* (citing *United States v. Brown*, 571 F.2d 980, 986 (6th Cir., 1978) ("[T]he right of presence stated in [Rule 43] is more far-reaching than the right of presence protected by the Constitution."); *See also Com v. Bond*, 693 A.2d 220, 224 n.6 (Pa. Super. Ct. 1997) (reaching the same conclusion as *Johnson*).

[41] *See, e.g., Thomas v. Carroll,* 581 F.3d 118 (3d Cir. 2009) (affirming denial of writ of *habeas corpus* and holding that Delaware Supreme Court did not rule contrary to established federal law when it upheld Delaware trial court's decision to conduct trial in absentia without any counsel for defendant); *Cristin v. Brennan,* 281 F.3d 404 (3d Cir. 2002) (reversing grant of writ of *habeas corpus* and finding neither cause and prejudice nor a miscarriage of justice due to procedural default of defendant's Pennsylvania post-conviction claims, when defendant was tried and convicted in absentia and never appeared at trial).

[42] *Thomas*, 581 F.3d at 126 (quoting Supreme Court Chief Justice Burger's concurring opinion in *Mayberry v. Pennsylvania,* 400 U.S. 455, 468 (1971)).

[43] *E.g., Walker v. State*, 684 S.E.2d 293 (Ga. App. 2009) (waiver by defendant's counsel allowed only if waiver made in defendant's presence, with the defendant's express authority, or if the defendant subsequently acquiesces to the waiver); *State v. Williams*, 15 So.3d 348 (La. App. 2nd Cir. 2009) (right to be present may be waived by defendant's attorney); *People v. Phillips*, 890 N.E.2d 1058 (Ill App. 1st Dist. 2008) (defense counsel may waive a defendant's right to be present only if the defendant voluntarily, knowingly and intelligently waived his right).

[44] *E.g., Thompson v. State*, 12 So.3d 723 (Ala. Ct. Crim. App. 2008) (waiver of a defendant's right to be present at trial must be made by him personally); *State v. Ingram*, 951 A.2d 1000 (N.J. 2008) (only a criminal defendant has the right to waive his constitutional right to be present at his own trial); *Collins v. State*, 182 P.3d 1159 (Alaska App. 2008) (defendant must personally waive his right to be present).

[45] *E.g., People v. Williams*, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (defendant's waiver will not be inferred from a silent record).

[46] *E.g., Carse v. State*, 778 N.W.2d 361 (Minn. App. 2010).

[47] *E.g.*, Fla. R. Crim. P. 3.180 (allowing trial in absentia when defendant voluntarily absents himself during the trial, with no distinction as to capital or non-capital crimes); *Peede v. State*, 474 So. 2d 808 (Fla. 1985) (upholding trial in absentia of defendant accused for murder when defendant knowingly and voluntarily absented himself from the trial).

[48] *People v. Parker,* 440 N.E.2d 1313 (N.Y. 1982).

[49] *See People v. Rosicky,* 853 N.Y.S.2d 498 (N.Y. Just. Ct. 2008) (explaining Parker warnings' requirements and application).

[50] *Id.*

[51] Larry Eichel and Claire Shubik-Richards, *Grappling with the City's Fugitive Problem – Many Accused of Crimes Never Show up in Court,* Phila. Inquirer, July 12, 2010 at A13.

[52] As with his work on the Grand Jury Subcommittee Report, Temple University Law student Doug Moak provided invaluable assistance on this report with his analytical insight and thorough legal research.

EXHIBIT A

The Philadelphia Inquirer

Posted on Tue, Dec. 15, 2009

Violent Criminals Flout Broken Bail System

Tens of thousands of Philadelphia fugitives are on the streets, abetted by the city's deeply flawed program.

By Dylan Purcell, Craig R. McCoy, and Nancy Phillips
Inquirer Staff Writers

DAVID SWANSON / Staff Photographer

Tracking Philadelphia fugitives, (from left) Investigator Troy Jones, Sgt. Adam Scholl, Lt. Daniel C. Stefanowicz, and Sgt. Randy Crawford of the city courts warrant unit plan their next move. The squad's 51 officers are tasked with finding 47,000 fugitives.

The robber had a gun in his hand and a smirk on his face.

"Y'all gonna make me kill you," he said. "Where's the safe?"

There was no safe inside the Caprice Villa bar, just a handful of middle-aged patrons passing a Tuesday evening.

Shaking, bartender Marcia Williamson gave the gunman the little bit of money in her till: $115. He took cash from the customers and fled into the West Philadelphia night.

The holdup in June left Williamson, 52, traumatized.

"It was really bad. The next day, I said, 'I can't go there,' " Williamson said. "I had to go see my psychiatrist. I had to increase my medicine."

Williamson bitterly recalls the "little smirk" of Timothy Scott, the 22-year-old man whom police have charged with holding up the Caprice Villa. But she is also upset at a court system that could not keep him behind bars despite multiple arrests.

"We all know the dockets are full. They're behind. We know all that," she said. "Whatever they're doing, stop letting them out."

Before the robbery, Scott had skipped out under the courts' "deposit bail" system, which requires many offenders to pay only 10 percent of their bail while signing IOUs for the remainder. In the early 1970s, it replaced a system run by largely corrupt private bail bondsmen.

The current system is overseen by the courts' top judges - Municipal Court President Judge Marsha H. Neifield and the two leaders of Common Pleas Court, President Judge Pamela P. Dembe and Administrative Judge D. Webster Keogh.

In Scott's many brushes with the law, arraignment magistrates were the ones making decisions that put him back on the street. Magistrates follow guidelines that try to weigh the severity of the crime and a suspect's history of skipping court.

