NOTE

Washington Defendants' New Right of Pre-Trial Flight

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As an indoctrinee to criminal law in the first semester of law school, I buried more than one naive assumption about the purpose and workings of criminal law. For instance, I learned that criminal law serves the important and broad societal purposes of retribution, rehabilitation, and deterrence. Yet, I can call to mind a bleached notion that criminal law should mainly serve the interests of crime victims. In the household of my youth, loud after-dinner discussions following the evening news focused not on the deterrence of future crime, the moral imperative of retribution, or the elusive promise of "correction." Rather, we were concerned that the justice system punish criminals for the sake of their victims. We believed that rape victims should not be deprived of "such balm as a conviction of their torturer supplies."[1] We felt that families of murder victims have a right to know that the person who took the life of a loved one will also be made to suffer.

Law students are taught doctrines of legal philosophy that neatly flank and dismember the common idea that criminal law should punish wrongdoers on behalf of their victims. First, vengeance is identified as a base moral purpose, ill-equipped to meet higher social objectives. For instance, acts of vengeance do not stoically deliver punishment as a moral obligation to the wrongdoer. Nor does vengeance acknowledge the sickness of the wrongdoer as a condition that society must cure.

Second, law students learn that, from a historical and practical viewpoint, a foremost purpose of criminal law is to serve the interest

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1. United States v. Watkins, 983 F.2d 1413, 1425 (7th Cir. 1993) (Easterbrook, J., dissenting).

of the state in maintaining an ordered society and deterring future crime.[2] Victims' interests are relegated to civil actions.[3] The subordination of victims' interests in criminal law is most plainly illustrated by the broad prosecutorial discretion afforded the state in selecting cases to try.

Lastly, the victim's perspective is identified as one too narrow from which to punish all crimes. For example, where a murder victim is loved and remembered by no one, punishment of the murderer will only make sense if it is carried out in service of a legal philosophy that considers more than just the victim's rights. Similarly, when a four-year-old child is raped by her uncle, she may be too young to have developed a sense of vengeance, or even to understand on a conscious level the violation. But, the psychological scars of such a crime may play out in untold ways over her lifetime.

Law students may play a lonely role at family gatherings and dinner parties, ardently defending the higher moral purposes of criminal law to "normal people," who seem universally frustrated by a criminal justice system that appears to have forgotten the victim. While 37 percent of Americans polled believe crime is the most important problem facing this country today, only 15 percent express confidence in the criminal justice system.[4] Perhaps the point made by "normal people" should influence our system. A system that devalues the rights of the victim may fail to achieve justice in some cases and may diminish public confidence in the courts as instruments of justice.

Certainly, it is only by disregarding the "victim's rights" that one can begin to fathom the Washington Supreme Court's recent decision in *State v. Jackson*.[5] This decision reversed the conviction of a man who raped his four-year-old niece on Christmas Eve in 1979, causing her to contract gonorrhea.[6] Following his arraignment, Jackson fled and failed to appear at his trial.[7] After attempts to locate Jackson failed, a trial was held in absentia[8] and he was found guilty of rape, with sentencing suspended pending his return to custody.[9] Jackson

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2. *See* RICHARD G. SINGER ET AL., CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW 82-88 (1989).

3. *See id.* at 13-15; Commonwealth v. Malloy, 450 A.2d 689, 691 (Pa. 1982) ("The individual who is the victim of a crime only has recourse in a civil action for damages.").

4. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 157, tables 2.4, 2.5 (1993).

5. 124 Wash. 2d 359, 878 P.2d 453 (1994).

6. *Id.* at 362, 878 P.2d at 454 (Durham, J., dissenting).

7. *Id.* at 360, 878 P.2d at 453.

8. *Id.*

9. *Id.*

evaded the law for nearly thirteen years.[10] Shortly after his eventual capture and incarceration, the Washington Supreme Court reversed his conviction.[11] The court did so not because Jackson was innocent or because his constitutional rights had been violated. Rather, the majority found that during Jackson's long evasion of authorities, the Washington Supreme Court had interpreted the state court rule pertaining to trials in absentia in such a manner that it dictated the reversal of Jackson's conviction.[12]

In *State v. Hammond*,[13] decided one year before *Jackson*, the Washington Supreme Court interpreted the state court rule pertaining to trials in absentia as prohibiting the commencement of a trial in the absence of a defendant. The *Hammond* court disregarded earlier appellate court decisions allowing the commencement of such trials in certain circumstances.[14]

The *Jackson* court applied *Hammond's* interpretation of the state court rule to Jackson, stating that procedural changes to criminal court rules apply retroactively to all cases not final when the rule is adopted.[15] The Washington Supreme Court reasoned it was duty-bound to retroactively apply *Hammond's* rule for trial in absentia and set Jackson free.[16] The reversal of Jackson's conviction is tantamount to an acquittal, given the practical impossibility of re-trying Jackson with presently available evidence.[17]

This Note will argue the woes of the *Jackson* decision, with minimal resort to the much disavowed notion of victims' rights. However, it is submitted that a visceral disagreement with this decision springs from the hollow echo of justice for the victim.

In arguing the infirmities of the *Jackson* decision, it is important to note that the Washington Supreme Court majority did not claim the decision to be a triumph of justice.[18] That position is untenable for all but Kenneth Jackson and his attorney. Nor did the majority opine that its ruling was consistent with the approved purposes of criminal law: deterrence of future crime, rehabilitation, and retribution for the

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10. *Id.*
11. *Id.* at 362, 878 P.2d at 454.
12. *Id.* at 361, 878 P.2d at 454.
13. 121 Wash. 2d 787, 854 P.2d 637 (1993).
14. *Id.* at 791, 854 P.2d at 639.
15. *Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454.
16. *Id.* at 362, 878 P.2d at 454.
17. Telephone Interview with Warren Sharpe, Prosecuting Attorney for Kitsap County (May 11, 1995).
18. Even those who believe that trials in absentia are inherently unfair to defendants cannot deny that in *Jackson*, a child rapist profited unjustly by his long evasion of the law.

criminal. Rather, the supreme court seems to have viewed Jackson's "acquittal" as a rare, unavoidable immunization of a particular defendant. Conservative legal rulings regarding two independent matters—trial in absentia and the retroactivity of new rules—converged, binding the court's hands in a mechanistic application of form over substance.

Notwithstanding the supreme court's assertion to the contrary, *Jackson*, although a rare case, was *not* an unavoidable decision. This Note questions the wisdom of the *Jackson* court's new interpretation of Washington's Criminal Rule (CrR) 3.4, which bars state courts from initiating trial in the absence of a criminal defendant, even when special circumstances are present.[19]

Section I provides a brief historical background of the right of the accused to be present at trial. Section II discusses the federal analysis of trials in absentia. Section III discusses Washington State's analysis of trials in absentia, focusing on the decisions in *State v. Hammond* and *State v. Jackson*. Section III also offers argument and analysis concerning the *Hammond* and *Jackson* decisions. It argues that, like the federal courts after the recent United States Supreme Court decision in *Crosby v. United States*,[20] Washington has created in criminal defendants a new "right of pre-trial flight." Section IV examines the possible motivations of the Washington Supreme Court in deciding *Hammond* and *Jackson* as it did. Section IV also explores an alternative solution to the absent defendant problem modeled after solutions found in other jurisdictions. Finally, this Note concludes that the Washington Supreme Court should reconsider the new "bright-line" absentia rule employed in *Jackson*.

I. BACKGROUND

The United States Supreme Court has yet to address the issue of whether the Constitution prohibits commencing trial against a criminal defendant who absconds before trial. It is clear, however, that the right of a criminal defendant to be present at his or her own trial is among those protected by the Constitution and has roots as ancient as the Magna Carta.[21] The Fifth Amendment to the United States

19. *Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454 (extending the holding of *Hammond* and prohibiting starting any trial in the absence of a criminal defendant under CrR 3.4 except in limited circumstances).

20. 506 U.S. 255 (1993).

21. State v. LaBelle, 18 Wash. App. 380, 387, 568 P.2d 808, 812 (1977) (citing the Magna Carta for early recognition of the right of a criminal defendant to be present at trial and to confront the witnesses against him by the following guaranty: "No free man shall be taken or

Constitution provides that "[n]o person shall. . . be deprived of life, liberty, or property, without due process of law."[22]

Historically, most important to the right of a criminal defendant to be present at trial has been the Confrontation Clause of the Sixth Amendment, which provides that the defendant in a criminal prosecution has the right to be confronted with the witnesses against him.[23] One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.[24] Under the incorporation doctrine of the Fourteenth Amendment, the Confrontation Clause extends to defendants in state criminal actions.[25]

Similarly, the Washington State Constitution expressly protects the right of an individual to be present at all times during his criminal trial and to "meet the witnesses against him face to face."[26] The Washington Supreme Court has declined to interpret the state constitutional provision as conferring broader protection than its federal counterpart.[27]

Beyond the constitutional protections, the presence of the defendant at trial serves several important policy functions for the defendant and the judicial system: (1) it allows a defendant to communicate with counsel during trial; (2) it allows a defendant to assist in the presentation of a defense or present his own defense; and (3) it ensures public confidence in the courts as instruments of justice.[28] Courts look to these policies when drafting rules that garner

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imprisoned or dissiesed or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the laws of the land.").

22. U.S. CONST. amend. V.

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

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

See also Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (The Sixth Amendment assures the privilege to confront one's accusers face to face in federal court.).

24. Illinois v. Allen, 397 U.S. 337, 338 (1970); Lewis v. United States, 146 U.S. 370, 371 (1892).

25. Pointer v. Texas, 380 U.S. 400, 401 (1965).

26. WASH. CONST. art. I, § 22.

27. State v. Palomo, 113 Wash. 2d 789, 794, 783 P.2d 575, 577 (1989).

28. State v. Hudson, 574 A.2d 434, 438 (N.J. 1990).

to defendants trial appearance rights beyond those provided by the Constitution.[29]

The United States Supreme Court has made it quite clear, however, that the Sixth Amendment right to confront witnesses is not absolute.[30] As Justice Cardozo said, "No doubt the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct."[31] Thus, unruly or disruptive defendants may, by their behavior, "waive" the right to be present at their own trial.[32]

The notion of whether, and under what circumstances, a criminal defendant may waive his right to appear at trial has undergone considerable development within the federal and state courts. The history of federal and state waiver doctrine is crucial to an understanding of the outcome in *Jackson*, and so will be capsulized in the next two sections.

