

**IF YOU CAN'T BEAT THEM JOIN THEM:
THE COMPARISON OF FAILURE TO
APPEAR JOINDER STANDARDS**

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I.0. INTRODUCTION

David Guthrie's trial started and ended in court. On 15 August 2008, Guthrie did not come to court for the calendar call.¹ Later that year, the State filed a failure to appear charge against Guthrie.² After the State indicated its intention to consolidate the trial of the fourth-degree assault and failure to appear, Guthrie asked the District Court to sever the charges.³

In addressing the issue, the Court of Appeals of Alaska noted that courts have applied two conflicting standards regarding the joinder of failure to appear. Most courts lifted the joinder standard:

Under this approach, joinder of the failure to appear charge is appropriate only when the circumstances surrounding the defendant's failure to appear affirmatively suggest that the defendant was actively attempting to avoid prosecution for the initial charges (and thus manifesting a consciousness of guilt).⁴

Another court, however, permitted upholding joinder of a failure to appear charge even though the circumstances did not indicate intent to flee or otherwise avoid prosecution.⁵ This essay argues in favour of the majority standard and in favour of a more stringent joinder benchmark for failure to appear charges.

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¹ *Guthrie v State* 222 P.3d 890 (Alaska Ct. App. 2010).

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*, at 894.

⁵ *Ibid.*

2.0. FAILURE TO APPEAR FRAMEWORK

The American Bar Association Standards for Pretrial Release, Standard 10-5.5, provides that “[T]he judicial officer may order a prosecution for contempt if the person has wilfully failed to appear in court or otherwise wilfully violated a condition of pretrial release”.⁶ According to Standard 10-5.5, “Wilful failure to appear in court without just cause after pretrial release should be made a criminal offense”.⁷ Standard 10-5.6, in turn, provides illustrations of how a party can be sanctioned for failing to appear in court.

For example, Standard 10-5.6 provides thus:

A person who has been released on conditions and who has violated a condition of release, including wilfully failing to appear in court, should be subject to a warrant for arrest, modification of release conditions, revocation of release, or an order of detention, or prosecution on available criminal charges.⁸

Meanwhile, the Commentary for Standard 10-5.6(a) provides:

These Standards’ presumption of pretrial release is tempered by their requirement that the defendant must abide by conditions set by the court. This Standard provides a range of options for responding to a defendant’s violation of conditions of release. The court can modify the release conditions to make them more restrictive or add new conditions more directly tailored to the risk posed by the defendant’s release.⁹

⁶ American Bar Association (ABA), “Pretrial Release”, available at https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/#10-5.5 (accessed 5 October 2020).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ ABA, “Pretrial Release – Black Letter with Commentary”, (2007), available at https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc/ (accessed 16 January 2021), p. 117.

Furthermore, the Commentary for Standard 10-5.6(a) provides that “...the court can order a prosecution for contempt or for wilful non-appearance or can order that a hearing be held to determine whether the release order should be revoked, and the defendant held in detention pending trial”.¹⁰

In other cases, people are alleged to have violated probation through an accumulation of wilful acts. For example, in *People v Zaring*,¹¹ the court noted that:

“On November 19, 1990, the appellant, according to undisputed testimony, appeared 22 minutes late for her 8:30 a.m. court appearance. Judge Broadman called her case at approximately 8:30 a.m. and the following colloquy took place between Judge Broadman and the appellant’s attorney as the court summarily revoked her probation”.

“The Court: What did we find out about Zaring? She’s not here?”

Mr. Muetting [appellant’s counsel]: Well, it’s two minutes after 8:30.

The Court: She’s going to prison. That’s the end of the story with Mrs. Zaring”.¹²

The court acknowledged that:

At the time of sentencing on November 29, 1990, Judge Broadman expressed what we interpret as the court’s conclusion as to the underlying facts supporting its probation revocation.

“Miss Zaring, I gave a break to, substantial break [sic]. And I thought that she [sic] —I believed her in the sense that she was finally going to get her life together. I think the People [sic], the lawyer for the People even thought she was going to get her life together.

...

But Miss Zaring in my viewpoint had never learned act for consequence. And so, I told Miss Zaring in a long speech that she had

¹⁰ *Ibid.*

¹¹ *People v Zaring* (1992) 8 Cal.App.4th 362 (California Court of Appeal).

¹² *Ibid.*, at 366.

to be here at 8:30, and the most important thing in her life was to be here at 8:30, and if she wasn't here at 8:30 she was going to go to prison. And I told her she should camp out here if she thought she was going to be late. Then she said, Yes, I will. I understand. I'll be here". Then she came in and she said, well she took her children to school.