When police say Scott walked into the Caprice Villa, he was a repeat fugitive from justice.

Scott has been arrested 10 times since turning 18. He's locked up awaiting trial on charges of robbing the bar and a state liquor store the following night.

His defense lawyer, Holly C. Dobrosky, says that he's innocent of the robberies and that two victims who picked him out of a police lineup are mistaken.

But before his most recent bust, he racked up eight bench warrants as he skipped court again and again - only to be arrested, hauled before the magistrates, and released anew.

Scott is in custody now on high bail. But at last count, there were 47,000 other Philadelphia fugitives on the loose.

In a crisis that has been brewing for decades, Philadelphia defendants are thumbing their noses at the city's judges and victims, given a free pass by the system's ineffectual bail program - and skipping court in huge numbers.

It is not too much of a stretch to say, as does Deputy District Attorney John P. Delaney Jr., one of the city's top prosecutors, "The bail system is a complete cartoon."

When defendants skip court, old victims are victimized again and fresh ones are created as fugitives commit more crimes.

For some fugitives, ducking out on court is a tactical step that wears down witnesses and helps set the stage for the eventual collapse of their cases.

"You think you're going to jail, you just run," said a convicted robber who is now a government witness and who asked not to be named for fear of reprisal.

"They catch you a year or two later, the case falls apart. Any witness they have, they don't have time for it. They got a life. . . . They just don't want the hassle. That's a known fact."

The courts' bail system is deeply flawed. Under the city's government-run 10 percent "deposit bail" program, thousands of accused criminals are blowing off court - and officials have abdicated the job of demanding the remaining bail they owe.

Fugitives now owe taxpayers a whopping $1 billion in forfeited bail, according to court officials who computed the figure at The Inquirer's request.

Despite a promise in January to hire a firm to aggressively pursue that money, the city has yet to do so. The effort is stalled because the Clerk of Quarter Sessions Office, an obscure player in the court bureaucracy, has never kept a computerized list of the debtors.

Mayor Nutter's Law Department and the courts also pledged 11 months ago that they would crack down on debtors going forward. That hasn't happened, either.

Clerk of Quarter Sessions Vivian T. Miller's staff has tagged only about 200 people as new bail debtors this year - though thousands of defendants have skipped court.

The evidence of systemic failure is massive:

A new Inquirer analysis of Philadelphia court data from 2007 and 2008 showed that 19,000 defendants annually fail to show up in court for at least one hearing.

That's one of every three defendants.

Every year, the pool of "long-term" fugitives grows. Though thousands of defendants come back voluntarily or are rearrested, many disappear. As of last month, there were 46,801 long-term fugitives - suspects generally on the run for at least a year. The bulk of these fugitives date from this decade and the last.

If jailed all at once, those fugitives would fill Philadelphia's prisons five times over.

Efforts to catch them are anemic. The court system operates a warrant squad with just 51 officers - one for every 918 suspects.

While Philadelphia police routinely check for bench warrants when they make arrests, the department has no unit assigned solely to pursue people who have fled court.

For years, Philadelphia has had one of the nation's worst long-term fugitive rates. According to the most recent federal report, it tied with Essex County, N.J. - home of Newark - for having the highest felony fugitive rate among large urban counties.

In both counties, 11 percent of defendants were on the run. The national data, made public last year, tracked 2004 court cases.

In the private bail industry, Philadelphia's $1 billion in uncollected and forfeited bail has become a notorious figure.

Dennis Bartlett, executive director of the American Bail Coalition, an organization for commercial bail insurers, said criminals realize that the Philadelphia system has no bite.

"If there's no certitude of being caught and being incarcerated, paying that 10 percent to the clerk is just a price of doing business to these people," he said. "That's why you have a billion dollars out there."

The enormous debt has been run up under the deposit bail system, under which defendants put down 10 percent of their bail with the stipulation that they will owe the rest if they run. In reality, no one has gone after that 90 percent for decades.

In interviews, judges and court officials seemed to view the fugitive tally as part and parcel of running a big urban court system.

Former Municipal Court President Judge Louis C. Presenza framed the issue against the backdrop of a clogged court docket and overcrowded Philadelphia prisons.

"It doesn't show much respect to the system that people are subpoenaed to come to court and they don't show up. That's an insult," said Presenza, who retired in May after 27 years on the bench.

"The flip side is, if everybody came to court, we'd need 200 more judges and all the staff. If all these people came in tomorrow, what do you want me to do? Hold court at the Linc?"

But police, prosecutors, and criminologists worry about the message that fugitives send in neighborhoods where police already face deep resistance in getting witnesses and even victims to cooperate.

In an interview, Temple University criminal justice professor John Goldkamp said the fugitives provide a lesson in "reverse deterrence."

He said the failure to go after them sent a harmful message.

"It says, 'Don't sweat it. You can go home and you don't have to come back,' " he said.

Goldkamp added: "This is the invisible caseload of the court that is never discussed. It is justice owed."

'Known to carry firearms'

In his first arrest as an adult, the 18-year-old Timothy Scott was accused of taking part in the 2006 carjacking of a $30,000 Audi A4 stolen at gunpoint in Mantua from three Haverford College students.

Police arrested Scott some time after the carjacking when they spotted him standing next to the open door of the stolen car - and he took off running when officers approached.

That arrest was tossed out because police couldn't tie Scott to the actual carjacking. The city later paid Scott $25,000 to settle a lawsuit alleging that he'd been falsely arrested and that his cystic fibrosis had gone untreated while he was in custody.

A year after the carjacking arrest, police say, Scott stole a Dodge from a used-car dealer and auto-repair shop near his home.