II. TRIALS IN ABSENTIA: THE FEDERAL ANALYSIS

A. *Federal Rule of Criminal Procedure 43: Its Evolution and Interpretation*

At common law, the defendant's presence was required during all stages of trial.[33] This rigorous requirement was first modified by the United States Supreme Court in 1912 in *Diaz v. United States*.[34] In *Diaz*, the defendant twice absented himself during the course of trial, forcing a mistrial on each occasion.[35] The Supreme Court held that if a defendant voluntarily absents himself from his own trial proceedings, it "operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."[36]

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29. *See, e.g.*, Illinois v. Allen, 397 U.S. 337, 344 (1970) (noting that a defendant's right to be present at trial affords the defendant the ability to communicate with counsel during trial and assist in presentation of a defense); Douglas v. Alabama, 380 U.S. 415, 418 (1965) (acknowledging benefits in the process of cross examination); United States v. Peterson, 524 F.2d 167, 184 (4th Cir. 1975) (commenting that institutionally, the defendant's right to be present at trial ensures public confidence in the courts as instruments of justice).

30. Snyder v. Massachusetts, 291 U.S. 97, 116 (1934).

31. *Id.* at 106.

32. *Id.* at 119.

33. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 372 (1892).

34. 223 U.S. 442 (1912).

35. *Id.* at 445.

36. *Id.* at 455.

The ruling in *Diaz* was codified in subsection (b) of rule 43 of the Federal Rules of Criminal Procedure (FRCrP) when the rules were adopted in 1945.[37] FRCrP 43 provides in relevant part:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere, (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial). . . .[38]

In 1973, the Supreme Court found that FRCrP 43 did not abridge the protections provided by the Sixth Amendment's Confrontation Clause.[39]

Alongside FRCrP 43, a body of federal case law developed, providing that under certain conditions a trial may *begin* in the absence of the defendant.[40] Prior to 1993, federal law regarding commencement of trial in the absence of the defendant was controlled by *United States v. Tortora*.[41]

Tortora was a multi-defendant case in which one defendant, Tortora, intentionally failed to appear for trial.[42] The Second Circuit acknowledged the "initial presence" requirement of FRCrP 43, but held that the cost of regrouping witnesses and delaying other defendants' rights to a speedy trial trumped that requirement.[43] Thus, *Tortora* established a rule allowing trials to commence in the absence of a defendant when (1) the defendant was voluntarily absent with

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37. FED. R. CRIM. P. 43(b)(1).

38. FED. R. CRIM. P. 43(a) & (b).

39. Taylor v. United States, 414 U.S. 17, 18 (1973).

40. *See, e.g.*, United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972). *Tortora* was the first federal case extending FRCrP 43 to allow commencement of trial against a knowingly and voluntarily absent defendant. The court noted that at the time, only one state court had recognized voluntary waiver of the right to be present at the commencement of trial. State v. Tacon, 488 P.2d 973 (Ariz. 1971), *cert. dismissed as improvidently granted*, 410 U.S. 351 (1973).

41. 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972).

42. *Id.* at 1206-07.

43. *Id.* at 1210.

knowledge of the trial date, and (2) the public interest in proceeding with trial clearly outweighed the court's interests on behalf of the defendant.[44]

Most federal courts followed *Tortora's* holding regarding multi-defendant trials commencing in the absence of one or more defendants.[45] However, the circuits were divided in their willingness to commence trials in absentia in *single* defendant cases. The First, Second, Fourth, and Fifth Circuits emphasized the interests of the absent defendant and effectively shielded single defendants who failed to appear from trial in absentia.[46] They interpreted the *Tortora* court's decision to proceed without the defendant as arising predominantly from the rights of the other defendants in the case to a speedy trial.[47] In contrast, the Third and Ninth Circuits focused on a defendant's knowing, deliberate failure to appear for trial and allowed trial in absentia upon a finding that the defendant's absence was voluntary.[48]

For approximately twenty years following *Tortora*, a divided body of law attempted to refine when a trial may commence in the absence of a defendant.[49] Development of federal case law within both camps, whether narrowly or broadly embracing trial in absentia, relied upon a key ingredient in the *Tortora* court's untested interpretation of FRCrP 43. FRCrP 43(a) requires that the defendant be present "except as otherwise provided by this rule."[50] The rule then pro-

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44. *Id.* at 1208-09.

45. The First, Second, Third, Fourth, Fifth, and Ninth Circuits all adopted some form of *Tortora* analysis in commencing trials in the absence of the criminal defendant. United States v. Lochan, 674 F.2d 960 (1st Cir. 1982); United States v. Tortora, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); Virgin Islands v. Brown, 507 F.2d 186 (3d Cir. 1975); United States v. Camacho, 955 F.2d 954 (4th Cir. 1992), *cert. denied*, 114 S. Ct. 571 (1993); United States v. Hernandez, 842 F.2d 82 (5th Cir. 1988); United States v. Houtchens, 926 F.2d 824 (9th Cir. 1991).

46. *See, e.g.*, *Lochan*, 674 F.2d at 967; *Tortora*, 464 F.2d at 1210; *Camacho*, 955 F.2d at 954; *Hernandez*, 842 F.2d at 85.

47. *Lochan*, 674 F.2d at 967-68; *Tortora*, 464 F.2d at 1210; United States v. Peterson, 853 F.2d 249, 252 (4th Cir. 1988); *Camacho*, 955 F.2d at 953; *Hernandez*, 842 F.2d at 85; United States v. Benavides, 596 F.2d 137, 139 (5th Cir. 1979).

48. *See, e.g.*, *Brown*, 507 F.2d at 189; *Houtchens*, 926 F.2d at 827. The Third and Ninth Circuits made only a single inquiry: whether the defendant's absence was voluntary. *See, e.g.*, *Brown*, 507 F.2d at 188-89; *Houtchens*, 926 F.2d at 826. If the court found that the defendant was willfully absent with knowledge of the trial date, the trial could begin. *See, e.g.*, *Brown*, 507 F.2d at 89-90; *Houtchens*, 926 F.2d at 826-27.

49. *Tortora* was decided in 1972. 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972). See *supra* notes 45-48 and accompanying text for case law construing FRCrP 43 in light of *Tortora*.

50. FED. R. CRIM. P. 43(a).

vides, in subsection (b), that trial may proceed if the defendant, *initially present*, is voluntarily absent after trial has commenced.[51] The *Tortora* court read the language of subsection (b) as merely an example of a permissible occasion for proceeding with trial in the absence of the defendant, rather than the *only* permissible occasion.[52]

In 1993, the United States Supreme Court unanimously invalidated *Tortora* and its progeny in *Crosby v. United States*.[53] The facts of the *Crosby* case are not unique among federal cases involving trial in absentia. Crosby was one of four named defendants joined in an action that included numerous counts of mail fraud.[54] Crosby and his codefendants fraudulently claimed to be funding a theme park honoring military veterans through the sale of commemorative medallions.[55] Crosby was released after arraignment on a $100,000 bond. He attended the pretrial hearings with his attorney, but failed to appear for his trial.[56] United States Deputy Marshalls sent to look for Crosby found his apartment "cleaned out," and a neighbor confirmed seeing Crosby back his car half-way into his garage the night before trial, as if to pack his trunk.[57] The trial was delayed for several days without success in locating Crosby.[58]

The prosecution formally requested to proceed to trial against all defendants, and Crosby's attorney objected. In determining whether to proceed with trial in the absence of Crosby, the district court employed the two-part *Tortora* analysis. First, the court found that Crosby's absence was knowing, deliberate, and hence voluntary.[59] Second, the court determined that the public interest in proceeding to trial in Crosby's absence outweighed his interest in being present during the proceedings.[60] In assessing the public interest, the court considered disruption of both the court's calendar and court process, which included the assembly of fifty-four potential jurors. Further, the court considered the fact that Crosby's attorney and the other three defendants were present for trial.[61] Trial commenced five days late, and Crosby, along with two of the three other defendants, was found

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51. FED. R. CRIM. P. 43(b).
52. *Tortora*, 464 F.2d at 1208; *see also supra* note 44 and accompanying text.
53. 506 U.S. 255 (1993).
54. *Id.* at 256.
55. *Id.*
56. *Id.* at 257.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

guilty.[62] Crosby was later arrested in Florida and transported back to Minnesota where he was sentenced.[63]

Crosby boldly appealed the validity of his trial on the ground that FRCrP 43 forbids the commencement of trial against an absent defendant.[64] The Eighth Circuit found that the district court was justified under the *Tortora* analysis in trying Crosby in absentia.[65] The United States Supreme Court rejected this approach, however, holding that by its plain language, FRCrP 43(b) contains an exclusive list of permissible occasions for conducting trial in the absence of the defendant.[66] As a practical matter, this means that with the possible exception of the disruptive and disorderly,[67] all defendants must be "initially present" at their trial.[68] The Court was not troubled by the apparent anomaly of a rule interpreted to allow trial in absentia if the defendant was present at the formal inception of trial, but not if the defendant disappears before or during more substantive portions of trial. Instead, the Court reasoned that "[w]hile it may be true that there are no 'talismanic properties which differentiate the commencement of trial from later stages,' we do not find the distinction between pre- and midtrial flight so farfetched as to convince us that Rule 43 cannot mean what it says."[69]

Ignoring the intervening federal case law, the Supreme Court relied on the notes from a member of the rule-drafting committee to support its plain meaning interpretation of the rule.[70] Further, the Court reasoned that there were practical reasons for drawing a line

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 258-59.

67. FRCrP 43 was amended in 1975, adding section (b)(3). The rule states:

> The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere, . . . (3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

FED. R. CRIM. P. 43(b)(3). This amendment reflects the holding of Illinois v. Allen, 397 U.S. 337 (1970). The United States Supreme Court held in *Allen* that a defendant may waive the right to be present at trial if he acts in a manner so disorderly and disruptive that the trial cannot be continued with the defendant in the courtroom. *Id.* at 347.

68. *Crosby*, 506 U.S. at 262; *see also Allen*, 397 U.S. at 343.

69. *Crosby*, 506 U.S. at 261 (quoting Virgin Islands v. Brown, 507 F.2d 186, 189 (3d Cir. 1975)).

70. *Id.* at 260-61.

between the consequence of pre- and mid-trial flight.[71] First, costs of delaying the inception of trial are lower than costs of suspending a trial in progress.[72] Second, the start of trial is a "likely" place to draw a bright line delineating the point at which the defendant's interest of being present at trial outweighs the public's interest in the cost of delay.[73] Lastly, the Court noted that the commencement of trial is a time when a defendant, untrained in the law, will most assuredly realize that his trial will go on without him should he choose to absent himself.[74]

The Supreme Court did not consider the constitutional arguments raised by Crosby on appeal, explicitly stating, "we express no opinion here on that subject."[75] Nor did the Court comment on the constitutionality of the earlier federal decisions following *Tortora*.