"Understand I let her out early, so had she not been there I don't know how the children would have gotten to school or if they would have gotten to school. She chose to take her children to school and wilfully violated that directive and agreement that we had. And so, I found her in violation of her probation".¹³

According to the court:

Nothing in the record supports the conclusion that her conduct was the result of irresponsibility, contumacious behaviour or disrespect for the orders and expectations of the court. However, as a result of last-minute circumstances, the appellant was approximately 22 minutes late to court, having driven some 35 miles from her home to the courtroom. Collectively, we cannot in good conscience find that the evidence supports the conclusion that the conduct of appellant, even assuming the order was a probationary condition, constituted a wilful violation of that condition.¹⁴

3.0. FAILURES TO APPEAR

According to the Court of Appeals of Alaska in *Guthrie*, "A 'calendar call' is a court proceeding at which the parties apprise the court either (1) that they are ready for the scheduled trial, or (2) that the trial will not be necessary because the case has been resolved, or (3) that the trial must be rescheduled for some reason".¹⁵ The court acknowledged that:

As we explained earlier, the "calendar call" in *Guthrie's* case was an administrative device deigned to give the judge advance warning if the parties believed that the trial should not go forward as scheduled. As

¹³ *Ibid*, at 377.

¹⁴ *Ibid*, at 379.

¹⁵ *Supra* n 1, p. 891.

described in the Clerk of Court's testimony, at this calendar call, the parties either announced themselves ready to proceed with the trial on the scheduled date, or they explained why they believed that a trial would not be needed, or why the trial should be rescheduled".¹⁶

People are increasingly appearing in court. The Bureau of Justice Statistics Special Report on Pretrial Release of Felony Defendants in State Courts indicates that:

The number of defendants charged with pretrial misconduct increased with the length of time spent in a release status. About a third (32%) of failure-to-appear bench warrants were issued within a month of release and about two-thirds (68%) within 3 months. The pattern was similar for rearrests, with 29% occurring within 1 month of release and 62% within 3 months.¹⁷

It states that:

From 1990 through 2004, 33% of defendants were charged with committing one or more type of misconduct after being released but prior to the disposition of their case. A bench warrant for failure to appear in court was issued for 23% of released defendants. An estimated 17% were arrested for a new offense, including 11% for a felony.¹⁸

According to the 2020 Edition of the National Standards on Pretrial Release, "Data from pretrial services agencies that maintain appearance and public safety rates show that most defendants appear for all scheduled court appearances and remain arrest-free pretrial".¹⁹ Data also suggests that "pretrial failure" is not as severe as perceived.²⁰ Frequently, failures to appear are not wilful abscondences from court,

¹⁶ *Ibid*, at 893.

¹⁷ T. Cohen and B. Reaves, "Pretrial Release of Felony Defendants in State Courts", available at <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> (accessed 16 January 2021), p. 7.

¹⁸ *Ibid*.

¹⁹ National Association of Pretrial Services Agencies (NAPSA), "Standards on Pretrial Release: Revised 2020", https://cdpsdocs.state.co.us/ccji/committees/PRTF/Handout/2020_NAPSA_StandardsOnPretrialRelease.pdf (accessed 16 January 2021), p. 72.

²⁰ *Ibid*.

but rather involve circumstances that can be resolved without significant change to a defendant's bail status.²¹

4.0. THE JOINDER OF FAILURE TO APPEAR

4.1. The Business-as-Usual Standard

Confronted with failure to appear, one court has applied the traditional standard to joinder, typically relying on a lesser version of a joinder three prong test. For instance, in *State v Bryant*,²² Vincent Bryant was charged with bail jumping and robbery in the second degree.²³ At trial, the court joined the offenses.²⁴ The Court of Appeals of Washington later agreed, noting that:

Here, the acts giving rise to the charges of robbery and bail jumping occurred within a period of four months; thus, the acts are related in time. And in our view more importantly, the missed court appearance was an omnibus hearing that stemmed from the robbery charge. When a defendant is released on bail pending trial of a charged offense and jumps bail by failing to appear when required at a hearing related to the underlying charge, the acts giving rise to the two charges are likely to be related in time. Bryant's bail jumping did not involve flight for the purpose of avoiding prosecution, however. Although he failed to appear for the scheduled omnibus hearing, he appeared voluntarily before the omnibus court in the company of his attorney four days later, seeking and obtaining reinstatement of bail. Thus, only two of the three prongs of the federal test for a sufficient connection between the charges to justify joinder are satisfied here.

Although the three prongs of the federal test for appropriateness of joinder are couched in the conjunctive, we are not persuaded that slavish adherence to the federal test is appropriate in Washington, given Washington's strong policy in favour of conserving judicial and

²¹ *Ibid.*

²² (1998) 89 Wash. App. 857 (Washington Court of Appeal).

²³ *Ibid.*, at 862.