Three days after the theft, the shop's owner, Alfred Mosby, spotted Scott in the Dodge. By now, one side of the car had been badly damaged. Mosby reached into the car and grabbed the keys, and he and Scott began to fight, Mosby said in a recent interview.

Police briefly handcuffed Mosby, thinking he was the car thief, but soon afterward arrested Scott.

About a month after that arrest, police said, Scott confronted Mosby in court and threatened him, saying, "I know where you are and I'm gonna f- you up." Scott now faced a second case, of witness intimidation.

Over the next year, both cases collapsed.

Mosby, 55, said he showed up for hearing after hearing, only to find them postponed.

"The system is messed up," Mosby said.

Indeed, records show that the trial in the car theft was rescheduled six times - and the witness-intimidation case, seven times.

After a while, Mosby said, he simply got worn out. He was losing valuable time repairing and selling cars.

"Time," he said. "I couldn't continue to run back and forth, back and forth."

To make matters worse, Mosby said, a judge kicked him out of one hearing because he was talking too loud. Mosby insisted he had been speaking quietly to a potential customer.

"I left," he said. "I had to go to work. I'm not going to sit there and be humiliated."

Finally, disgusted, Mosby decided to settle the whole thing privately. At a court hearing, he took Scott aside and told him he would drop the case if Scott paid him $5,850 to repair the Dodge. Scott agreed, paying him $40 on the spot, and promising more later, Mosby said.

Mosby said he stopped pursuing the case, but Scott never paid any more money.

As he turned 21 last year, Scott racked up more arrests - and a series of bench warrants as he failed to show up for court.

One pinch was for cursing at police and trying to block them while they made arrests in the summer of 2008. Scott was found guilty and given two years' probation.

In another arrest sheet that summer, police called him a "drug dealer known to carry firearms."

Investigators said this after police arrested him on the street, where they said they found him with 13 vials of crack. He was released without having to put up any money.

Within five weeks, Scott was apprehended on a second drug charge. Again, he was released without having to put up any money.

Two weeks later, he was arrested again on a third misdemeanor drug-possession charge. This time, the court said he had to put up $100 - 10 percent of $1,000 bail.

Before he came up with the money, Scott got lucky. As the result of a routine move by the city, he was let out of jail in the fall of 2008 under a "special release" petition to relieve prison overcrowding. Scott didn't have to put up any money.

He was one of about 2,000 inmates released yearly under a twice-weekly review process that has been going on for more than a decade.

Within five weeks, he would skip a court date. He was a fugitive.

$11 and a bag of T-shirts

While most fugitives in Philadelphia are wanted for property crimes, more than 300 accused rapists, robbers, and assault suspects slipped free between 2006 and 2008 and remain uncaught, The Inquirer's analysis shows.

Scott has plenty of company when it comes to defendants who commit more crimes while on the run, police say.

Donald Guy of North Philadelphia knocked a man's teeth out in a robbery last year while free after putting up 10 percent of $2,500 bail on a drug-dealing charge, police say. He was given new bail of 10 percent of $4,000 and released again.

Guy promptly became a fugitive. One day after a judge signed a bench warrant for his arrest, police say, Guy shot a husband and wife to death in their clothing store on Wyoming Avenue. He bolted with $11 and a bag of T-shirts in the July 2008 killing, detectives said. Guy, 25, is behind bars, awaiting trial.

La

In June, the two young men accused in a car crash that killed a young mother and three children in Feltonville were both fugitives on bench warrants.

Donta Craddock, 18, had been on the run for seven weeks after taking off from a juvenile home; he'd been sent there after stealing a case of beer at gunpoint. His accomplice, Ivan Rodriguez, 20, had failed to show up for his preliminary hearing in a theft case a week before the crash.

In 2007, accused rapist Reginald Strickland, free on bail, could not bear to wait for the verdict on charges of sexually assaulting Keira Ford at gunpoint the previous year.

Strickland took off just as the jury began deliberating - and he went on a rampage, raping or assaulting four women within days of each other.

As it happened, Strickland was acquitted in absentia by the jury in the first assault case, but convicted of the subsequent four attacks. Strickland, 32, is now serving a sentence of at least 70 years.

Ford told investigators that as Strickland held a gun to her head and forced her to perform oral sex, he boasted - falsely - that he had been spotlighted on the television show *America's Most Wanted*. In the later attacks, two more women told detectives that Strickland made the same boast.

In a recent interview, Ford, 25, who gave permission to be identified, said she was upset that he hadn't been found guilty in her case. Even so, she said, Strickland's jumping bail meant that even a guilty verdict wouldn't have stopped him. He was on the run even before the jury came back, she pointed out.

"He would have gotten away," she said. "No matter what the D.A. did. No matter what the jury did. No matter what I did."

$1 billion in IOUs

Not so many years ago in Philadelphia, the city's bail system was in disarray. Crooked private bail bondsmen had stuck taxpayers with bogus bail bonds - leaving the city almost $1 million in the hole. Too many fugitives were on the loose: 4,324 of them in 1969.

"Hundreds of Criminals Evade Prison," an Inquirer headline cried at the time.

In a sweeping reform, Philadelphia put the bondsmen out of business. The court itself took over the job of bailing out defendants - part of a national trend that found private bail distasteful. In a 1971 opinion, Supreme Court Justice Harry A. Blackmun called the commercial bail trade "offensive" and "odorous."

Today, with 47,000 Philadelphia defendants on the loose and $1 billion in forfeited bail uncollected, it's safe to say that the reform hasn't worked out so well.

Assistant District Attorney Sarah V. Hart, an expert on bail issues, said what she called a "culture of disrespect" had taken strong root in Philadelphia among criminals.