Crosby was a bombshell case, invalidating more than twenty years of federal case law that allowed trial to commence against absent defendants under many circumstances. The *Crosby* decision may have opened the flood gates to incarcerated prisoners previously tried in absentia, availing them fresh grounds for the invalidation of their convictions.

The question of whether a conviction may be appealed on the basis of a new rule or interpretation of an existing rule is controlled by the retroactivity doctrine, a body of federal and state case law that has undergone considerable development in recent years.[76]

B. Retroactivity Doctrine

At common law, all high court statutory interpretations and new constitutional rules were applied retroactively to cases already decided.[77] This application was modified by *Linkletter v. Walker*,[78] in which the United States Supreme Court determined that the Constitution neither compels nor prohibits retroactive application of

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71. *Id.* at 261.
72. *Id.*
73. *Id.*
74. *Id.* at 261-62.
75. *Id.* at 261.
76. *In re* St. Pierre, 118 Wash. 2d 321, 324, 823 P.2d 492, 494 (1992) (asserting that retroactivity analysis has been marked by erratic development since the United States Supreme Court announced the doctrine in 1965); *see also* Comment, Griffith v. Kentucky: *Partial Adoption of Justice Harlan's Retroactivity Standard*, 10 CRIM. JUST. J. 153 (1987).
77. *In re* St. Pierre, 118 Wash. 2d at 325, 823 P.2d at 494 (stating that prior to Linkletter v. Walker, 381 U.S. 618 (1965), all new constitutional rules of criminal procedure were applied retroactively).
78. 381 U.S. 618 (1965).

new constitutional rules.[79] In a subsequent case, *Stovall v. Denno*,[80] three factors were identified for determining whether a new constitutional rule should apply retroactively: (1) the purpose served by the new rule, (2) the extent of reliance by law enforcement on the old rule, and (3) the effect of retroactive application of the new rule on service of justice.[81] The three factor approach was later modified by the injection of an additional concept: where a new constitutional rule represents a "clear break" from past precedent, it need not be applied retroactively.[82]

An approach advocated by Mr. Justice Harlan eventually replaced the earlier models.[83] This approach draws a distinction between cases on direct review and cases on collateral review, limiting the retroactive application of new constitutional rules of criminal procedure primarily to those cases for which direct review is available.[84] The term "direct review" describes cases still on appeal or otherwise not yet final.[85] By contrast, "collateral review," which includes habeas corpus actions, may take place even after a conviction becomes final "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack."[86]

Justice Harlan's approach was modified in *Teague v. Lane*,[87] and the current framework for determining the retroactivity of new constitutional rules follows a two-tiered analysis: (1) "A new [constitutional] rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct

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79. *Id.* at 619.

80. 388 U.S. 293 (1967).

81. *Id.* at 297.

82. United States v. Johnson, 457 U.S. 537, 549 (1982).

83. Justice Harlan opposed the balancing factors in favor of a system using procedural distinctions among defendants as a primary means of determining retroactivity. He raised dissent in four cases: Mackey v. United States, 401 U.S. 667, 675-81 (1971); United States v. Coin Currency, 401 U.S. 715, 724-27 (1970); Desist v. United States, 394 U.S. 244, 258-59 (1969); Jenkins v. Delaware, 395 U.S. 213, 222-24 (1969). *See also* Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (agreeing with Justice Harlan's position regarding application of new rules to other cases on direct review or not yet final); Teague v. Lane, 489 U.S. 288, 305 (1989) (endorsing Justice Harlan's view regarding the limited retroactive application of new constitutional rules of criminal procedure to other cases on collateral review).

84. *See Desist*, 394 U.S. at 258 (Harlan, J., dissenting).

85. *See Griffith*, 479 U.S. at 327 (holding that a case is final when the availability of appeal on convictions is exhausted and the time for petition for certiorari elapsed or a petition is finally denied); Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding that a defendant's conviction was not yet final for retroactivity analysis purposes until his petition for certiorari on direct appeal was denied).

86. 28 U.S.C. § 2255 (1996).

87. 489 U.S. 288, 305 (1989).

review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."[88] (2) A new constitutional rule will not be given retroactive application to cases on collateral review except where: (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures "'implicit in the concept of ordered liberty.'"[89]

The two prongs of the analysis make it clear that while new constitutional rules of criminal procedure will apply retroactively to all cases on direct review, they will not apply to collateral challenges unless one of the narrow exceptions is met. Constitutional rules that are *not new* always apply retroactively.[90] For this reason, courts hearing a case on collateral review should initially determine whether the rule is new. A rule is "new" if the result in the case was not dictated by precedent existing at the time the defendant's conviction became final.[91]

The question of whether *Crosby* announced a new rule for purposes of retroactivity was addressed by the Sixth Circuit in *Pelaez v. United States*.[92] *Pelaez* involved a trial in absentia that took place before *Crosby* was decided.[93] Because the *Pelaez* appeal was heard on collateral review, rather than on direct review, *Crosby* would not have applied retroactively if it was interpreted as announcing a *new* constitutional rule, unless it was determined to meet one of the two narrow exceptions. The Sixth Circuit determined that because *Crosby* was decided on the language, history, and logic of FRCrP 43, it was a case dictated by precedent, and therefore was not a new rule.[94] Thus, under the Sixth Circuit's interpretation of the rule *Crosby* announced, *Crosby* provides a basis for attack of all convictions, including those already final when *Crosby* was decided.

The Sixth Circuit may not have the last word on *Crosby's* retroactivity, however. The United States Supreme Court has not yet

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88. *Id.* at 304-05 (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)); *accord In re* St. Pierre, 118 Wash. 2d at 326, 823 P.2d at 495.

89. *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., dissenting)); *accord In re* St. Pierre, 118 Wash. 2d at 326, 823 P.2d at 495.

90. Pelaez v. United States, 27 F.3d 219, 223 (6th Cir. 1994) (holding that interpretation of FRCrP 43 by the United States Supreme Court was not a new rule and must therefore be applied retroactively to cases on collateral review).

91. Butler v. McKeller, 494 U.S. 407, 412 (1990).

92. 27 F.3d 219 (6th Cir. 1994). The Sixth Circuit is the only federal circuit court to hear a habeus corpus or collateral review of a pre-*Crosby* trial in absentia.

93. *Id.* at 220.

94. *Id.* at 223.

provided clear guidance as to whether its current retroactivity analysis applies to *nonconstitutional* rules of criminal procedure.[95] *Teague* addressed retroactive application of a *constitutional* rule regarding jury selection.[96] *Crosby*, however, was not *expressly* decided on constitutional grounds.[97] At least one court has determined that the rule in *Crosby* cannot apply retroactively to cases on collateral review because it is nonconstitutional in character.[98] The court noted that collateral attack of convictions on nonconstitutional grounds has been confined to those challenges presenting "a fundamental defect which inherently results in a complete miscarriage of justice."[99]

The retroactive effects of *Crosby* do not necessarily affect state prisoners whose convictions were based upon the invalidated *Tortora*-style trials in absentia, although states may have borrowed from the federal model in establishing their own court rules. Courts in two separate cases have found that FRCrP 43, as interpreted in *Crosby*, is a non-binding force on a state, even if the state employed an absentia rule with identical language.[100] Also, several post-*Crosby* decisions by state supreme courts addressing trial in absentia have ignored or dismissed as unpersuasive the United States Supreme Court's interpretation of FRCrP 43.[101]

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95. *See* Oliver v. United States, 901 F. Supp. 1262, 1265-66 (W.D. Mich. 1995) (noting the United States Supreme Court's ambiguity regarding the scope of the *Teague* retroactivity analysis beyond new constitutional rules of criminal procedure, and citing the Sixth, Ninth, and Tenth Circuits as having applied or rejected the *Teague* retroactivity analysis to cases other than new constitutional rules of criminal procedure); *see also* Cain v. Redman, 947 F.2d 817, 819 (6th Cir. 1991) (applying *Teague* analysis to a new rule of "substantive" nature), *cert. denied*, 503 U.S. 922 (1992). *But see* Chambers v. United States, 22 F.3d 939, 942 (9th Cir. 1994) (holding that the *Teague* analysis was not applicable to new substantive decisions rendering invalid a statute under which a person seeking collateral relief was previously convicted), *vacated*, 47 F.3d 1015 (1995); United States v. Dashney, 52 F.3d 298, 299 (10th Cir. 1995) (rejecting the application of *Teague* analysis to a substantive nonconstitutional decision concerning the reach of a federal statute).

96. *Teague*, 489 U.S. at 299 (addressing collateral application of a new constitutional fair cross section claim in jury selection).

97. *Crosby*, 506 U.S. at 261.

98. United States v. Escobar, 863 F. Supp. 131, 133 (S.D.N.Y. 1994).

99. *Id.* at 132 (quoting Davis v. United States, 417 U.S. 333, 345-46 (1974)).

100. Kirk v. Dutton, 1994 WL 561146 (6th Cir. Oct. 11, 1994); State v. Walker, No. 1994CA00037, 1994 Ohio App. LEXIS 3069 (Ohio Ct. App. July 11, 1994).

101. In each of the following post-*Crosby* state cases, the United States Supreme Court's interpretation of FRCrP 43 was ignored or dismissed as unpersuasive in upholding state provisions to commence trial in the absence of defendant: State v. Sanderson, 898 P.2d 483 (Ariz. Ct. App. 1995); People v. Clark, 645 N.E.2d 590 (Ill. App. Ct. 1995); Hardin v. State, 611 N.E.2d 123 (Ind. 1993); Gillespie v. State, 634 N.E.2d 862 (Ind. Ct. App. 1994); State v. Butler, 650 A.2d 397 (N.J. Super. Ct. App. Div. 1994); People v. Daley, 617 N.Y.S.2d 68 (App. Div. 1994); State v. Walker, No. 1994 CA00037, 1994 Ohio App. LEXIS 3069 (July 11, 1994) (unpublished opinion). *But see* Meadows v. State, 644 So. 2d 1342 (Ala. Crim. App. 1994)

III. TRIALS IN ABSENTIA: THE WASHINGTON STATE ANALYSIS

A. *Washington Rule of Criminal Procedure 3.4 and Prior Case Law*

Washington case law development regarding trial in absentia parallels the federal history. An initially rigid requirement of the defendant's presence in the courtroom during all phases of trial was eased over time by court decisions. In the 1913 case of *State v. Beaudin*,[102] the absence of the defendant from the courtroom when jury instructions were read violated the requirement that the defendant be present at all times during trial.[103] By 1949, however, in *State v. Perkins*,[104] the Washington Supreme Court, in dicta, found agreement with a contemporary article on criminal law, which stated that "despite considerable disagreement among courts, trial may proceed if defendant leaves after commencement, or if being in custody, the defendant makes his escape."[105]

In 1973, the Washington Supreme Court adopted its own rules of criminal procedure, drawing heavily upon the federal model.[106] Under the Washington Constitution, the formation and interpretation of court rules is the unique province of the judicial branch.[107] The state court rules govern the procedures of the court and supersede all procedural statutes and rules with which they may be in conflict.[108] The rules, however, must not abridge a defendant's constitutional

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(finding *Crosby* persuasive in invalidating a trial commenced in absentia under the Alabama Rules of Criminal Procedure); Jarrett v. State, 654 So. 2d 973 (Fla. Dist. Ct. App. 1995) (noting *Crosby*, but invalidating trial commenced in absentia on a plain language interpretation of its own court rules); Sandoval v. State, 631 So. 2d 159 (Miss. 1994) (ignoring *Crosby*, but deciding that the plain language of MISS. CODE ANN. § 99-17-9 (1972) prohibits commencement of trial in absentia where criminal charges are felony or greater).