²⁴ *Ibid.*, at 863.

prosecution resources. We conclude that these charged offenses, which are related in time with one stemming directly from the other, are sufficiently “connected” to permit a single trial.²⁵

4.2. The Stricter Standard

Another court has lifted the joinder benchmark in cases involving failure to appear. In *Guthrie*, David Guthrie was convicted for failure to appear.²⁶ At trial, after the State indicated its intention to consolidate the trial of the fourth-degree assault and failure to appear, Guthrie asked the District Court to sever the charges.²⁷ The District Court denied this request.²⁸ The Court of Appeals of Alaska later reversed in part, noting that:

Many judicial decisions suggest or hold that, in circumstances like Guthrie’s case, it is improper to jointly try a failure to appear charge with the other charges that were initially filed against a defendant. These court decisions indicate that joinder is improper when the only “connection” between the failure to appear charge and the initial charges is that the failure to appear charge is based on the defendant’s failure to attend a court proceeding involving the initial charges. Under this approach, joinder of the failure to appear charge is appropriate only when the circumstances surrounding the defendant’s failure to appear affirmatively suggest that the defendant was actively attempting to avoid prosecution for the initial charges (and thus manifesting a consciousness of guilt).²⁹

The Court of Appeals of Alaska then suggested

Among the jurisdictions that follow the majority rule (i.e., jurisdictions that do not allow joinder of the failure to appear charge unless the circumstances of the defendant’s failure to appear demonstrate an intent to flee or otherwise avoid prosecution), we

²⁵ *Ibid*, at 867.

²⁶ *Supra* n 1.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid*, at 894.

have found no case in which joinder has been upheld under facts analogous to the facts of Guthrie's case—where a defendant who had attended earlier court proceedings missed a single court appearance but then, within days, voluntarily returned to court with his attorney.

Nevertheless, we need not decide whether joinder of the failure to appear charge was proper in Guthrie's case. We conclude that, even assuming the joinder was improper, Guthrie suffered no prejudice.³⁰

5.0. LIFTING THE BENCHMARK

The split of authority acknowledged by the Court of Appeals of Alaska in *Guthrie* also suggests the test that should be used for determining whether the joinder benchmark should be lifted for failure to appear: If the deprivation of liberty risk with a joined failure to appear is similar to the deprivation of liberty risk without a joined failure to appear, and if the lesser version of a joinder three prong test typically used to consolidate trials is similarly able to quell concerns regarding that risk, the joinder benchmark should not be lifted. But if there is a higher deprivation of liberty risk with failure to appear, or if the lesser version of a joinder three prong test typically used to consolidate trial does not alleviate doubts concerning whether jurors will conclude that the defendant must necessarily be guilty of the crime charged or he would not have jumped bail, the failure to appear joinder benchmark should be lifted.

5.1. The Higher Deprivation of Liberty Risk Associated with Failure to Appear

Imagine a judge issues a bench warrant when the defendant does not come to court, and the defendant's attorney claims that the bench warrant should be lifted. How easy will it be to determine what the sanction should be? The Court of Appeals of Alaska in *Guthrie* relied on *State v Haag* and indicated that:

³⁰ *Ibid.*

While it is possible to imagine cases in which a jury might unfairly infer a defendant's consciousness of guilt based on the defendant's failure to appear at a court hearing, Guthrie's case presented no such risk. The prosecutor never asked the jury to infer consciousness of guilt from Guthrie's failure to appear.³¹

But the court rejects the concern that joinder of the failure to appear was proper and notes that:

Thus, even assuming that Judge Miller erred when he allowed the State to join the two charges for trial, Guthrie has failed to make the particularized showing of prejudice that would entitle him the reversal of his assault conviction.³²

The Commentary accompanying Standard 4.6 in turn indicates that

While some courts immediately issue a bench warrant whenever a defendant fails to appear, others will wait for a short time to enable the pretrial services agency to make follow up contact with the defendant.³³

In other words, the failure to appear structure is based upon the foundational belief that appearance in court is not only requested, but better. This supposition is borne out by cases in which judges give warnings initially.

Four days later, Bryant voluntarily appeared before the omnibus court in the company of his attorney, claiming that he had become confused about his court dates with respect to the robbery charge and a different charge pending in another county. The judge reinstated his bond, warning him, "This is your last break".³⁴

These judges say, "I'm going to give her this chance" and "Miss Zaring, I gave a break to, substantial break. And I thought that she-I believed her in the sense that she was finally going to get her life together. I

³¹ *Ibid*, at 895; *supra* n 7 (citing *See State v Haag*, 176 Mont. 395, 578 P.2d 740, 746 (1978)).

³² *Supra* n 1.

³³ *Ibid*.

³⁴ *Supra* n 22.

think the People; the lawyer for the People even thought she was going to get her life together”.³⁵

Conversely, it is uniquely easy to create, and difficult to attend to, bail jumping without sanction. In *Swisher v US*,³⁶ an exchange occurred between the parties:

“The Court: All right, Mr. Swisher, is there anything you want to say? Bear in mind, of course, that anything you say can be used against you.