It was fueled, she said, by efforts in the late 1980s to reduce prison overcrowding that made it harder for prosecutors to lock up defendants ahead of trial. Increasingly, Hart said, defendants realized that the pool of fugitives was too large for there to be any real threat of arrest.

Under Philadelphia's bail system, only about 15 percent of the 60,000 suspects arrested yearly remain behind bars to await trial.

Of the remainder, about half are released without having to put up any money at all. This would include people arrested for, say, petty drug possession.

The others put down 10 percent of their bail amount under the deposit bail program. They sign an IOU for the rest. There is no means test, or determination of ability to pay, before bail is set.

It is these uncollected IOUs that now add up to $1 billion.

That sum is owed by about 210,000 defendants - or one bail debt for every seven Philadelphians.

In his recent unsuccessful campaign for district attorney, the Republican candidate, Michael Untermeyer, sought to make the bail debt a key issue. Citing the Scott case and others, he declared, "$1 billion owed to the city, one billion reasons to change."

"That is an IOU that in practice is never collected," Untermeyer said. "The system is insane. We might as well put up a sign that reads 'Come to Philadelphia - for the restaurants, the theater, and to be a criminal.' "

In a recent interview, the incoming district attorney, Democrat Seth Williams, said the high fugitive count was "a huge issue."

The bail problem has persisted even though outgoing District Attorney Lynne M. Abraham has tried for years to encourage change. A decade ago, she said the unpaid debt "makes a mockery of the bail system.

This fall, she wrote Mayor Nutter to call the bail system "a train wreck which imperils our financial stability and guts the justice system."

She said the system's failure to crack down on fugitives amounted to "just a great big 'Get Out of Jail Free' card for defendants and a big expensive joke played on the City of Philadelphia."

In interviews, city officials have blamed one another for the steady accumulation of massive bail debt.

Clerk of Quarter Sessions Miller has pointed a finger at the Law Department, saying its lawyers had failed to go after the bail deadbeats.

Aides to City Solicitor Shelley R. Smith said it was Miller's fault. They complained that Miller had never passed on the names of the debtors.

In the wind

After Scott caught his break due to prison overcrowding - going free without having to put up any money - he still faced trials on his three drug arrests.

At the first hearing on his first drug arrest, scheduled for Oct. 3, 2008, Scott failed to appear.

The following month, though, he showed up for court. His outstanding bench warrants were lifted, and he was released without having to put up any bail - again.

Within a matter of weeks, he missed more hearings. He was a fugitive once more.

In March of this year, Timothy Scott appeared once again at the Criminal Justice Center.

This time around, court officials cracked down a bit - a bail magistrate said Scott would have to put up 10 percent of $2,500 bail to go free. Scott put up the $250 the same day.

A month later, police arrested him one more time. It was his eighth bust in three years.

Police picked him up seven blocks from his Mantua home, charging him with possessing crack and marijuana, and carrying a concealed firearm.

The courts set his bail at 10 percent of $15,000. Scott paid up his $1,500 about a month after his arrest and walked free.

Court officials, for their part, said recently that the D.A.'s Office had never appealed any of the bail decisions. They also pointed out that bail, in some of the arrests, had been set higher than recommended by the guidelines.

Two weeks after putting up the money, Scott was a no-show at a June 5 trial for possession of crack.

The judge issued a bench warrant for his arrest. It was Scott's eighth bench warrant.

He was in the wind - again.

The next time he would surface, police said, was the night he leveled a machine gun-like pistol at Marcia Williamson inside the Caprice Villa.

Chasing the money

In the months ahead, critics say, leaders of the criminal justice system face a pair of related challenges: going after the missing $1 billion - and fixing a bail program that put the thousands of fugitives on the streets and spawned the massive debt.

After The Inquirer started asking questions about the mountain of bail, the Nutter administration promised action. It put out a bid request for firms to go after the $1 billion.

Eleven months later, the city still has not awarded contracts.

The Law Department refused to to say why. But in a recent exchange of letters with Abraham, Nutter laid out the reason. He wrote that the staff of Clerk of Quarter Sessions Miller "is unable to provide records of debtors and the amounts that have been paid or unpaid."

Robin T. Jones, Miller's first deputy and daughter, acknowledged in an interview that the office had never kept computerized records of the debts. It has simply put a paper notation into individual defendant's files, she said.

Even assuming that can be remedied, David C. Lawrence, the top administrator of the city courts, predicted that the move to collect the money would be a flop.

"Most of those people are dead. You'll never find them," he said. "There's a tremendous amount of uncollectible judgments there."

Though it has yet to close the deal, the city has tentatively selected two collection firms: Municipal Services Bureau of Austin, Texas, and Unifund of Cincinnati.

Executives with MSB said they were confident that it could recover much of the money.

"Once we find them, we are very effective at getting them to settle up their debts," said Patrick J. Swanick, the firm's chief executive officer.

A fix for the future?

Despite its image of shady storefront businesses and the baggage of past scandals, the private bail industry argues that it can save Philadelphia millions and dramatically reduce the number of fugitives.

For starters, the trade says, the evidence is in: that Philadelphia has become an object lesson in the failure of 10-percent-down bail.

"The numbers of unpaid bail-bond forfeitures and the concurrent rise in crime statistics speak for themselves in Philly," said Bill Carmichael, president of American Surety Co., an company that offers bail insurance in 43 states.

"The present system doesn't work, and those in charge lack the imagination or the willingness to look at alternatives."

Of the nation's top 10 cities, they point out, only Chicago and Philadelphia rely heavily on deposit bail. They say it is no surprise that each has more than 40,000 fugitives.