102. 76 Wash. 307, 136 P. 137 (1913).

103. *Id.* at 308-09, 136 P. at 138.

104. 32 Wash. 2d 810, 204 P.2d 207 (1949).

105. *Id.* at 862-63, 204 P.2d at 238.

106. The Washington Superior Court Criminal Rules were adopted April 18, 1973, effective July 1, 1973, as amended through court order dated May 10, 1990. Several cases provide analysis showing Washington drafters used the federal rules as a model in drafting the Washington rules. *See* State v. Hammond, 121 Wash. 2d 787, 792, 854 P.2d 637, 640 (1993) (noting the textual similarities of CrR 3.4 to FRCrP 43); Wood v. Morris, 87 Wash. 2d 501, 508, 554 P.2d 1032, 1037 (1976) (verifying through committee notes that the drafters of CrR 4.2 modeled the rule after FRCrP 11); State v. Weddel, 29 Wash. App. 461, 467, 629 P.2d 912, 915 (1981) (recognizing CrR 4.4 as substantially similar to FRCrP 14).

107. *See* WASH. CONST. art. I, § 24.

108. *See* WASH. R. CRIM. P. 1.1; *see also* State v. Ryan, 103 Wash. 2d. 165, 177, 691 P.2d 197, 206 (1984) (holding that where a rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme).

rights.[109] Additionally, they are to be interpreted by ordinary methods of statutory construction and supplemented in light of the common law and decisional law of the state.[110] Moreover, the judiciary is to construe the rules to "secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay."[111] The court rule applicable to trial in absentia is Washington Rule of Criminal Procedure (CrR) 3.4, which reads as follows:

> Presence of the defendant.
>
> (a) When Necessary. The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.
>
> (b) Effect of Voluntary Absence. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.[112]

The language of CrR 3.4 differs from FRCrP 43 by the inclusion of the phrase: "or as excused or excluded by the court for good cause shown."[113] This phrase would seem to facially empower state courts to exclude or excuse defendants on a case-by-case basis for good cause shown, suggesting that courts are not limited to those exceptions explicitly enumerated by the rule.[114]

B. State v. Hammond: *Background and Analysis*

In 1993, six months after the United States Supreme Court decided *Crosby*, the Washington Supreme Court decided *State v. Hammond*,[115] in which it interpreted CrR 3.4 in the context of a trial *commenced* in a defendant's absence.[116]

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109. WASH. R. CRIM. P. 1.1.

110. State v. Kuberka, 35 Wash. App. 909, 911, 671 P.2d 260, 262 (1983).

111. WASH. R. CRIM. P. 1.2

112. WASH. R. CRIM. P. 3.4(a) & (b).

113. WASH. R. CRIM. P. 3.4(a). *Compare* FED. R. CRIM. P. 43(a). The two rule sections are essentially identical, except for the additional clause in the Washington rule.

114. WASH. R. CRIM. P. 1.2.

115. 121 Wash. 2d 787, 854 P.2d 637 (1993).

116. *Id.* at 790, 854 P.2d at 639. Before the Washington Supreme Court decided *Hammond*, the appellate courts of the state heard at least five cases between 1973 and 1993 involving trials commenced in absentia. State v. Hammond, 65 Wash. App. 585, 829 P.2d 212 (1992), *aff'd*, 121 Wash. 2d 787, 854 P.2d 637 (1993); State v. Ahlquist, 67 Wash. App. 442, 837 P.2d 628 (1992); State v. Stark, 48 Wash. App. 245, 738 P.2d 684 (hearing other issues on appeal, in a case

Hammond was charged with indecent liberties taken over a seven year period with his then eleven-year-old stepdaughter.[117] Hammond violated the terms of his bail by leaving Washington State to stay with his parents in California.[118] Hammond returned to Washington to appear for a pretrial hearing. However, several days prior to the scheduled trial date, Hammond indicated to his attorney in a telephone conversation that he was in California and had no money to pay for his transportation back to Washington.[119] Hammond asked the state to either delay the proceedings for several weeks or to arrange in-custody transportation back to Washington.[120] The trial court refused both requests, noting that the defendant "knew what he was doing" when he left the state, and citing other delaying tactics used by the defendant at prior stages of the proceedings.[121] A jury found Hammond guilty in absentia.[122]

On appeal, Hammond challenged the trial court's decision to proceed with trial in absentia.[123] Because the United States Supreme Court had not yet decided *Crosby*, Division III of the Washington Court of Appeals reviewed the case under *Tortora*, reversing Ham-

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commenced in absentia), *review denied*, 109 Wash. 2d 1003 (1987); State v. Washington, 34 Wash. App. 410, 661 P.2d 605, *rev'd on other grounds*, 100 Wash. 2d 1016 (1983); State v. LaBelle, 18 Wash. App. 380, 568 P.2d 808 (1977).

Interestingly, just as there was division among the federal circuits concerning the analysis used when determining whether to commence a trial in absentia, a similar division existed between Divisions I and III of the Washington Court of Appeals. The analysis employed by Division I focused on the defendant's *voluntary* absence and accords with the Ninth Circuit's approach under *Tortora*. *Washington*, 34 Wash. App. at 413, 661 P.2d at 607 (holding that all factors and inquiries prior to commencing trial in absentia relate to a determination of the voluntariness of the defendant's absence); *LaBelle*, 18 Wash. App. at 397-98, 568 P.2d at 817-18 (stating that when a criminal defendant is present at arraignment, enters a plea, receives actual notice of the time, date, and place of trial, deliberately absconds without compelling reason, is represented by counsel at trial, and never offers a satisfactory explanation for this absence, a trial court may find such actions on the part of the defendant to amount to a knowing and voluntary waiver of his right to be present and may conduct trial in his absence). *Compare* United States v. Houtchens, 926 F.2d 824, 827 (9th Cir. 1991) (inquiring only whether the defendant's absence is voluntary).

In contrast, Division III imposed a balancing of interests inquiry, adopted from the Second Circuit. *Hammond*, 65 Wash. App. at 589, 829 P.2d at 215 (considering a series of factors to be weighed against defendant's right to be present). *Compare* United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir.) (balancing defendant's rights against state's interests in proceeding to trial), *cert. denied*, 409 U.S. 1063 (1972). This "rift," however, was not long-lived.

117. *Hammond*, 65 Wash. App. at 586, 829 P.2d at 213.

118. *Id.*

119. *Id.* at 587-88, 829 P.2d at 213.

120. *Hammond*, 121 Wash. 2d at 789, 854 P.2d at 639.

121. *Hammond*, 65 Wash. App. at 587, 829 P.2d at 213.

122. *Id.* at 587, 829 P.2d at 214.

123. *Id.* at 586, 829 P.2d at 213.

mond's conviction as an abuse of discretion.[124] While the court of appeals agreed with the trial court that Hammond's failure to appear was deliberate and without excuse, it found that this fact alone could not be determinative.[125] Under the second prong of its *Tortora* analysis, the court cited several reasons why Hammond's constitutional interests outweighed the public's interest in commencing trial on schedule.[126] Hammond was in contact with the court and offered to make himself available for transport, which could have been accomplished with minimal delay to the trial.[127] Further, Hammond was a single defendant so delay would not put other defendants' rights to a speedy trial at risk.[128] Nor were witness expenses a factor.[129]

The State appealed *Hammond* to the Washington Supreme Court.[130] By this time, the United States Supreme Court had decided *Crosby*, so the Washington Supreme Court examined *Hammond* in the context of *Crosby*. The court found *Crosby's* textual analysis of FRCrP 43 persuasive and unanimously adopted the same interpretation for the Washington counterpart.[131] The state supreme court's reasoning followed the principle that where state and federal language is similar, a United States Supreme Court interpretation of the federal language should also be applied to the state language.[132] The state supreme court decided that CrR 3.4 dictated that a defendant must appear at the onset of his trial, thus affirming the court of appeals' reversal, although using a different rationale.[133]

Clearly, Washington State was not required to follow the United States Supreme Court's interpretation of FRCrP 43 when interpreting its own CrR 3.4.[134] Federal interpretations of federal rules are not binding precedent for state courts interpreting state rules, even when

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124. *Id.* at 589, 829 P.2d at 215.
125. *Id.* at 590, 829 P.2d at 215.
126. *Id.*
127. *Id.* at 589, 829 P.2d at 215.
128. *Id.* at 590, 829 P.2d at 215.
129. *Id.*
130. 121 Wash. 2d 787, 854 P.2d 637 (1993).
131. *Id.* at 791, 854 P.2d at 640.
132. *Id.* at 792, 854 P.2d at 640; *see* City of Tacoma v. Heater, 67 Wash. 2d 733, 736, 409 P.2d 867, 869 (1966).
133. *Hammond*, 121 Wash. 2d at 794, 854 P.2d at 641.
134. *See Crosby*, 506 U.S. at 259 (decided on plain language of the rule, not on constitutional grounds); *see also* State v. Brown, 111 Wash. 2d 124, 140, 761 P.2d 588, 597 (1988) (holding that federal constructions of federal rules are not binding precedent for state courts in interpreting state rules that are identical to the federal rules), *superseded on rehearing*, 113 Wash. 2d 124, 782 P.2d 1013 (1989).

the rules are textually identical.[135] Moreover, as noted earlier, the language of the two rules is not the same.[136] The *Hammond* court acknowledged this point by stating, "It is true that CrR 3.4 is arguably broader than the Federal Rule, insofar as it permits the court to proceed in defendant's absence if 'excused or excluded by the court for good cause shown.'"[137]

Because the result reached by the Court in *Crosby* arose from a "plain language" analysis of FRCrP 43, it is ironic that the Washington Supreme Court ignored the different language of its own rule[138] and found "*Crosby's* textual analysis of the Federal Rule persuasive."[139] Straining to impose the newly clarified meaning of FRCrP 43 upon Washington's CrR 3.4 is clearly within the power of the state court, as interpretation of court rules is within the unique province of the judicial branch.[140] However, such interpretation is at odds with other court rules that indicate court rules are to be interpreted by ordinary methods of statutory construction and supplemented in light of the common law and decisional law of the state.[141] One such method of statutory construction completely ignored by the Washington Supreme Court is the plain meaning method. Under the plain meaning of CrR 3.4, a state court may excuse or exclude a defendant for good cause shown.[142] Moreover, the judiciary is to construe the court rules to "secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay."[143]

The Washington Supreme Court's decision in *Hammond* amounted to a denial of the ordinary methods of statutory construction and more than twenty years of relevant decisional law in the state. If *Crosby* had been decided upon constitutional grounds, the Washington Supreme Court's action would be completely understandable: The states are bound by the United States Supreme Court's interpretation of minimum rights due under the Constitution.[144] However, the

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135. *Brown*, 111 Wash. 2d at 140-41, 761 P.2d at 597-98.