Mr. Swisher: Yes, sir, I had to go home, because my grandfather died and it was an expense to you, and it was a great expense to me to lose my grandfather. And I wanted to go home and see him one last time before he was put in the ground.

The Court: Well, unfortunately sir, when—

Mr. Swisher: And I was not able to make it because my family was just falling apart. And, I just had to be there. I tried to get hold of Mr. Camenisch here, and his line’s been busy, and I had my friends down here try, and I’ve tried from home, and the line’s been busy until 12:00 at night.

The Court: Unfortunately, sir, when you have a criminal case pending, it has to take priority over everything else.

I believe that the defendant’s non-appearance, [was] wilful contempt of court in the presence of the court, and accordingly we will add Count D, Contempt of Court. And I find the Defendant guilty of Contempt of Court.

I’ll hear from you, Mr. Camenisch, before I sentence him”.³⁷

Reaffirming his adjudication, the judge said:

He made a choice; he wanted to go see his grandfather instead of coming to court. I can sympathize with that, but it’s a wilful failure, and when you get entangled in the criminal justice system, allegedly, I assume for Mr.

³⁵ *Estate of Justesen* (1999) Cal.App.4th 362, 366—77 (Cal. Ct. App.).

³⁶ 572 A.2d 85 (D.C. 1990).

³⁷ *Ibid*, at 87.

Swisher, driving into D.C. to take advantage of those open-air drug markets, and provide that market, making this city a shamble, then you have to be willing to abide by the consequences of being required to show up in court on time.³⁸

When the judge invited counsel to allocate with respect to the sentence, Mr. Camenisch once again protested the procedure which had been utilized:

“Mr. Camenisch: Well, your Honour, I feel that I’ve been put at a great disadvantage. You’re calling this case, and then the court finding my client guilty, when I really haven’t even had a chance to advise him not to speak up and all that, and I just think it’s not right, and I feel like, rather than go forward like that, he should say nothing under the circumstances, and I just think that I’ve been put in a very bad position here.

The Court: All right. So, you have nothing to say?

Mr. Camenisch: Well, Your Honour, I really didn’t have an opportunity to consult with him prior to calling this case.

The Court: That, of course, is also another risk—³⁹

The District of Columbia Court of Appeals later reversed, noting that:

We hold that in summary proceedings based on failure to appear in court, the accused is entitled, at least, to notice that he is being charged with criminal contempt, to the meaningful assistance of counsel (which includes a chance to tell the attorney the facts and to secure his or her advice), and to a reasonable opportunity to present a defence.

Swisher was denied these rights.⁴⁰

In addition, it is exceptionally easy to fail to arrange transportation to court. Such a feat usually consists of life not always being predictable, which can be accomplished by something as simple as it snowing that

³⁸ *Ibid*, at 88.

³⁹ *Ibid*, at 88.

⁴⁰ *Ibid*, at 92-93.

day or more complex like not having a driver's license, and the neighbour being unable to leave her children at home.⁴¹ In the end, the proof of the ease of appearing to jump bail is largely in the pudding. A case, in which the Court of Appeals of Washington reversed a bail jumping conviction where Delphine Jackson testified that she attempted to get to the May second hearing, but missed the hearing because her truck broke down, and the State presented no evidence showing that Jackson had been notified of the next court date or that she had signed the notice.⁴²

5.2. The Impracticability of not Following the Majority Rule

Such concerns about failure to appear joinder might be acceptable if courts applied a joinder standard that substantially quelled concerns about a jury unfairly inferring consciousness of guilt based on the failure to appear at a court hearing. As noted, a court typically upholds joinder of a failure to appear charge under a lesser version of a joinder three prong test.⁴³ The problem is that, as currently applied, the lesser version of a joinder three prong test is a failing rule in a present world.

The Commentary to American Bar Association Standards for Pretrial Release Standard 10-5.5, in turn, provides:

This Standard outline two possible responses when a defendant has wilfully failed to appear for a scheduled court date or violated another condition of release. It provides that a wilful violation of release conditions may be prosecuted as criminal contempt. In addition, it encourages jurisdictions to criminalize a wilful failure to appear in court without just case.⁴⁴

5.2.1. The Contempt Hearing

First, “the judicial officer may order a prosecution for contempt if the person has wilfully failed to appear in court or otherwise wilfully

⁴¹ *Abell v Commonwealth*, 2007 WL 737540 (Va. Ct. App. 2007).

⁴² *State v Jackson*, 188 Wash. App. 1053, 1-2 (Wash. Ct. App. 2015).

⁴³ *Supra* n 1.