Jerry Watson, chief legal officer for AIA Holdings Inc., which annually underwrites 20 percent of all bail bonds in the nation, made a similar point.

"If I'm a career criminal, I will move tomorrow to Philadelphia. Because I love it - if I get arrested, I will get out of jail for 10 percent, max.

"I will know that I will not pay any more than that and that nobody is going to come after me. How much better can it be?"

Aside from the forgone money, Watson and others argue, a price is paid in wasted judicial resources, exasperated victims and witnesses, lawyer downtime - and, most seriously, in continued lawbreaking.

"I'm certain that the current pretrial release method in Philadelphia is a direct cause of an escalated crime rate there," Watson said.

While Philadelphia court officials seem almost resigned to the fugitive problem, private-industry executives say their involvement - and their self-interest - would mean that defendants would show for court.

"We get these folks in," Watson said. "We do it not because we're nice folks - though I do think we're nice - it's because if we can't, we have to pay the full amount of that bail. All of our focus is getting these people to court."

One way to ensure that, the executives said, is to make sure people close to the accused are on the hook for bail.

"Our customer is not the defendant," Watson said. "It is someone who wants that person out of jail - a wife, a mother, an employer, a relative, a sweetheart. If he runs away, they are going to tell us where he went."

The industry has its critics.

Timothy J. Murray, executive director of the Pretrial Justice Institute in Washington, a group that vigorously opposes private bail, agreed that Philadelphia had an "unacceptable" fugitive problem.

But he said the solution lay in making smart judgments about which defendants might run - and not in imposing financial burdens on impoverished defendants. That, he said, smacks of the medieval "debtors' prison."

However, academics seem to agree that private bail does a better job at reducing fugitives.

Experts from universities and the U.S. Department of Justice have found that clients of commercial bail agencies are more likely to appear for court in the first place and more likely to be captured if they do flee.

Places that ban commercial bail "pay a high price," economics professors Eric Helland and Alexander Tabarrok wrote in a 2004 study.

After studying eight years of national data, they concluded that fugitive rates were 30 percent higher in states that relied on deposit bail.

And Abraham wrote Nutter recently that "the return of private bail bondsmen should be seriously considered."

Lawrence, the veteran court administrator, remains cool to the return of private bail in any big way.

"Our history with bail bondsmen is absolutely horrible, abysmal, and criminal," he said. "And that's why we changed it."

In 2006, however, the Philadelphia courts took a small step to reopen the door to private bail.

But they imposed a big hurdle. The courts required bail firms to deposit $250,000 up front for every $1 million in bail they write.

Executives in the private bail business called the requirement "ridiculous," "ludicrous," and virtually unprecedented in the nation.

So far only one company, Lexington National Insurance, has been writing bail in Philadelphia. In a city where thousands of defendants face cases yearly, it has backed just two dozen bails this year.

A robber on the run

Detectives were worried. A young man, equipped with a very deadly gun, was off on a crime jag.

Over just three days in June, a masked robber armed with a MAC-10, similar to an Uzi, hit six places, sometimes accompanied by a lookout. The accomplice carried a 9mm handgun.

Their targets included two State Stores. At one of those, blurry video stills taken from a surveillance camera show the two gunmen menacing patrons and clerks, guns held high.

After some of the robberies, the pair would ride away on black dirt bikes.

Police said the crew also targeted bars, choosing quiet places frequented by an older clientele. One was the Caprice Villa.

Police say the leader was Timothy Scott. Detectives took him into custody on the street near his home only a day after the last robbery.

They charged him with two of the holdups, including the stickup at the Caprice. Victims have identified him as the gunman in lineups.

He is now behind bars at the city's Curran-Fromhold prison. He's been unable to post his new bail - 10 percent of $300,000.

The accomplice is still at large.

Contact staff writer Dylan Purcell

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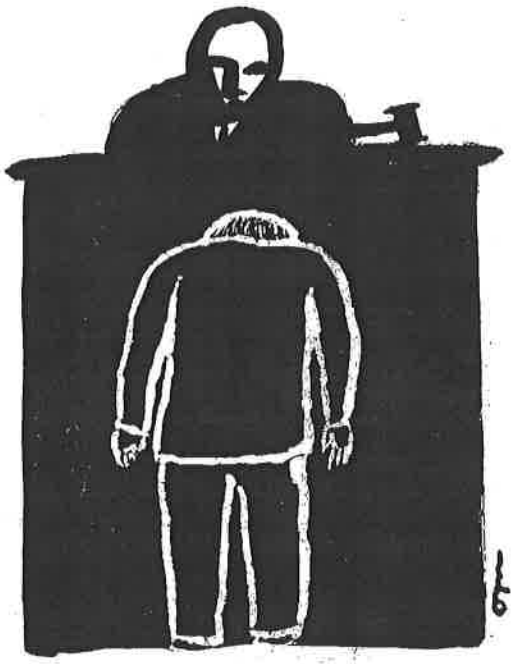
EXHIBIT B

Trials in absentia may deter fugitives

City judges should proceed even without defendants.

By Walter Phillips

Philadelphia suffers from the highest per-capita fugitive rate in the country, with 47,000 defendants on the streets having skipped bail, as The Inquirer reported last year. There is a cheap, practical way to deal with this problem that has not been widely discussed: The city's judges should try in absentia all defendants who are freed on bail and deliberately fail to appear in court.



JOHN OVERMYER

Most of the defendants who have thumbed their noses at the system figured that, rather than appear, testify, and face cross-examination, they had better odds of beating the rap if they simply didn't show up. Despite Philadelphia's abysmal conviction rate, they were right.