136. *See supra* notes 38, 113 and accompanying text.

137. 121 Wash. 2d at 793, 854 P.2d at 640 (quoting WASH. R. CRIM. P. 3.4(a)).

138. *Id.* (finding that any textual differences between FRCrP 43 and CrR 3.4 did not apply to Hammond).

139. *Id.* at 791, 854 P.2d at 639.

140. *See* State v. Ryan, 103 Wash. 2d 165, 177, 691 P.2d 197, 206 (1984) (supporting the primacy of the rules).

141. WASH. R. CRIM. P. 1.1, 1.2.

142. WASH. R. CRIM. P. 3.4(a); *see supra* note 112 and accompanying text.

143. WASH. R. CRIM. P. 1.2.

144. U.S. CONST. amend. XIV.

United States Supreme Court avoided the constitutional issues in *Crosby*, and instead decided the meaning of the rule on the basis of its "plain language" and the 1912 decision in *Diaz v. United States*.[145]

An unusual link between *Crosby* and *Hammond* is that in each case, the court disregarded the jurisdictional case law development on commencing trial in the defendant's absence.[146] A core concept of both the federal and Washington case law prior to *Crosby* and *Hammond* was that the interests of the defendant and the state were not fundamentally changed simply by the onset of a trial.[147]

While admitting that there may not be "talismanic properties" which differentiate the commencement of trial from later stages, *Crosby* offered three arguments in support of the distinction between pre-trial flight and mid-trial flight: (1) it is more expensive, in terms of court costs, to suspend a trial already under way than to postpone a trial not yet begun;[148] (2) mid-trial flight is clearly knowing and voluntary;[149] and (3) to allow a defendant to suspend a trial in progress would be to grant him the power to accept acquittal, if granted, or defeat an impending conviction by fleeing near the end of trial.[150] While these arguments may have been persuasive to the court in *Hammond*, they were not raised in the *Crosby* opinion as dispositive of the issue, but merely as post-hoc rationalizations of the premise that FRCrP 43 means exactly what its plain language says.[151] The Court in *Crosby* did not claim to consider all relevant issues in the balance, nor to strike an optimal balance between the rights of defendants and the costs to the justice system.[152] The Washington Supreme Court, not limited by *Diaz*, was free to consider a broader range of issues.

For example, while *Crosby* may be accurate in its claim that court costs are higher after trial has commenced than before,[153] court costs are only one of the relevant factors to be weighed. A list of other relevant factors may begin with the cost associated with tracking and apprehending the accused person a second time for the same offense.

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145. *Crosby*, 506 U.S. at 259.

146. *Id.* at 261; *Hammond*, 121 Wash. 2d at 791, 854 P.2d at 639.

147. *See* Virgin Islands v. Brown, 507 F.2d 186, 189 (3d Cir. 1975) (noting that there are no talismanic properties which differentiate the commencement of trial from later stages); State v. LaBelle, 18 Wash. App. 380, 392, 568 P.2d 808, 815 (1977).

148. *Crosby*, 506 U.S. at 262.

149. *Id.*

150. *Id.*

151. *Id.* at 261 ("We do not find the distinction between pre- and midtrial flight so farfetched as to convince us that Rule 43 cannot mean what it says.").

152. *Id.*

153. *Id.*

Unlike an accused person who may have been easy to find when he was originally charged, the fugitive is aware that he is being sought by police and will most likely make himself difficult to find. Second, there is a very real cost to the criminal justice system from a deterioration of the evidentiary base upon which the prosecution's case will be made (the point obviated in *Jackson*).[154] Third, the state has an interest in specifically deterring lawless persons from committing further harm to society,[155] an aim not well served by a rule that is friendly to pre-trial flight. While this last argument may be less persuasive for crimes of fraud, as in *Crosby*,[156] where the defendant is charged with acts of sexual abuse to minors, as in *Hammond* and *Jackson*,[157] the state has a compelling interest in preventing further crimes of this nature.[158] Finally, there is the all but forgotten cost to the victim, who will sleep poorly at night knowing that the suspected perpetrator is at large.

The other two arguments advanced by the Court in *Crosby*[159] in defense of a plain language interpretation of FRCrP 43 were straw men. The Court's second argument—that *mid-trial* flight is clearly knowing and voluntary[160]—fails to assert that *pre-trial* flight is *not* knowing and voluntary. The third argument—that allowing a defendant to suspend trials in progress would allow defendants to gamble on an acquittal or flee to avoid impending conviction[161]—should have been similarly unpersuasive to the *Hammond* court. It makes a point that is not relevant to the analysis. CrR 3.4 clearly states that trial may continue in the absence of the defendant

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154. Telephone Interview with Warren Sharpe, Prosecuting Attorney for Kitsap County (May 11, 1995).

155. *See* SINGER, *supra* note 2, at 85-95.

156. Defendant Crosby was charged on a number of counts of mail fraud. *Crosby*, 506 U.S. at 255.

157. Defendants Jackson and Hammond were each charged with sex crimes against children. *Jackson*, 124 Wash. 2d at 360, 878 P.2d at 453; *Hammond*, 625 Wash. App. at 586, 829 P.2d at 213.

158. One of two key aspects of deterrence is incapacitation or specific deterrence, aimed at preventing the individual offender from committing another offense. SINGER, *supra* note 2, at 95. Washington legislative history explains that "[t]he legislature finds that sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment . . . ." WASH. REV. CODE § 4.24.550 (1995). *See also Recent Legislation: Criminal Law - Sex Offender Notification Statute - Washington State Community Protection Act Serves as Model for Other Initiatives by Lawmakers and Communities - 1990 Wash. Laws Ch. 3, 101-1406*, 108 HARV. L. REV. 787, 791 n.27 (1995) (noting that recidivism is particularly high among sex offenders who choose child victims).

159. *See supra* text accompanying notes 149-150.

160. *Crosby*, 506 U.S. at 262.

161. *Id.*

initially present.[162] The question is not how much worse it would be if trials could not continue in absentia, but whether a fair reading of the rule allows for trial to *commence* in absentia.

In summary, the arguments raised in *Crosby* need not have been persuasive to the *Hammond* court, which was free to render an independent interpretation of its own state rule. *Crosby* merely justified as plausible its interpretation of FRCrP 43, without recognizing the substantial costs of allowing pre-trial flight to confound justice.

C. Hammond's *Influence on Subsequent Cases: An Analysis of* State v. Jackson

Although the *Hammond* court adopted the federal interpretation for the Washington rule, the court implicitly left open four bases for differentiation in future state law cases: (1) the case was decided on the text of CrR 3.4 without addressing state or federal constitutional issues; (2) the holding was expressly limited to the facts in *Hammond*; (3) the holding acknowledged the differences in the language between the state and federal rules; and (4) the holding was not explicit regarding its retroactive effect upon other defendants.[163] The state supreme court was not prompted to extend or narrow its holding in *Hammond* until taking certification of *State v. Jackson*[164] about a year later. Unfortunately, the court failed to differentiate *Jackson* on any of the four bases.

On Christmas Eve of 1978, four-year-old Deborah Jackson was raped by her uncle Kenny, who had come to stay the night on the couch at her parents' home.[165] The following morning, Deborah's mother overheard Deborah telling her brother that her genitals were sore and complaining of sexual contact the night before with her uncle on the couch.[166] Evidence of the crime was established several days later when, in response to Deborah's complaint of soreness, Mrs. Jackson took Deborah to their family physician. It was determined that Deborah had contracted gonorrhea.[167] Both of Deborah's parents tested negative for gonorrhea,[168] and the defendant was the only other adult with whom Deborah had been in contact unattended

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162. WASH. R. CRIM. P. 3.4(b).
163. *Hammond*, 121 Wash. 2d at 793, 854 P.2d at 641-42.
164. 124 Wash. 2d 359, 878 P.2d 453 (1994).
165. *Id.* at 360, 878 P.2d at 453.
166. Appellant's Brief at 11, *Jackson* (No. 61265-0).
167. *Id.*
168. *Id.*

by her parents.[169] Deborah told her doctor that her uncle had sexual contact with her. She said that he "put his penis on my face" and "put his tongue in my bottom (demonstrating)."[170] She said that Jackson told her to be quiet when he took off her panties.[171] At her deposition, Deborah recalled other sexual contact with her uncle on or about October 25, 1978.[172]

Kenneth Jackson was arrested and arraigned on charges of statutory rape in the first degree.[173] He appeared with counsel, pled not guilty, and was present at the setting of the trial date.[174] Jackson, who had a prior history of failing to appear in court,[175] failed to appear at Deborah's competency hearing.[176] Consequently, the hearing was rescheduled and a bench warrant was issued for Jackson's arrest.[177] Jackson failed to appear at the rescheduled competency hearing, and over his attorney's objection, the hearing proceeded and was video recorded in his absence.[178]

Upon his failure to appear for his April trial date, the court learned that Jackson had quit his job, vacated his apartment, and apparently fled the area.[179] In deference to the concerns raised by the prosecution that the young victim's testimony was time-fragile, the court reset the trial date for June 13, 1979.[180] Jackson again failed to appear. He was then tried in absentia and found guilty, with sentencing pending his return to custody.[181]

Despite the guilty verdict, Jackson eluded authorities for nearly thirteen years until he was picked up on a Washington arrest warrant in California in January 1992.[182] In April 1992, Jackson appeared in Kitsap County court and was asked to provide the reason for his absence from trial.[183] Jackson offered no explanation for his absence, nor did he relate any information inconsistent with the jury's verdict. Consequently, the court determined that his absence was "voluntary"