⁴⁴ *Supra* n 9, at 116.

violated a condition of pretrial release”.⁴⁵ In *People v Douglas*,⁴⁶ a hearing hinged on the wilfulness of Jack Douglas not being able to secure a ride to court, attempted to hitchhike, giving up hitchhiking, and starting for home.⁴⁷ The Appellate Court of Illinois found that “[W]e agree with the defendant that the evidence here does not prove beyond a reasonable doubt that his failure to appear was wilful”.⁴⁸

In the 21st century, the extraordinary has become ordinary, and the notion that many events will not happen to stop people from attending court seems quaint. And yet, many courts deem people jumped bail by failing to appear based on the assumption that people did not want to be on time. In *Thompson v US*,⁴⁹ when the court reconvened at 12:25 p.m. to consider an order to show cause, the judge reiterated that “Mr. Thompson has now a long history of coming late to court almost too many times to mention”.⁵⁰ The judge stated that:

These past lateness are not part of this trial, this contempt proceeding. That is, you don’t have to defend yourself against those matters. I have already dealt with those matters at that time. I’m just letting Mr. Thompson know and counsel know why, at this point. I’m not willing to defer again, Mr. Thompson’s contempt of court, why I’m not willing to let it slide.⁵¹

The District of Columbia Court of Appeals reversed the conviction for contempt of court, because:

When the events of that day are separated from the context of Thompson’s previous late appearances, the record supports a finding of negligence on his part, in that he failed to estimate correctly how long it would take him to park. We conclude, however, that the

⁴⁵ *Supra* n 6.

⁴⁶ 73 Ill. App. 3d 520 (Illinois Appeals Court 1979).

⁴⁷ *Ibid*, at 521.

⁴⁸ *Ibid*.

⁴⁹ 690 A.2d 479 (D.C. 1997).

⁵⁰ *Ibid*, at 481.

⁵¹ *Ibid*.

evidence relating to October 25, 1994, falls short of proving wilfulness or recklessness.⁵²

Additionally, as was the case for David Guthrie, Robert Williams's case started and ended in court. Williams offered an explanation for his failure to appear for calendar call in October 2010: as a member of the Florida National Guard, he was called up early in September by his Special Forces unit and was given only a twenty-four hour notice to go into Africa, to a location where he had no opportunity to call his lawyer until approximately a month before the April 2011 bond hearing.⁵³ No findings were made that his failure to appear was wilful; the judge stated only that, although Williams might be in the military, his nonappearance was "not acceptable to me".⁵⁴

The District Court of Appeal of Florida found that:

We therefore grant the petition for writ of habeas corpus to the extent of remanding to the trial court to set an expedited hearing to determine whether Williams' nonappearance for calendar call was wilful and whether there are any reasonable conditions of release which would assure Williams' presence at trial.⁵⁵

In order for any of these rulings to hold water, it would have to be extraordinary for people to miss court without a satisfactory excuse. In *Douglas*, this was not the case, because the man who was supposed to give the defendant a ride failed to show up, several telephone calls failed to secure him a ride, he attempted to hitchhike, he gave up hitchhiking, and he started for home.⁵⁶ In *Thompson*, as the District of Columbia Court of Appeals acknowledged:

⁵² *Ibid*, at 484-485.

⁵³ *Williams v State*, (2011) 59 So.3d 387 (Florida District Court of Appeal).

⁵⁴ *Ibid*, at 387-388.

⁵⁵ *Ibid*, at 388.

⁵⁶ See *Douglas*, *supra* n 46 ("The defendant took the stand and testified that he had arranged for a ride to court (some 37 miles from his home), but the man who was supposed to give him a ride failed to show up. After several telephone calls failed to secure him a ride, he attempted to hitchhike. He was unable, however, to get to court on time, and eventually gave up hitchhiking and started for home, where he was arrested").

Other than the fact of late arrival, there is little, if anything, to show that Thompson was actuated by a wrongful state of mind. In retrospect, he should plainly have made allowances for the possibility that parking near the courthouse might prove difficult. A single erroneous estimate of the time that it takes to find a parking space, however, does not, when considered alone, translate readily into a criminal offense.⁵⁷

Moreover, in *Williams*, Williams as a member of the Florida National Guard was called up by his Special Forces unit and was given only a twenty-four hour notice to go into Africa.⁵⁸ The court did not hold that Williams did not have more than enough reason for his nonappearance to be something other than wilful.

All of these cases reinforce the reality that we live in an appearing new world where almost missing a single court date can make charges join. Moreover, once people get busy, the word “almost” can be removed from the previous sentence. Thus, it seems appropriate to lift the benchmark on exactly what type of intent allows for failure to appear joiner. For instance, in *Bouie v State*,⁵⁹ the extent of the proceedings was as follows:

“Court: There is one more thing. There is apparently a failure to appear?”

Clerk: Yes, sir.

Court: What was that?

Clerk: That was 12/6 of '99 for jury trial, and it has never been addressed since he was arrested on that.