One way the city's Common Pleas judges could address this problem — without any expense — would be to take the unified stance that trials will go on even in the absence of such defendants.

The trouble is that many Philadelphia judges just won't call the bluff of absent defendants and follow the law that allows trials to go forward in their absence. A variety of reasons have been advanced for their timid stance: fear of reversal, the awkwardness of forcing defense attorneys to make fundamental decisions without consulting their clients, and just plain lethargy.

Some judges do not hesitate to try defendants in absentia when the record shows deliberate absconding, and they are to be applauded. They also have the law on their side under state Superior Court and Supreme Court decisions.

A defendant tried in absentia and later arrested will most often argue that he was denied his Sixth Amendment right to be confronted by witnesses. Judges concerned about being reversed based on this argument could institute a requirement that when a case is assigned for trial, the assignment judge must engage in an on-the-record colloquy with the defendant explaining the rights he would give up by not appearing for trial, and warning that a trial is likely to go on without him. Currently, defendants are handed a subpoena to appear on the date in question and notified that if they fail to appear, a bench warrant *may* be issued.

Waiving constitutional rights is not to be taken lightly. But if a person in custody can waive his right not to incriminate himself after being given a Miranda warning, surely a defendant who has been fully advised of his Sixth Amendment right to be confronted by witnesses can be deemed to have waived it when he deliberately fails to appear in court for trial. Appellate courts in New York have upheld that principle.

Since there doesn't seem to be any push by the Common Pleas leadership to install a uniform system of trying defendants in absentia, it may take a directive from the state Supreme Court mandating such colloquies when cases are assigned for trial. That would send the message that the courts mean business, which in turn should result in a dramatic drop in the fugitive rate once the word gets out.

Walter Phillips, a former state and federal prosecutor, is chairman of the Pennsylvania Commission on Crime and Delinquency and practices law in Philadelphia. He can be reached at walter.phillips@obermayer.com.

EXHIBIT C

Rule 602. Presence of the Defendant

(A) The defendant shall be present 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 and the imposition of sentence.

(B) A corporation may appear by its attorney for all purposes.

Comment: Nothing in this rule is intended to preclude a defendant from affirmatively waiving the right to be present at any stage of the trial, see e.g., *Commonwealth v. Vega*, 719 A.2d 227 (Pa. 1998) (plurality) (requirements for a knowing and intelligent waiver of a defendant's presence at trial includes a full, on-the-record colloquy concerning consequences of forfeiture of the defendant's right to be present) or from waiving the right to be present by his or her actions, see e.g., *Commonwealth v. Wilson*, 712 A.2d 735 (Pa. 1998) (defendant, who fled courthouse after jury was impaneled and after subsequent plea negotiations failed, was deemed to have knowingly and voluntarily waived the right to be present).

Former Rule 1117(c) was moved to Rule 462 (Trial *de novo*) in 2000 as part of the reorganization of the rules.

Note: Rule 1117 adopted January 24, 1968, effective August 1, 1968; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; renumbered Rule 602 and amended March 1, 2000, effective April 1, 2001; amended December 8, 2000, effective January 1, 2001.

EXHIBIT D

LEXSEE 440 NE 2D 1313

The People of the State of New York, Respondent, v. Vicki Parker, Appellant

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

57 N.Y.2d 136; 440 N.E.2d 1313; 454 N.Y.S.2d 967; 1982 N.Y. LEXIS 3671

August 31, 1982, Argued
October 7, 1982, Decided

PRIOR HISTORY: Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered September 18, 1981, which affirmed a judgment of the Supreme Court (James H. Boomer, J.), rendered in Monroe County upon a verdict convicting defendant of two counts of criminal sale of a controlled substance in the third degree.

Defendant told her counsel that she might not be able to appear for trial due to illness and the trial court, after a hearing, determined that she had notice of a day certain for her scheduled appearance and deliberately failed to appear. The court made no finding regarding whether defendant was aware that the consequence of her absence would be that her trial would proceed without her being present. Defendant was tried *in absentia* and found guilty.

The Court of Appeals reversed the order of the Appellate Division and ordered a new trial, holding, in an opinion by Judge Wachtler, that a finding that a criminal defendant has received actual notice of the date for trial and has nonetheless voluntarily failed to appear is not sufficient, as a matter of law, to permit the court to proceed to try the defendant *in absentia*, and that the validity of any waiver of the right to be present at trial must be tested according to constitutional standards.

People v Parker, 83 AD2d 995, reversed.

DISPOSITION: Order reversed and a new trial ordered.

HEADNOTES

Crimes -- Right to be Present at Trial -- Waiver

A finding that a criminal defendant has received actual notice of the date for trial and has nonetheless voluntarily failed to appear is not sufficient, as a matter of law, to permit the court to proceed to try the defendant *in absentia*; although the fundamental constitutional right to be present at a criminal trial may be waived, the validity of any waiver, including an implied one, must be tested according to constitutional standards, and accordingly, in order to effect a knowing, voluntary and intelligent waiver, the defendant must be informed of the nature of the right to be present at trial and the consequences of failing to appear for trial, including the fact that the trial will proceed even though the defendant fails to appear.