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169. *Id.*
170. *Id.* at 12.
171. *Id.*
172. *Id.* at 8.
173. *Jackson*, 124 Wash. 2d at 360, 878 P.2d at 453.
174. *Id.*
175. *Id.* at 362, 878 P.2d at 454-55 (Durham, J., dissenting).
176. *Id.* at 360, 878 P.2d at 453.
177. Appellant's Brief at 7, *Jackson* (No. 61265-0).
178. Respondent's Brief at 3-4, *Jackson* (No. 61265-0).
179. *Id.* at 4-5, *Jackson* (No. 61265-0).
180. *Id.*
181. *Jackson*, 124 Wash. 2d at 360, 878 P.2d at 453.
182. *Id.* at 360-61, 878 P.2d at 453-54.
183. Respondent's Brief at 6, *Jackson* (No. 61265-0).

and proceeded with sentencing.[184] The trial judge adopted the thirty-one to forty-one month standard-range sentence, applicable before the Sentence Reform Act was passed in 1986,[185] but imposed an exceptional sentence of sixty-five months to twenty years, owing to the deliberate transmission of a venereal disease to the victim and the violation of trust.[186]

Jackson raised no objection to his sentencing, but appealed his conviction alleging violations of CrR 3.4 and the Sixth and Fourteenth Amendments.[187] The appellate court certified the case to the Washington Supreme Court.[188]

In August 1994, the Washington Supreme Court reversed Jackson's conviction, holding that Jackson's 1979 trial in absentia violated the court's 1993 interpretation of CrR 3.4 in *Hammond*.[189] Recall that the *Hammond* court decided that CrR 3.4 would be interpreted in the same manner as FRCrP 43, disallowing the *commencement* of criminal trials without the presence of the defendant.[190] The court found the *Hammond* decision binding upon Jackson because new rules for the conduct of criminal prosecutions must be applied to all cases pending on direct review or not yet final.[191] Jackson's appeal constituted a direct review when *Hammond* was announced;[192] thus, the rule in *Hammond* was applied to Jackson.[193]

After serving just thirty-two months of a twenty year sentence, Jackson was released and cleared of his conviction in a seven-to-two decision.[194] A cogent dissent, delivered by Justice Durham, combined two points: First, while the ruling may have been a technically

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184. *Id.*

185. The Sentencing Reform Act of 1981 is codified at WASH. REV. CODE § 9.94A (1995).

186. *Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454.

187. *Id.* at 360, 878 P.2d at 453. The appeal also alleged reversible error for failure to adopt the jury instructions submitted by the defense and for failure to accept defense counsel's motion to withdraw. Appellant's Brief at 1, *Jackson* (No. 61265-0).

188. Telephone Interview with Warren Sharpe, Prosecuting Attorney for Kitsap County (May 11, 1995).

189. *Jackson*, 124 Wash. 2d at 362, 878 P.2d at 454.

190. *See supra* text accompanying notes 131-133; *see also Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454.

191. *Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454 (stating that newly announced rules in the criminal context are applied retroactively to all cases pending on direct review or not yet final); *see also* State v. Summers, 120 Wash. 2d 801, 815-16, 846 P.2d 490, 498 (1993); *In re* St. Pierre, 118 Wash. 2d 321, 326, 823 P.2d 492, 494 (1992).

192. *Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454.

193. *Id.* at 362, 878 P.2d at 454.

194. Jackson was incarcerated in January 1992. His conviction was reversed by the Washington Supreme Court on August 18, 1994. *Id.* at 359, 878 P.2d at 453.

plausible summary analysis of the law, the ruling completely ignored its consequence to the victim and the impossible burden on the State to retry the case.[195] Second, while *Hammond* was unanimously decided on its facts, Justice Durham argued that the court erred by extending *Hammond* beyond its factual context.[196] The dissent concluded that Washington's interpretation of CrR 3.4 need not and ought not be inflexible when a defendant objectively manifests an intent to knowingly and voluntarily waive both his constitutional and statutory rights to be present at trial.[197]

Kitsap County prosecutors, faced with the prospect of returning the victim and other witnesses to the stand and gathering fifteen-year-old evidence in order to retry the case, simply let Jackson go.[198] Warren Sharpe, the Kitsap County prosecutor responsible for both the 1979 trial in absentia and the appellate process some fifteen years later, indicated two reasons for the decision not to retry Jackson. First, the county prosecutors did not want to put Deborah Jackson through the process of another trial because, in a very real sense, it could victimize her again.[199] Second, Mr. Sharpe did not believe that a jury could be convinced of Deborah's testimony so long after the event.[200] Her testimony would be susceptible to impeachment based on her lack of memory or the great probability of constructed memories assembled from the hearsay communications of her parents and other adults speaking with Deborah about her experience.[201] The memory of a small child is fragile evidence, and it was for precisely this reason that Mr. Sharpe sought trial in absentia against Jackson.

The glaring inequity of *Jackson* is that the defendant was able to subvert the criminal justice process solely by his own calculated act of fleeing the jurisdiction prior to trial. *Jackson* did not present a situation in which acquittal was required to protect the violated rights of a potentially guilty defendant. Such would be the case where the police fail to mirandize a suspect,[202] or a criminal defendant is subjected to double jeopardy.[203] Rather, in *Jackson*, it was the defendant who showed contempt for the criminal justice system when

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195. *Id.* at 362, 878 P.2d 453 (Durham, J., dissenting).

196. *Id.*

197. *Id.* at 363, 878 P.2d at 454.

198. Telephone Interview with Warren Sharpe, Prosecuting Attorney for Kitsap County (May 11, 1995).

199. *Id.*

200. *Id.*

201. *Id.*

202. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

203. *See* U.S. CONST. amend. V, XIV.

he absconded before trial. Yet, that same criminal justice system strained quite unnaturally to shield his contemptuous action from its consequences.

The court's decision in *Jackson*—to foreclose the possibility of *commencing* trial in absentia—guarantees to all future defendants who abscond *prior* to trial that while they remain out of custody, and the evidence against them erodes, their right to be present at trial will remain perfectly preserved. This dramatic entitlement is not grounded upon the constitutional rights of the defendant, but upon rules of court that grant entitlements in grand excess of constitutional protections, and which cannot find rational support in balanced social policy considerations.

The result in *Jackson* was avoidable. The following discussion demonstrates that the Washington Supreme Court was not compelled by its earlier decision in *Hammond* to reach the result in *Jackson*.

The Washington Supreme Court made two determinations that led to the result in *Jackson*. First, it determined that *Hammond* announced a new rule of criminal procedure, which applied retroactively to Jackson.[204] Second, the court found that under the *Hammond* interpretation of CrR 3.4, it was error to try Jackson in absentia.[205] Neither of these determinations were soundly reasoned by the court, and both warrant analysis.

1. The Retroactive Application of *Hammond*

The Washington Supreme Court employed faulty reasoning to find that *Hammond* applied retroactively to *Jackson*. First, the supreme court incorrectly characterized the rule announced in *Hammond* as a "new" rule. Second, the court applied an inapplicable test, the *Teague* test, to find that *Hammond* applied retroactively to Jackson. Application of the *Teague* test was inappropriate because *Teague* applies only to *constitutional* rules, and the rule announced in *Hammond* was a nonconstitutional rule.

The supreme court claimed in *Jackson* that *Hammond* announced a new rule.[206] *Hammond*, however, did not announce a new rule. Rather, as the Washington Supreme Court recently affirmed, interpretation of an existing court rule by the Washington Supreme Court operates not as a new rule, but as if the clarified meaning was

204. *Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454.
205. *Id.*
206. *Id.*

originally written into the rule.[207] The text of *Hammond* itself disclaims the announcement of a new rule, simply stating: "We find *Crosby's* textual analysis of the Federal Rule persuasive, and adopt the same interpretation of CrR 3.4."[208] The view that *Hammond* does not announce a new rule is bolstered by the Sixth Circuit's conclusion under related reasoning that *Crosby* did not announce a new rule.[209]

Because under the above analysis *Hammond* does not announce a new rule, there is no reason to limit its retroactive application to cases on direct review. In other words, all Washington convicts who were not present at the onset of their trials may now have grounds for collateral attack of their convictions.[210]

By claiming that *Hammond* announced a *new* rule, which would not provide the basis for a collateral attack, the court was apparently trying to limit *Hammond's* retroactive application. The court might have been more willing to distinguish *Jackson* from *Hammond* if it had been unable to simply sidestep broad retroactivity by claiming that *Hammond* announced a new rule. Because Jackson's appeal was on direct review, *Hammond* would have applied retroactively regardless of whether it announced a new or non-new rule, assuming, for the moment, that the rule is constitutional. But by claiming that *Hammond* announced a *new* rule, the court could at least prevent *Hammond* from providing a basis for collateral attacks of trials commenced in absentia.

The second criticism of the *Jackson* court's retroactivity analysis is that it applied *Teague*, an inapplicable test, to find that the *Hammond* "new" rule should apply retroactively.[211] Recall that *Teague* provides the current framework for determining the retroactivity of new *constitutional* rules in federal cases.[212] Recall also that at least one

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207. State v. Greenwood, 120 Wash. 2d 585, 592, 845 P.2d 971, 975 (1993).

208. 121 Wash. 2d at 791, 854 P.2d at 639.

209. Pelaez v. United States, 27 F.3d 219, 223 (6th Cir. 1994); *see also supra* notes 92-94 and accompanying text.

210. State prisoners, unlike federal prisoners, have been unsuccessful in using *Crosby* to obtain federal habeas corpus review of state trials commenced in absentia. *See supra* note 101. However, it now appears possible that a Washington prisoner, claiming that *Hammond* did not announce a new rule, may seek federal review of his conviction.

211. *Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454. The court cited State v. Summers, 120 Wash. 2d 801, 846 P.2d 490 (1993), as authority for the proposition that "an appellate court's newly announced rule in the criminal context is applied retroactively to all cases pending on direct review or not yet final." *Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454. *Summers* applied the retroactivity test first announced by the Washington Supreme Court in *In re* St. Pierre, 118 Wash. 2d 321, 823 P.2d 492 (1992), adopting the retroactivity test crafted by the United States Supreme Court in *Teague*.

212. *See supra* text accompanying notes 87-89.

federal court refused to apply a *Teague* analysis to *Crosby*, finding that *Crosby* announced a *nonconstitutional* new rule.[213] Therefore, it is debatable whether the *Teague* retroactivity requirements extend to *nonconstitutional* new rules in federal cases.

In matters of state law, the state courts are free to select the degree to which new nonconstitutional rules will be retroactively applied.[214] The Washington Supreme Court invoked the *Teague* analysis in two cases prior to *Jackson*, but both of those cases addressed retroactivity of new *constitutional* rules.[215]

Clearly, even if *Hammond* announced a new rule, it was not a new rule of constitutional magnitude: it was explicitly decided on the language of CrR 3.4 and the persuasive effect of the reasoning in *Crosby*, not on an interpretation of constitutional rights.[216] The court sets a troublesome and ironic precedent in *Jackson* if *all* new rules, regardless of their constitutionality, will apply retroactively to cases on direct review.