Court: OK, there was a failure to appear back in December for a jury trial. State, time served on that? Any objection?

State: No objection.

Court: Any objection?

⁵⁷ *Supra* n 49, at 485.

⁵⁸ See *Williams v State*, *supra* n 53, at 387.

⁵⁹ 784 So.2d 521 (Florida District Court of Appeals 2001).

Defence Counsel: No objection.

Court: Alright, I just want him to be sentenced to time served on that failure to appear”.⁶⁰

The District Court of Appeal of Florida reversed, noting that:

Prior to the adjudication of guilt, the judge did not inquire as to whether appellant had any cause to show why he should not be adjudged guilty of contempt and was not given an opportunity to present evidence of excusing or mitigating circumstances, contrary to rule 3.830.⁶¹

Bouie reflects the reality of bail jumping and the fact that failing to appear might not really be failing in the bail jumping realm. Accordingly, courts should rely on something more than a broad “No objection” from the defence or State to find people guilty of contempt for failure to appear.

5.2.2. The Failure to Appear

Second, Standard 10-5.5 indicates that “Wilful failure to appear in court without just cause after pretrial release should be a criminal offense”.⁶² In *State v Khadijah*,⁶³ the Appellate Court of Connecticut reversed a failure to appear jury verdict finding that:

Working late, the night before a court appearance, pursuant to a regularly kept work schedule, failing to set an alarm clock or asking a friend to awaken her from a potentially inadvertent doze does not amount to purposefully and intentionally absencing oneself from the courthouse. At best, the state’s first two offered pieces of evidence would support a finding of negligent, not purposeful; absence from court. As for the state’s third piece of evidence, namely, that the defendant asked her boyfriend to wake her should she

⁶⁰ *Ibid*, at 522.

⁶¹ *Ibid*, at 523.

⁶² *Supra* n 6.

⁶³ 98 Conn. App. 409 (Connecticut 2006).

fall asleep, it supports the defendant's claim of non-wilfulness.⁶⁴

In another case involving bail jumping, the prosecution only went forward with the failure to appear—if you can't beat them join them—that is the other counts were later dismissed. For instance, in *Foster v U.S.*,⁶⁵ the trial court stated:

I convict [Mr. Foster] of the offense of having ... wilfully failed to appear in court.

I find ... that [the defence has] conceded ... that the case presented by the Government is sufficient ... because it permits the inference that [Mr. Foster] wilfully did not appear as he was directed to do.

Now [the defence has] conceded generally that ... [Mr. Foster] was directed to appear on a certain date. He knew it and ... he did not appear. Rather [he] offer[s] a defence. The defence is along the lines of coercion or duress ... that circumstances were such that it [was] impossible for him to come back to court.

And there is some force to that argument, but on reflection I'm persuaded that ... [Mr. Foster] put himself in a position where it was not possible for him to get back to court. And it seems to me that the testimony established that [fact] in an indifferent sort of way or ... in a fashion that indicates if not a contempt for his obligation to the Court, as I say reckless indifference to it.

He left both the jurisdiction and the country, and when he did that, his testimony was that he knew that from time to time he would get to a destination that could be hundreds of miles away. In this case, Montreal is some 800 miles from Washington and [Mr. Foster] was not able to get back.

And it seems to me that it's proper to infer that he recognized that ... accepting this assignment to drive to Montreal was incompatible with his obligation to

⁶⁴ *Ibid*, at 418-419.

⁶⁵ *Foster v US*, 699 A.2d 1113 (D.C.).

appear in court on Monday, if for no other reason that he knew he might be marooned there and in fact that's what happened.⁶⁶

The District of Columbia Court of Appeals remanded finding that:

When the August 7 assignment was cancelled, Mr. Foster “notified the dispatcher” who informed him that there was no other transportation by way of Greyhound that could get him back to Washington on the morning of August 8. Foster indicated that “Greyhound is the only [bus] carrier that services Montreal”. Mr. Foster called his attorney by using the company phone. He did not contact the train station or any airline company because he had only \$7 in cash. He carried no cash for expenses; and only had vouchers for food and lodging. He had no personal credit cards or checks, and no friend or relative who could have wired him money. His wife was unemployed and his six children, all of whom still lived with Mr. Foster and his wife, ranged in ages from six to eighteen.⁶⁷

Meanwhile, in *State v Ross*,⁶⁸ the Oregon Court of Appeals reversed a failure to appear conviction noting that:

The legislature’s willingness to exclude negligent failure to appear from culpable conduct, as well as other lawful excuses, indicates its willingness to also allow other similar exclusions, such as the one proffered here mistake. Accordingly, evidence of defendant’s assertions of his mistaken belief as to the necessity of his appearance was relevant and the trial court erred in excluding it.⁶⁹

These cases illustrate at least two problems with applying a lesser version of a joinder three prong test to failure to appear. In these cases, the fact that the original prosecution might not be able to convict people through a jury trial or bench trial, and ultimate plea

⁶⁶ *Ibid*, at 1114-1115.