COUNSEL: *Edward J. Nowak, Public Defender* (*Howard A. Bloch* of counsel), for appellant. I. There was no waiver of appellant's right of presence; trial *in absentia* violated her constitutional rights of confrontation and due process, as well as her statutory rights pursuant to CPL 260.20, 340.50. (*Illinois v Allen*, 397 U.S. 337; *Lewis v United States*, 146 U.S. 370; *Barber v Page*, 390 U.S. 719; *Pointer v Texas*, 380 U.S. 400; *Johnson v Zerbst*, 304 U.S. 458; *Brady v United States*, 397 U.S. 742; *People v Epps*, 37 NY2d 343;

Schneckloth v Bustamonte, 412 U.S. 218; *Miranda v Arizona*, 384 U.S. 436.) II. Assuming, *arguendo*, a waiver of appellant's right of presence, it was an abuse of discretion to have tried her *in absentia*. (*People v Foy*, 32 NY2d 473; *Goldsby v United States*, 160 U.S. 70; *United States v Tortora*, 464 F2d 1202; *United States v Toliver*, 541 F2d 958; *People v Byrnes*, 33 NY2d 343; *People v Oskroba*, 305 NY 113; *People v Matz*, 23 NY2d 196; *People v Ballott*, 20 NY2d 600.) III. The trial court erred in sentencing appellant *in absentia*. (*United States v Behrens*, 375 U.S. 162; *Illinois v Allen*, 397 U.S. 337; *People ex rel. Lupo v Fay*, 13 NY2d 253; *Green v United States*, 365 U.S. 301; *Snyder v Massachusetts* , 291 U.S. 97; *People v Mullen*, 44 NY2d 1; *Townsend v Burke*, 334 U.S. 736; *Mempa v Rhay*, 389 U.S. 128; *People v Perry*, 36 NY2d 114; *People v Stroman*, 36 NY2d 939.)

Donald O. Chesworth, Jr., District Attorney (*Sheldon W. Boyce, Jr.*, and *Kenneth R. Fisher* of counsel), for respondent. I. By her voluntary absence after personal notification of a day certain for her trial, defendant forfeited her right to be present. (*Taylor v United States*, 414 U.S. 17; *Diaz v United States*, 223 U.S. 442; *United States v Tortora*, 464 F2d 1202, cert den *sub nom. Santora v United States*, 409 U.S. 1063; *Government of Virgin Is. v Brown*, 507 F2d 186; *People v Aiken*, 45 NY2d 394; *People v Epps*, 37 NY2d 343, 423 U.S. 999; *Matter of Whitley v Cioffi*, 74 AD2d 230; *Illinois v Allen*, 397 U.S. 337; *People v Johnson*, 37 NY2d 778.) II. By her continued absence, defendant also forfeited her right to be present at sentencing. (*Matter of Root v Kapelman*, 67 AD2d 131; *People v Montez*, 65 AD2d 777; *People v Perry*, 36 NY2d 114; *People v McClain*, 35 NY2d 483.)

JUDGES: Wachtler, J. Chief Judge Cooke and Judges Jasen, Jones, Fuchsberg and Meyer concur; Judge Gabrielli taking no part.

OPINION BY: WACHTLER

OPINION

[*138] [**1314] [***968] **OPINION OF THE COURT**

The question on this appeal is whether a finding that a criminal defendant has received actual notice of the date for trial and has nonetheless voluntarily failed to appear is sufficient, as a matter of law, to permit the court to proceed to try the defendant *in absentia*. The courts below held this finding sufficient to establish an implicit relinquishment of a defendant's right to be present at trial. We disagree and reverse.

In February, 1977 defendant was indicted for two counts of criminal sale of a controlled substance in the third degree (Penal Law, § 220.39, subd 1). On Tuesday, July 5, 1977, the trial court notified defense counsel that defendant's case was scheduled for trial on Friday, July 8, 1977. Defense counsel immediately contacted defendant by telephone to notify her of the trial date. She replied that she was seriously ill, that she might not be able to appear for trial, and that she was too ill to meet with counsel prior to the trial date.

Defendant did not appear for trial on July 8. After being informed of defendant's illness by defense counsel, the court adjourned the matter until Monday, July 11. Defendant failed to appear on that day and defense counsel indicated that he had neither heard from nor been successful in locating defendant during the adjournment.

The trial court then conducted a hearing to determine defendant's whereabouts. The prosecutor called Jeanette Harris, who had known defendant for 10 years and who posted bail for her. Mrs. Harris testified, [**1315] on direct examination, that she spoke with defendant on June 25, 1977, at which time defendant indicated an intention to leave town. Mrs. Harris also stated that defendant never mentioned that she was ill. On cross-examination, Mrs. Harris stated that about one month before the hearing defendant's sister told defendant to leave town but that defendant responded by saying she would not flee. She testified that her son, James Harris, told her defendant was "out in the street".

After Mrs. Harris testified, defense counsel told the court that defendant never told him she was planning to leave [*139] the jurisdiction. The court found that defendant's absence was voluntary and that she had voluntarily waived her right to be present at trial. Pursuant to court order and over defense counsel's objection, defendant was tried *in absentia*. No effort was made to secure the presence of the defendant through the use of a bench warrant.

At trial Officer Ruffin, of the Drug Enforcement Administration (DEA) Task [***969] Force of Monroe County, testified to purchasing cocaine and morphine from defendant. Two other DEA officers, who were observing Ruffin's vehicle from a distance of 60 feet at the time of the sale identified defendant as the individual

who entered the vehicle when the transaction occurred. At the close of the People's case defense counsel called no witnesses but indicated that he would have called defendant had she not been tried *in absentia*, and that she would have rendered an exculpatory explanation of the transaction.

The jury returned a verdict finding defendant guilty on both counts of criminal sale of a controlled substance in the third degree. She was sentenced *in absentia* to an indeterminate term of two years to life in prison on each count, to run concurrently.

The Appellate Division affirmed the judgment of conviction, without opinion. We conclude that the trial court's factual finding of voluntary absence from court on the day scheduled for her appearance is alone insufficient as a matter of law to establish an implicit waiver of defendant's right to be present at trial so as to permit the court to try defendant *in absentia*.

