CONSTITUTIONAL LAW—EXPULSION OF DEFENDANT FROM THE COURTROOM FOR MISCONDUCT—SIXTH AMENDMENT CONFRONTATION CLAUSE

In *Illinois v. Allen*[1] the United States Supreme Court held that a defendant's right to confront the witnesses against him guaranteed by the confrontation clause of the sixth amendment[2] and made applicable to the states through the fourteenth amendment in *Pointer v. Texas*,[3] was not violated when the trial judge had the defendant removed from the courtroom for misconduct. Respondent Allen refused court-appointed counsel and asked to be allowed to represent himself. The trial judge agreed after considerable argument but had the court-appointed counsel sit in to preserve the record. After examining the first juror at great length, the trial judge requested respondent to confine himself solely to the juror's qualifications. The respondent began to argue with the trial judge in an abusive and disrespectful manner, and the judge asked court-appointed counsel to continue. Respondent proclaimed that when he went to lunch the judge would be a corpse. At that point respondent took a file from his attorney and tore it. The judge warned respondent that he would be removed if he continued his conduct. After more abusive remarks the judge had respondent removed and the jury was selected in respondent's absence.

After the noon recess respondent was once again removed when he objected to his attorney moving to exclude the witnesses from the courtroom. Respondent remained out of court during the state's case except when he was brought in for identification purposes. After the prosecution's case the judge reiterated his promise that respondent could return if he promised to behave. Respondent did promise to behave and was allowed to remain the remainder of the trial.

Respondent was convicted of armed robbery, and the conviction was affirmed by the Illinois Supreme Court.[4] Respondent then filed a petition for a writ of habeas corpus in federal court alleging that he had been wrongfully deprived of the right to be present throughout his trial.

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1. ___ U.S. ___, 90 S.Ct. 1057 (1970).

2. "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 defense" (emphasis added).

3. 380 U.S. 400 (1965).

4. People v. Allen, 37 Ill.2d 167, 226 N.E.2d 1 (1967), *cert. denied*, 389 U.S. 907 (1967).

The court of appeals reversed[5] the district court's denial of the writ, and certiorari was granted.

Before the *Allen* case if a defendant became unruly, the trial judge could only summarily hold him in contempt, wait until the end of the trial and hold him in contempt, or have the defendant bound and gagged. The contempt power of the judge is not adequate in cases where the defendant is purposely trying to frustrate the court in carrying out its function, and binding and gagging the defendant can create a bad impression on the jury.[6]

There have been two cases which allowed exclusion because of misconduct. In *United States v. Davis*[7] the court recognized that a defendant had a right to be present at his trial but went on to hold that this right did not include the right to prevent a trial by unseemly disturbance. The circuit court stated that the defendant could not complain of an order made necessary by his misconduct and which could have been terminated by agreeing not to continue creating a disturbance.[8] The court did not discuss the requirements of the sixth amendment. Its decision was evidently based on what it considered to be the inherent authority of the trial judge. In *People v. DeSimone*[9] the Illinois court held that defendant's misconduct constituted a waiver of his right to be present. The court indicated, "The right to appear and defend is not given to a defendant to prevent his trial . . . by wrongfully obstructing its progress."[10]

The requirement that a defendant must be present during his trial has its basis in the early common law. When guilt or innocence was decided by trial by "ordeal" and trial by "battle", it can be readily seen that the presence of the accused was an absolute necessity. The requirement had nothing to do with insuring that the trial was fair and that all defendant's rights were protected. When the jury system first began to develop, the judge served as a private arbitrator who was called in to settle a private quarrel. The presence of the defendant was necessary in order to present a dispute for the arbitrator to decide, to at least tacitly accept the judge as the arbitrator, and to elect whether to "wage battle" or defend by "suit of witnesses." After the reforms of Henry II, the

5. Allen v. Illinois, 413 F.2d 232 (7th Cir. 1969).

6. For an excellent study of the sanctions available to the trial judge to keep order, *see* Murray, *The Power to Expel A Criminal Defendant From His Own Trial: A Comparative View*, 36 U. COLO. L. REV. 171 (1964).

7. 25 F. Cas. 773 (No. 14,923) (C.C.S.D.N.Y. 1869).

8. *Id.*

9. 9 Ill.2d 522, 138 N.E.2d 556 (1956).

10. *Id.* at __, 138 N.E.2d at 562.

defendant had the right either to elect trial by "wager of battle" or trial by "his country" (proof by the verdict of a sworn inquest of neighbors). The defendant's presence was necessary in order for him to make an election.[11]

In *Hopt v. Utah*[12] the United States Supreme Court laid down the principle that a defendant must be personally present at all stages of a trial at which his substantial rights may be affected in a prosecution of a felony. The Court in emphasizing this stated that the *statutory* requirements to the defendant's personal presence at the trial could not be waived by the defendant or his counsel.[13] In *Lewis v. United States*[14] the Supreme Court recognized the rule requiring defendant's presence at all stages after indictment where defendant's rights might be affected had been relaxed in cases of misdemeanors, but still held that in case of felonies neither the defendant nor his counsel had the power to waive this right.[15]

But the law up until this time was not unanimous. State courts did not adopt the position of the Supreme Court, and in the case of *Howard v. Kentucky*[16] the United States Supreme Court said that the sixth amendment did not apply to the states. In *State v. Kelly*[17] the North Carolina Supreme Court restricted the rule that the defendant's presence is required in capital cases and cases in which the defendant is in custody unless *he expressly* waives the right. The court said that to allow a party charged with a crime to flee and take advantage of his own wrong and obtain a new trial would savor of absurdity and positive injustice.[18] This case was decided after *Hopt* but before *Lewis*. The same result was reached in *State v. Way*[19] which was decided after both *Hopt* and *Lewis*.