⁶⁷ *Ibid*, at 1116.

⁶⁸ 123 Or. App. 264 (Oregon Court of Appeals 1993).

⁶⁹ *Ibid*, at 268.

offer rejection, is established through the unlikelihood of a guilty verdict after a not guilty plea.

Conversely, because the weakness in the prosecution's case can be seen before the jury verdict, courts in cases like *Foster* and *Ross* illustrated that the failure to appear is the charge people might fail to beat. In *Ross*, "[D]efendant stipulated to having not appeared, but sought to introduce as evidence in his defence, his mother's statement that she was "dropping the charges" and a letter written by his mother dated December 10, 1990, requesting dismissal of the Unauthorized Use of a Motor Vehicle (UUV) charge."⁷⁰ In *Foster*, "the case charging Mr. Foster with four misdemeanour counts was later dismissed for want of prosecution".⁷¹

Courts such as the court in *Khadijah's case* also seem to grasp the way that court dates work in determining bail jumping. For an attorney to defend a client's absence from court, the attorney might prepare that case separately. On the other hand, in *Khadijah's case*, the transcript records the following discussion:

"[Defence Counsel]: There was something that happened, and I didn't have time to go through the details because I said, 'Just get here now'. I will be more than happy to find out what happened and report back to Your Honour. If you could please just give her-

The Court: I don't think so, counsel. We've got a clerk, a court reporter, marshals, myself, a prosecutor and sixteen jurors sitting there waiting for her.

[Defence Counsel]: I mean, Your Honour-

The Court: I don't think I'm inclined to do that".⁷²

An exchange addressed the late to court client

Later that day, defence counsel stated to the court, "I just wanted to say that as [the prosecutor] and I exited the courtroom, we saw [the defendant] coming in through the metal detector". Following this, the

⁷⁰ *Ibid*, at 266.

⁷¹ *Supra* n 65, at 1114.

⁷² *Supra* n 63, at 411.

defence counsel requested that the court consider the rearrest order. The court responded, “She did wilfully fail to appear. She wilfully failed to appear, and I don’t want to hear any more. I’m not recalling the matter. Do you have any other matters?”⁷³

The State nulled the first three counts of the information, opting to prosecute only the failure to appear.⁷⁴ Therefore, the fact that the defendant Khadijah had a trial start with a failure to appear and other charges say nothing more than that the prosecutor was after all of the charges.

One of the courts to recognize the problems with applying a lesser version of a joinder three prong test to bail jumping was the Supreme Court of Vermont in *In re Miller*.⁷⁵ In *Miller*, the court noted that Jason Miller was required to check in daily at the Brattleboro police station but found about § 7559 that “Therefore, although the purpose of reporting to a police station every morning may be to ensure eventual appearance in court, failure to appear at the station is punishable under (e) while failure to appear in court is punishable under (d)”.⁷⁶ In *State v McColly*,⁷⁷ the Supreme Court of Oregon found that the failure to appear was not wilful, suggesting that

But the requirements for failure to appear were not satisfied when the event purportedly amounting to “custody”—a book-and-release process that may have imposed actual or constructive restraint by a peace officer pursuant to court order—had not yet occurred when the court ordered defendant’s release.⁷⁸

Given the difference between the first day of trial and reporting to a police station every day, courts should apply something approximating the more rigorous analysis utilized by the courts in *Miller* and *McColly*. It should not be enough that people failed to appear; instead, courts

⁷³ *Ibid*, at 411-412.

⁷⁴ *Ibid*, at 412.

⁷⁵ 185 Vt. 550 (Vermont 2009).

⁷⁶ *Ibid*, at 558.

⁷⁷ 364 Or. 464 (Oregon 2019).

⁷⁸ *Ibid*, at 487-488.

should require additional evidence that people intended to deliberately stay away from court.

In *Espinal v Ryan*,⁷⁹ the District Court of Appeal of Florida granted a petition to reinstate the defendant's bond observing that:

Marcos Espinal was scheduled for a docket sounding at 8:30 a.m. on January 7, 2010, for his pending criminal case. Neither he nor his counsel was present when his case was called. The trial court *sua sponte* issued an alias capias and estreated his bond. When Espinal's case was recalled approximately an hour into that morning docket, both the defendant and his counsel were present. Espinal explained he started a new job that night, and he had arrived to court fifteen minutes late due to his need to travel to court from his new job.⁸⁰

The court noted:

It is clear that the defendant's failure to appear timely before the court in this case was unintentional and *de minimus* in length. It was defendant's "first offense." Although the court was justly annoyed by the defendant's tardiness, it was minimally inconvenienced. A court should be very cautious about depriving a person of his liberty in such a circumstance.⁸¹

A court used a similar analysis to address not appearing for a plea and arraignment. In *Stewart v State*,⁸² the Court of Appeals of Arkansas reversed a failure to appear conviction where appellant's father, Mr. Stewart, testified at the hearing that appellant was in jail after being arrested for the battery charge and, after being released, appellant began living with him at 1716 South Pulaski. Mr. Stewart stated that appellant had lived at 2719 Welch, and "she was in the process of moving back over there, and I was trying to help her". He testified that appellant "kept the residence [2719 Welch] up". "We were keeping it up, but she just—the utilities and stuff was down, and the

⁷⁹ 31 So.3d 818, 819 (Florida District Court of Appeals 2010).