A defendant's right to be present at a criminal trial is encompassed within the confrontation clauses of the State and Federal Constitutions (NY Const, art I, § 6; US Const, 6th Amdt) and the Criminal Procedure Law (CPL 260.20, 340.50). Of course the right to be present may, as a general matter, be waived under both Constitutions (*Diaz v United States*, 223 U.S. 442; *People v Byrnes*, 33 NY2d 343).

More specifically, we have recently held that a waiver of the right to be present at a criminal trial may be inferred from certain conduct engaged in by the defendant after the trial has commenced. Thus in *People v Epps* (37 NY2d 343, [*140] cert den 423 U.S. 999), we held that defendant waived his right to be present when, after attending his trial for the first two days, he refused to leave his cell and attend further proceedings as part of his participation in an inmate boycott of the courts. We noted that prison personnel had repeatedly warned the defendant of the consequences of his refusal to leave his cell. Similarly, in *People v Johnson*, (37 NY2d 778), we held that the defendant's behavior in disrupting trial proceedings and his repeated requests to leave the courtroom, along with the court's explanation of the consequence that the trial would proceed without him, were sufficient to waive the defendant's right to be present at the trial (see, also, *Taylor v United States*, 414 U.S. 17).

Although the right to be present at a criminal trial may be waived, the right is of a fundamental constitutional nature and therefore the validity of any waiver including one which could be implied, must be [**1316] tested according to constitutional standards. Thus, in *People v Epps* (37 NY2d, *supra*, at p 350) we noted that the key issue was whether this defendant knowingly, voluntarily and intelligently relinquished his known right (*Johnson v Zerbst*, 304 U.S. 458, 464).

The People argue that a forfeiture rather than a waiver analysis should be applied in the trial *in absentia* context when the trial is commenced in defendant's absence. It is true that the forfeiture of a right may occur even though a defendant never made an informed, deliberate decision to relinquish that right. While waiver requires a knowing, voluntary and intelligent decision, which may be either express or implied, forfeiture occurs by operation of law without regard to defendant's state of mind (see, generally, Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich L Rev 1214). The People argue that forfeiture of the right to be present at trial occurs as a matter of law whenever defendant knows of the court date and nonetheless voluntarily fails to appear.

[***970] We reject this contention and conclude that *Epps* and *Johnson* (*supra*), require the application of a constitutional waiver analysis to the facts now before us. In *Epps* and [*141] *Johnson* the defendants were present when trial commenced and were warned of the consequences of their conduct. In each of those cases the defendant's conduct represented a clear expression of a desire not to be present at trial under any circumstances and therefore it would be inaccurate to say that the defendants in those cases renounced their right to be present. In those cases we required a voluntary, knowing and intelligent waiver of the right to be present at trial. In the case before us, considering the defendant's knowledge at the time of her disappearance, there is no less reason for applying a waiver analysis. Certainly the mere fact of her disappearance presents a far more ambiguous situation than was present in *Epps* or *Johnson* for it does not appear that she was advised at any time by anyone that if she did not appear in court on the scheduled date the trial would proceed without her.

In order to effect a voluntary, knowing and intelligent waiver, the defendant must, at a 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 (see *Schneckloth v Bustamonte*, 412 U.S. 218, 243-244; *Brady v United States*, 397 U.S. 742, 748). This, of course, in turn requires that defendant simply be aware that trial will proceed even though he or she fails to appear. As noted above, the defendants in *Epps* and *Johnson* were both expressly told that trial would proceed in their absence.

As we have previously noted, the record before us is devoid of any evidence indicating that defendant was ever apprised or otherwise aware that her trial would proceed in her absence. Defendant told her counsel that she might not be able to appear for trial due to illness and the trial court, after a hearing, determined that she had notice of a day certain for her scheduled appearance and deliberately failed to appear. However, the court made no finding regarding whether defendant was aware that the consequence of her absence would be that her trial would proceed without her being present.

Moreover, nothing in the record provides a basis for implying a waiver as a matter of law from the circumstances. In *Taylor v United States* (414 U.S., *supra*, at p 20) [*142] the defendant absented himself voluntarily after attending the opening of his trial. The Supreme Court implied a waiver from that conduct as a matter of law, stating: "It seems equally incredible to us, as it did to the [**1317] Court of Appeals, 'that a defendant who flees from a courtroom in the midst of a trial -- where judge, jury, witnesses, and lawyers are present and ready to continue -- would not know that as a consequence the trial could continue in his absence'" (citation omitted). A similar waiver was implied from mere voluntary failure to appear for trial in the multiple defendant case of *United States v Tortora* (464 F2d 1202, cert den *sub nom. Santoro v United States*, 409 U.S. 1063). No similar circumstances are presented in the case at bar.

We consider it appropriate to emphasize that even after the court has determined that a defendant has waived the right to be present at trial by not appearing after being apprised of the right and the consequences of nonappearance, trial *in absentia* is not thereby automatically authorized. Rather, the trial court must exercise its sound discretion upon consideration of all appropriate factors, including the possibility that defendant could be located within a reasonable period of time, the difficulty of rescheduling trial and the chance that evidence will be lost or witnesses will disappear (see *United States v Peterson*, 524 F2d 167). In most cases the simple expedient of adjournment pending execution of a bench warrant could provide an alternative to trial *in absentia* unless, of course, the prosecution can demonstrate that such a course of action would be totally futile.

[***971] Accordingly, the order of the Appellate Division should be reversed and the matter remitted for a new trial.

Order reversed and a new trial ordered.