The United States Supreme Court in *Diaz v. United States*[20] recognized the exceptions in non-capital cases that when the defendant is not in custody his voluntary absence from the courtroom constitutes a waiver. The court distinguished *Hopt* and *Lewis* on the grounds that in

11. Goldin, *Presence of the Defendant At Rendition of the Verdict in Felony Cases*, 16 COL. L. REV. 18, 18-19 (1916).

12. 110 U.S. 574 (1884).

13. *Id.* at 579.

14. 146 U.S. 370 (1892).

15. *Id.* at 372.

16. 200 U.S. 164 (1906). *But see* Pointer v. Texas 380 U.S. 400 (1965) which made the sixth amendment applicable to the states.

17. 97 N.C. 404, 2 S.E. 185 (1887). Defendant fled before the jury returned its verdict.

18. *Id.*

19. 76 Kan. 928, 93 P. 159 (1907). Defendant was out on bond and was voluntarily absent when the jury returned its verdict.

20. 223 U.S. 442 (1912).

each case the accused was in custody and charged with a capital offense. The dissent disagreed that it was possible for a defendant to waive his personal right to be present when he was not in custody, but reasoned that the court would proceed because it was obliged to go on without the defendant and not because it could or would accept a formal waiver.[21] Both the majority and the dissent recognized that a defendant should not be able to force a court to recess or declare a mistrial by not showing up. The result certainly should not be different if the defendant is in the courtroom and tries to frustrate the court's efforts to give him a fair trial.

The spirit of *Diaz* was displayed in *United States v. Parker*[22] where the court held that a defendant could waive his right to be present after the trial begins when he is not in custody.[23] The court went on to say that to hold up the jurors and other parties to await the pleasure of a defendant to come into court would be impractical.[24] In the *Parker* case the defendant, who was out on bond, was injured in an automobile accident on the way to court. The court had started the day's proceedings in his absence but recessed when it learned of defendant's accident. Defendant was shown a daily transcript of the testimony taken in his absence and discussed it with his counsel. After the discussion he did not request that any testimony be offered in response to the testimony taken while he was absent nor did he ask that any of the witnesses examined be recalled for further examination. The court of appeals while affirming[25] the district court's holding backed off somewhat saying that the defendant had unquestionably waived his right to be present after examining a transcript for the time he was out of court even though it could not be said he voluntarily absented himself because of the accident.

In *Frank v. Magnum*[26] the United States Supreme Court interpreted Georgia law to be that a defendant could waive the right to be present at the giving of the verdict and found no objection to this. Mr. Justice Holmes dissented from the opinion on other grounds but said ". . .[W]e never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States."[27]

The principal case relied on the opinion of Mr. Justice Cardozo in

21. *Id.* at 461.
22. 91 F. Supp. 996 (M.D.N.C. 1950), *aff'd*, 184 F.2d 488 (4th Cir. 1950).
23. *Id.* at 998.
24. *Id.* at 999.
25. Parker v. United States, 184 F.2d 488 (4th Cir. 1950).
26. 237 U.S. 309 (1915). Defendant stayed away from the giving of the verdict at the suggestion of the trial judge because of fear that there would be violence.
27. *Id.* at 346.

Snyder v. Massachusetts[28] as authority that a defendant not only could waive the right to be present, but also could lose it by misconduct. In *Snyder* the defendant objected because he was not allowed to be present at a view of the scene of the crime by the jury. Mr. Justice Cardozo while saying that notice of the charge and an adequate opportunity to defend against it cannot be taken away,[29] went on to say, "No doubt the privilege [to be present at the trial] may be lost by consent or at times even by *misconduct*."[30] Speaking of the requirements of the fourteenth amendment, Mr. Justice Cardozo stated, "So far as the Fourteenth Amendment is concerned the presence of the defendant is a condition of due process to the extent that a fair and a just hearing would be thwarted by his absence and to that extent only."[31]

The law as it stood before *Allen* was that the sixth amendment required that the defendant be given the right to be present during his trial. While at first it was held that his right could not be waived, exceptions developed that a defendant could waive his right where he was not in custody and in non-capital cases. As far as excluding a defendant for misconduct there was only the dictum of Mr. Justice Cardozo in *Snyder* and the *Davis* and *DeSimone* cases.

It seems inconceivable that the courts would recognize that a defendant could not stop court proceedings by fleeing the court's jurisdiction after a trial has begun and then allow him to disrupt and attempt to stop or otherwise frustrate the court's efforts to give him a fair trial. To those who may be afraid that *Allen* gives the trial judge too much power that could be used to unjustly keep the defendant out of the courtroom, the court inserted two safeguards: (1) the defendant cannot be removed until he has been warned and continues his behavior, and (2) once the defendant has been removed, he will be readmitted once he promises to conduct himself in a respectful manner. Therefore, the defendant has the "key to the courtroom" in his own pocket. When a defendant is excluded, he should be accessible to his counsel for consultations. The defendant will still have the appeal process open to him if he believes that a trial judge has acted unjustly. There will not be the slightest hestitation on the part of the appellate courts to order a new trial if they feel the trial judge has abused his discretion.

If the courts are to be the protector of the individual's rights and

28. 291 U.S. 97 (1934). The Court held that defendant's presence at the view was not required by the United States Constitution.

29. *Id.* at 105.

30. *Id.* at 106. (emphasis added).

31. *Id.* at 107-8.

freedoms, it is essential that they be allowed to conduct their business in as orderly a manner as possible. Courts must be kept as free as possible from distractions that will interrupt their work. Exclusion of a defendant is admittedly a drastic step that should not be used except in the most drastic circumstances, but it should be used if necessary to keep a defendant from thwarting the court's purpose.

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