The *Jackson* court reasoned that application of the rule from *Hammond* comports with the underlying policy served by retroactivity: treating similarly situated defendants the same.[217] However, the view that Jackson is similarly situated to contemporary defendants misses the vital point that had Jackson not purposely and voluntarily absconded, his sentence would long since have become final, and no

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213. *See supra* note 98 and accompanying text.

214. *See* Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932) (stating that the federal constitution has no voice in a state's choice to apply precedent in forward operation, in relation backward, or to "intermediate transactions"). The manifestation of this state judicial autonomy was exemplified in the recent Wyoming Supreme Court decision, Farbotnik v. State, 850 P.2d 594 (Wyo. 1993). Mr. Farbotnik, alias "Jesse James," and his love interest, SS, stole household possessions from a man who was hospitalized for an unsuccessful suicide attempt after Farbotnik ran off with the man's girlfriend, SS. *Id.* at 595. Following Farbotnik's conviction, but before sentencing, Farbotnik and SS absconded to Canada. *Id.* Shortly thereafter, SS was returned to custody, but Farbotnik evaded authorities for a number of years. *Id.* During Farbotnik's absence, the Wyoming court modified its rules regarding transcriptional recording of voir dire. *Id.* at 597. Farbotnik sought to invalidate his conviction on this basis. *Id.*

The court determined that it was not bound to employ the *Teague* analysis in the matter of a nonconstitutional new rule. *Id.* Employing the older *Stovall* factors instead, the Wyoming court declined to apply the favorable new court rule to Farbotnik, even though his case was on direct review. *Id.* The court noted that it would do an injustice to allow Farbotnik to avoid his trial, while his female accomplice, already in prison, could not access collateral review of her case. *Id.* at 603.

215. State v. Summers, 120 Wash. 2d 801, 846 P.2d 490 (1993) (applying retroactivity analysis to a new constitutional rule regarding jury instructions); *In re* St. Pierre, 118 Wash. 2d 321, 823 P.2d 492 (1992) (applying retroactivity analysis in rule requiring lesser included offenses to be named in the charges against a defendant). These cases did not interpret a court rule.

216. *Hammond*, 121 Wash. 2d at 793, 854 P.2d at 641.

217. *Jackson*, 124 Wash. 2d at 361, 878 P.2d at 454.

new nonconstitutional rule would reach him. It is consummate injustice to allow Jackson to benefit from his long evasion of the justice system. Such a decision removes the discretion of the court to avoid unjust applications of nonconstitutional new rules to other cases on direct review.

There is irony in Washington's retroactive application of nonconstitutional new rules. The rationale behind the *Teague* approach was to limit, not broaden, the scope of retroactivity.[218] Gradual changes in the law about which reasonable jurists could disagree were not meant to become the bases for overturning cases already final.[219] The Washington Supreme Court stated that in adopting the *Teague* analysis, its aim was to simply keep pace with the United States Supreme Court.[220] The retroactive application of all new rules expands retroactivity beyond that which was federally contemplated.[221]

2. Distinguishing *Hammond* on its Facts

Another reason why *Hammond* is poor precedent on which to base the *Jackson* decision is that *Hammond* was expressly limited to its facts.[222] In providing its reasoning, the *Hammond* court stated, "[T]he United States Supreme Court's interpretation of a similar federal rule, and our own independent analysis of the text of CrR 3.4, persuade us that *on these facts*, CrR 3.4 does not authorize the trial court to commence trial in the defendant's absence."[223]

Because *Jackson* is factually distinguishable from *Hammond*, a different outcome in *Jackson* is justifiable. First, the nature of the absence of the two defendants is very different. Although Hammond violated the terms of his bail by leaving the state in order to live with his parents in California, he made his whereabouts known to the court

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218. Prior to Linkletter v. Walker, 381 U.S. 618 (1965), all new constitutional rules of criminal procedure were applied retroactively. Like *Linkletter*, *Teague* presented a model for limiting the retroactive application of new constitutional rules. Ellen E. Boshkoff, Note, *Resolving Retroactivity After* Teague v. Lane, 65 IND. L. J. 651, 651 n.2 & 3 (1990). The term retroactivity analysis can be confusing in that it suggests a system for applying decisions retroactively, rather than the more historically correct function of determining when and how to appropriately limit retroactive application. At least one court uses the term "non-retroactivity doctrine" as a means of clarifying this point. Oliver v. United States, 901 F. Supp. 1262, 1265 (S.D. Mich. 1995).

219. Sawyer v. Smith, 497 U.S. 227, 234 (1990).

220. *In re* St. Pierre, 118 Wash. 2d at 324, 823 P.2d at 494.

221. *Id.* at 325, 823 P.2d at 494 ("We have attempted from the outset to stay in step with the federal retroactivity analysis.").

222. *Hammond*, 121 Wash. 2d at 793, 854 P.2d at 641.

223. *Id.* (emphasis added).

through his attorney.[224] He asked that the state issue an arrest warrant so he could be transported by authorities to Washington, as he claimed he lacked the funds to transport himself.[225] The appeals court noted that Hammond could have been transported by authorities with minimal delay.[226] By contrast, Jackson knew the date of his trial and consciously fled from the jurisdiction, intentionally eluding authorities for almost thirteen years.[227] Jackson offered no evidence that his absence was other than voluntary.[228] Unlike Hammond, Jackson's actions constituted a clear and deliberate refusal to be present at trial.

Second, the fragility of the testimony in the two cases differed. The witness/victim in *Hammond* was an eleven-year-old girl.[229] Her testimony did not present the same evidentiary problems associated with the fragile, easily forgotten or mutated memory retained by a four year old, such as Deborah Jackson. Delays in the start of trial were unlikely to affect the coherence of the victim's testimony in *Hammond*, whereas delay could have been devastating to the effectiveness or even the admissibility of Deborah Jackson's testimony.[230]

Third, Hammond was returned to Washington within a relatively short period after his trial date.[231] Invalidating the trial commenced in Hammond's absence did not necessarily defeat justice in the case, as a new trial could be conducted with the existing evidence. By contrast, Jackson's long evasion of authorities outlasted the evidence against him, making the reversal of his trial in absentia an effective acquittal.[232] Thus, the factual distinctions between the two cases provide practical and equitable grounds for distinguishing *Jackson* from *Hammond*.

Jackson may also be differentiated from *Hammond* based on the language of CrR 3.4 (a), which states: "The defendant shall be present . . . at every stage of the trial . . . except . . . as excused or excluded

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224. *Id.* at 789, 854 P.2d at 638.

225. *Id.*

226. *Hammond*, 65 Wash. App. at 589, 829 P.2d at 215.

227. *Jackson*, 124 Wash. 2d at 362, 878 P.2d at 454-55 (Durham, J., dissenting).

228. *Id.*

229. *Hammond*, 65 Wash. App. at 585, 829 P.2d at 212.

230. Telephone Interview with Warren Sharpe, Prosecuting Attorney for Kitsap County (May 11, 1995). The victim in *Hammond* was older and could recall specific sex acts she was forced to perform from age four to eleven. *Hammond*, 65 Wash. App. at 588, 829 P.2d at 214.

231. *Hammond*, 121 Wash. 2d at 586-87, 854 P.2d at 213-14. Hammond's trial was conducted November 2, 1988 and his sentencing hearing occurred October 12, 1990.

232. Telephone Interview with Warren Sharpe, Prosecuting Attorney for Kitsap County (May 11, 1995).

for good cause shown."[233] In *Hammond*, the Washington Supreme Court declined to apply this clause because Hammond was neither excused nor excluded from his trial.[234] The *Hammond* court, borrowing from federal case law, interpreted the term "excused" to include an incarcerated defendant who refused to be present at his trial.[235] While Hammond did not meet this definition because he never refused to be present at trial,[236] it seems altogether possible that Jackson could have been excused under this definition. When Jackson quit his job, moved out of his apartment, and disappeared from contact with all who knew him, his actions constituted a clear and deliberate refusal to be present at trial.

An inference of waiver from a defendant's knowing absence is equitable because in pre-*Hammond* Washington case law, a reincarcerated defendant was afforded an opportunity to explain his absence before sentence was imposed.[237] If the defendant could demonstrate that his disappearance was involuntary, then a mistrial would be called and the case would be retried with the defendant present.[238] Jackson's thirteen year absence, coupled with his complete lack of excuse when offered an opportunity to explain his absence, provide a substantial basis to find that Jackson was deliberate in refusing to appear at trial. Armed with these facts, the Washington Supreme Court could reasonably have determined that Jackson was excused from his trial for good cause shown, in accordance with the unique language of CrR 3.4.

Jackson destroyed any inference remaining after *Hammond* that trial court judges were afforded discretion in excusing absent defendants. Thus, *Jackson* stands for an unconditional right to be present at the start of trial, creating a new "right" in Washington criminal defendants to pre-trial flight. The fact that the statute of limitations is tolled until the defendant is captured is not an assurance that justice is merely delayed. Long absences erode the quality of available evidence, and witnesses die, move away, and forget, making an ultimate determination of guilt much less likely years after the crime

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233. WASH. R. Crim. P. 3.4(a).

234. *Hammond*, 121 Wash. 2d at 793, 854 P.2d at 640-41. Hammond neither refused to be present nor disrupted the proceedings through misconduct at his trial in a manner necessitating his exclusion.

235. *Id.*

236. *Id.* at 793, 854 P.2d at 641.

237. State v. Washington, 34 Wash. App. 410, 413, 661 P.2d 605, 607, *rev'd on other grounds*, 100 Wash. 2d 1016 (1983).

238. *Id.* at 414, 661 P.2d at 607.

is committed. Thus, in many cases, justice may be subverted, not simply delayed.

While the right of a person to confront the witnesses against him is undoubtedly a cornerstone of the common law legal tradition,[239] it should not be construed as an absolute right to confront the witnesses against him at a time, place, and manner of his choosing. "No defendant has a unilateral right to set the time or circumstances under which he will be tried."[240] Once the court has met its duty to provide reasonable access and assurances of the defendant's right to confront the witnesses against him, it should thereafter be appropriate for the court to weigh the costs and interests of society in extending further protection to an uncooperative individual in the name of that right.