⁸⁰ *Ibid*, at 819.

⁸¹ *Ibid*.

⁸² 89 Ark. App. 86 (Arkansas 2004).

babies—I just kept them over there at my house, that’s all. But she was still technically living at that residence”. He testified that appellant did receive mail at the South Pulaski residence.⁸³

According to the court:

Appellant testified and confirmed that she gave Mr. Oliver the Welch Street address. She also testified that she and her children stayed with her father because she was without a job and had no electricity at the house on Welch Street. She stated that mail continued to go to the Welch Street address, “besides the mail that was going to my dad’s.” She did not move back to the home on Welch Street until May or June. She testified that she had no knowledge of the March 31 court date until she was contacted by her bondsman, Will Oliver.⁸⁴

The court noted, “The trial judge could not find that the appellant had actual notice of the plea and arraignment set on March 31 without resorting to speculation and conjecture”.⁸⁵

There is at least one problem with applying a lesser version of a joinder three prong test to failure to appear charges. According to the Commentary to National Standards on Pretrial Release Standard 4.6 “Frequently, failures to appear are not wilful abscondences from court, but rather involve circumstances that can be resolved without significant change to a defendant’s bail status”.⁸⁶ This issue, of course, could partially be remedied by two of the solutions proposed in the Commentary to National Standards on Pretrial Release Standard 4.6:

Sometimes the failure is inadvertent due, for example, to a miscommunication about the exact time or location of the court event - and can be remedied quickly by a call to the defendant that will result in the defendant’s appearance that same day. While some courts immediately issue a bench warrant whenever a defendant fails to appear, others will wait for a short time to enable the pretrial services agency to make the follow up contact with the defendant. Either way

⁸³ *Ibid*, at 87-88.

⁸⁴ *Ibid*, at 88.

⁸⁵ *Ibid*, at 90.

⁸⁶ *Supra* n 19.

it is important for the pretrial services agency to act in a timely fashion and facilitate the defendant's return to court as soon as possible.⁸⁷

In *State v Haag*,⁸⁸ Calvin Haag was charged with felony issuance of bad checks in connection with a payment of past child support and felony bail-jumping.⁸⁹ Haag failed to appear for his scheduled 18 March 1977 preliminary examination.⁹⁰ After trial, the jury found Haag guilty.⁹¹

After it reversed the bad check conviction on a witness basis, the Supreme Court of Montana concluded that:

By affirming the bail-jumping conviction, this Court in no way approves consolidating in a single trial, separate charges against a defendant for violating a specific criminal law and for bail-jumping due to his failure to appear for a court proceeding relating to the crime with which he is being tried.⁹²

Appreciating the concerns, the court then suggested:

In certain cases, jurors might improperly, though perhaps understandably, conclude that a defendant must necessarily be guilty of the crime charged or he would not have jumped bail. The facts of this case, however do not require reversal on this basis. Furthermore, defendant neither objected to this procedure at trial nor raised the issue on appeal.⁹³

Haag should not be read for the proposition that a lesser version of a joinder three prong test can never be used. But, if a case features evidence of last-minute unforeseen circumstance, indications that most people acted negligently, or no evidence that people had been of a mind to not comply with a court order, the prosecution should have to present evidence of something beyond the failure to appear at a court hearing shows consciousness of guilt.

⁸⁷ *Ibid.*, at 75.

⁸⁸ (1978) 176 Mont. 395.

⁸⁹ *Ibid.*, at 397.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*, at 404.

⁹³ *Ibid.*

6.0. CONCLUSION

Courts are increasingly at a crossroads with regard to the consolidation of bail jumping. One court cling to the belief that the joinder of failure to appear is permissible even though the circumstances did not indicate intent to flee or otherwise avoid prosecution. Another court, however, is beginning to recognize that a lesser version of a joinder three prong test is a failing rule in the present world that must be lifted to address the appearing world, where missing a single court date can make charges join—if you can't beat them join them—and jurisdictions should not allow failure to appear joinder unless the circumstances of the failure to appear demonstrate an intent to flee or otherwise avoid prosecution. This essay is a first attempt to address how to lift the benchmark on failure to appear joinder.