How could the Washington and federal court rules permit the exclusion of an uncontrollable defendant from the courtroom without an acknowledgment that the right is not absolute? Both federal and state systems make clear that the court need not tolerate such unruly conduct. The court is not required to present the defendant bound and gagged to the courtroom in order to meet the intent of the Sixth Amendment.[241] It seems somehow perverse that in Washington, after the *Jackson* decision, a defendant who appears in court, but refuses to conform to reasonable conduct as determined within the discretion of the court, may be denied his right to be present at trial. Yet, a somewhat more crafty defendant, also bent on defying the system by means of fleeing, will, by failing to appear, seize the wheels of justice in their tracks. Absent defendants have been so empowered presumably because we cannot trust the court's reasonable discretion in determining that this manner of disruptive conduct is a willful waiver of a constitutional right.

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239. Illinois v. Allen, 397 U.S. 337, 338 (1970).

240. State v. LaBelle, 18 Wash. App. 380, 391, 568 P.2d 808, 814 (1977) (citing United States v. Bentvena, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963)).

241. Illinois v. Allen, 397 U.S. 337 (1970) (upholding a trial judges decision to banish a defendant from the courtroom for unruly, threatening conduct; reversing the Seventh Circuit opinion, which held that the proper course for the trial judge in treating a disruptive and disrespectful defendant was to restrain the defendant by whatever means necessary, even if those means included his being shackled and gagged).

IV. POSSIBLE MOTIVATIONS OF THE WASHINGTON SUPREME COURT AND A RECOMMENDED SOLUTION

A. *Possible Motivations of the Washington Supreme Court for Adopting a Bright-Line Rule*

Perhaps the Washington Supreme Court adopted a bright-line rule in place of the discretionary rules that had developed in Washington case law because it was concerned about potential abuse of judicial discretion. The trial court's decision to proceed with trial in the absence of the defendant in *Hammond* presents a strong case for a bright-line rule. *Hammond*, although not present for trial, made his whereabouts known to the court. Neither equitable nor practical arguments support the exclusion of such a defendant from trial. Yet, evidence that the "old" system was working just fine may be found in the analysis by the appellate court, rejecting the trial court's ruling as an abuse of discretion and educating that judge and other similarly situated judges as to the appropriate factors to consider.[242]

Additionally, the very rare occurrence of a trial commenced in absentia is further evidence that the pre-*Hammond* interpretation of CrR 3.4 was not leading to an abuse of judicial discretion. Only five such cases were brought to the appellate level prior to *Hammond*.[243] In Kitsap County, only two cases have ever been brought in absentia, including *Jackson*.[244] Thus, it seems that if the Washington Supreme Court interpreted CrR 3.4 as it did for the purpose of curbing judicial abuse of discretion, the court was fixing a problem that did not exist. However, in granting review of *Hammond*, the court did not affirm, but supplanted the appellate court's reasoning with its own. If removing discretion was not the court's purpose in setting a bright-line rule, then what was the reason for taking review of *Hammond*?

One possible motivation for the Washington Supreme Court to take *Hammond* on review was to unify the differing analyses used by Divisions I and III of the Court of Appeals in determining when to commence trial against an absent defendant.[245] Division I cases

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242. State v. Hammond, 65 Wash. App. 585, 589-90, 829 P.2d 212, 215 (1992), *aff'd*, 121 Wash. 2d 787, 854 P.2d 637 (1993).

243. State v. Ahlquist, 67 Wash. App. 442, 837 P.2d 628 (1992); State v. Rich, 63 Wash. App. 743, 821 P.2d 1269 (1992); State v. Stark, 48 Wash. App. 245, 738 P.2d 684 (1987); State v. Washington, 34 Wash. App. 410, 661 P.2d 605, *rev'd on other grounds*, 100 Wash. 2d 1016 (1983); State v. LaBelle, 18 Wash. App. 380, 568 P.2d 808 (1977).

244. Telephone Interview with Warren Sharpe, Prosecuting Attorney for Kitsap County (May 11, 1995).

245. *See supra* note 116.

employed the simple inquiry: Was the defendant voluntarily absent?[246] This approach, used by the trial court in *Hammond*, was ignored by Division III in favor of the two-step *Tortora* analysis.[247] However, the Washington Supreme Court, noting that the federal case law from which each approach was derived was rendered moot by *Crosby*, chose neither approach.[248]

Another possible, though less likely, rationale is that the Washington Supreme Court interpreted CrR 3.4 as it did to avoid being left out on thin constitutional ice. Under this theory, the court abandoned Washington case law in favor of a federal interpretation, suspecting that in *Crosby*, FRCrP 43 was *really* redrawn to meet with the protections of the Sixth Amendment. Despite the fact that the *Crosby* court declined to directly address constitutional protections,[249] such a reading of the case seems at least plausible. Why else would the United States Supreme Court invalidate *Tortora* twenty-five years after denying certification in the first place?[250]

Apart from Washington, no other states have flinched at the Supreme Court's interpretation of FRCrP 43.[251] Much to the contrary, state courts in Arizona, New Jersey, Indiana, and Illinois have reaffirmed their rules allowing the commencement of trial in absentia since *Crosby*.[252] After *Crosby*, New Jersey Court Rule 3:16 was modified to explicitly state that a defendant may waive his right to be present at trial by either a written or oral waiver or by conduct evincing what is in effect a waiver.[253] Under New Jersey's new rule, knowledge of trial plus failure to attend the trial constitutes a knowing waiver, and the clearest evidence of knowledge of the trial date is the defendant's presence in court on the day the matter is set for trial.[254] An appellate court in Ohio, interpreting *Crosby*, stated that "*Crosby* does not stand for the proposition that the right to be present at the commencement of trial cannot under any circumstance be waived."[255]

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246. *See, e.g.*, *LaBelle*, 18 Wash. App. at 397-98, 568 P.2d at 817-18.

247. *See, e.g.*, *Hammond*, 65 Wash. App. at 586, 829 P.2d at 213.

248. *Hammond*, 121 Wash. 2d at 791, 854 P.2d at 639.

249. *Crosby*, 506 U.S. at 262.

250. United States v. Tortora, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972).

251. The author has identified no state high courts disallowing trial in absentia in response to *Crosby*. *But see* Ohio v. Meade, No. 69533, 1996 Ohio App. LEXIS 1962, at *7 (Ohio Ct. App. May 16, 1996) (finding *Crosby* a compelling authority in reversing a trial conducted in absentia).

252. *See* cases cited *supra* note 101.

253. State v. Butler, 650 A.2d 397, 400-01 (N.J. 1994).

254. *Id.* at 401 (citing State v. Hudson, 574 A.2d 434, 444 (N.J. 1990)).

255. State v. Walker, 1994 Ohio App. LEXIS 3069, at *2 (Ohio Ct. App. July 11, 1994) (unpublished opinion).

It is clear that if Washington had been on "thin constitutional ice" prior to *Hammond*, it was at least in good company.

B. An Alternative Solution

Whatever the possible motivations of the court in deciding *Hammond* and *Jackson*, the decisions have created a right to pre-trial flight. It is important therefore to consider possible alternative actions Washington courts might take to avert the injustice of *Jackson* in future cases, without subverting the Sixth Amendment. Any such corrective action must come from the court itself. Legislative remedies, such as the rape shield laws[256] and provisions for small children to testify without "face to face" confrontation with the defendant[257] exist, if at all, at the pleasure of the court.[258] Court rules are exclusively the province of the judicial branch,[259] and the legislature may not usurp this authority by passing legislation.[260]

Among the judicial remedies available, it may be valuable for Washington courts to consider rules similar to those used in Illinois and New York, which require the court to admonish criminal defendants at arraignment that their future absence at trial will be taken as a knowing waiver of their right to be present.[261] Under the Illinois system, the defendant receives a copy of the form he signs, and that form makes the rule explicit.[262]

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256. WASH. REV. CODE § 9A.44 (1995) (permitting a trial court to exclude evidence of the prior sexual behavior of the victim of a rape).

257. WASH. REV. CODE § 9A.44.150 (1995) (allowing the testimony of victimized children to be taken on closed circuit video where direct contact with the accused may cause the child emotional trauma).

258. WASH. R. CRIM. P. 1.1.

259. State v. Ryan, 103 Wash. 2d 165, 177, 691 P.2d 197, 206 (1984).

260. Perhaps even more severe than the limits of legislative power to affect court rules would be the practical limit of legislation to address such an issue. While the rape shield laws of evidence are "vote-getters," this author is unaware of any organized lobby to broaden the conditions whereby criminal defendants may be tried in absentia.

261. People v. Daley, 617 N.Y.S.2d 68 (App. Div. 1994) (finding defendant's nonappearance on the day of trial constituted waiver of right to be present at trial when defendant was given unequivocal instruction that trial would proceed if he failed to appear); People v. Garner, 590 N.E.2d 470 (Ill. 1992) (invalidating trial held in absentia because trial court failed to properly admonish defendant of his right to be present at trial).

262. ILL. ANN. STAT. ch. 725, para. 5/115-4.1 (Smith-Hund 1995) provides:

> When a defendant after arrest and an initial court appearance for a non-capital felony, fails to appear for trial, at the request of the State and after the State has affirmatively proven through substantial evidence that the defendant is willfully avoiding trial, the court may commence trial in the absence of the defendant. . . .

See also People v. Partee, 530 N.E.2d 460, 467 (Ill. 1988) ("The section 113—4(e) admonishment is obviously a prophylactic measure which is designed both to dissuade defendants from absconding at any time, before or after trial, and to provide for a formal waiver of their right to

Unfortunately, after coming out so strongly in favor of the federal interpretation, it appears unlikely that the Washington Supreme Court will enthusiastically adopt an entirely new rule, dramatically liberalizing the conditions for trial in absentia. Thus, the court ought to consider granting trial courts a small window of discretion for advancing cases like *Jackson*. Otherwise the fragility of evidence forces the court to choose between the complete thwarting of justice due to the defendant's absence or the abridgment of an absconded defendant's right to be present at trial.

V. CONCLUSION

State v. Jackson was a decision that did not productively serve justice and was not in any way compelled by factors external to the Washington Supreme Court. On the contrary, the decision was a consequence of the court's election to embrace the new federal interpretation of FRCrP 43 as the new rule in Washington, despite differences in the plain language of the rules. The new Washington rule creates a bright line exclusion of trials commencing in absentia, without discretion for the trial court. The primary harm created by the new rule is a remarkable escape hatch from justice, or "right of pre-trial flight," that empowers defendants to thwart justice if they remain at large long enough to outlive the evidence against them. This interpretation of CrR 3.4 is fundamentally inconsistent with the provisions in the rule for exclusion from trial based upon misconduct in the courtroom.

The Washington Supreme Court should apply deep thought to its ruling in *State v. Jackson*. The court should recall that bleached notion that criminal law should serve the interests of crime victims and allow the almost indiscernible weight of the "right" of the victim to tip the scale in favor of trials in absentia in remarkable cases.

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be present.").