

THE LAST WILL AND TESTAMENT: THE COURT SHOULD LIFT THE JOINDER BENCHMARK FOR WILLFUL FAILURE TO APPEAR CHARGES

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I. INTRODUCTION

David Guthrie's trial started and ended with court. On August 15, 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 jury convicted Guthrie of fourth-degree assault and failure to appear, a basis for his appeal was that the court should have granted his request for separate trials of the two 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 apply a higher benchmark where "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 permits upholding joinder of a failure to appear charge even though the circumstances did not indicate an intent to flee or otherwise avoid prosecution.⁵ This Essay argues in favor of the majority standard and in favor of a more stringent joinder benchmark for failure to appear.

II. FAILURE TO APPEAR FRAMEWORK

According to American Bar Association Standard 10-5.5, "[t]he judicial officer may order a prosecution for contempt if the person has willfully failed to appear in court or otherwise willfully violated a condition of

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¹ Guthrie v. State, 222 P.3d 890, 891 (Alaska Ct. App. 2010).

² *Id.*

³ *Id.*

⁴ *Id.* at 894.

⁵ *Id.*

pretrial release.”⁶ Under Standard 10-5.5, “[w]illful failure to appear in court without just cause after pretrial release should be made a criminal offense.”⁷ Standard 10-5.6 provides illustrations of how a party can be sanctioned for missing court. For example, Standard 10-5.6 provides “[a] person who has been released on conditions and who has violated a condition of release, including willfully 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 The Commentary for Standard 10-5.6(a) provides

[t]hese 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 risks posed by the defendant’s release. Alternatively, the court can order a prosecution for contempt or for willful non-appearance (see Standard 10-5.5, *supra*) 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.⁹

In other cases, people are alleged to have violated probation through an accumulation of willful acts. For example, in *People v. Zaring*,¹⁰ the court noted:

On November 19, 1990, 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 appellant’s attorney as the court summarily revoked her probation.

THE COURT: What did we find out about Zaring? She’s not here?

MR. MUETING [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.¹¹

The court acknowledged at the time of sentencing on November 29, 1990,

⁶ ABA, *ABA Standards for Criminal Justice: Pretrial Release Black Letter with Commentary*, 117 (3d. ed., 2007).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ 8 Cal.App.4th 362 (Cal. Ct. App. 1992).

¹¹ *Id.* at 366.

Judge Broadman expressed what we interpret as the court's conclusion as to the underlying facts supporting its probation revocation:

THE COURT: 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 think the People, 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 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 willfully violated that directive and agreement that we had. And so I found her in violation of her probation."¹²

According to the court:

Nothing in the record supports the conclusion that her conduct was the result of irresponsibility, contumacious behavior 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 the evidence supports the conclusion that the conduct of appellant, even assuming the order was a probationary condition, constituted a willful violation of that condition.¹³

III. FAILURES TO APPEAR

According to the National Standards on Pretrial Release, 2020 Edition, "[d]ata 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."¹⁴ Data also suggests that "pretrial failure" is not as severe as perceived.¹⁵ Frequently, failures to

¹² *Id.* at 377.

¹³ *Id.* at 379.

¹⁴ National Association of Pretrial Services Agencies, *Standards on Pretrial Release: Revised 2020*, NAPSA, at 72 (2020).

¹⁵ *Id.*

appear are not willful abscondences from court, but rather involve circumstances that can be resolved without significant change to a defendant's bail status.¹⁶

IV. THE JOINDER OF FAILURE TO APPEAR

A. 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*,¹⁷ the prosecutor charged Vincent Bryant with bail jumping and robbery in the second degree.¹⁸ The trial court joined the two offenses for trial.¹⁹ The Court of Appeals of Washington later agreed, noting:

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.²⁰

The court acknowledged:

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 favor of conserving judicial and 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.²¹

¹⁶ *Id.*

¹⁷ 89 Wash. App. 857 (Wash. Ct. App. 1998).

¹⁸ *Id.* at 862.

¹⁹ *Id.* at 863.

²⁰ *Id.* at 867.

²¹ *Id.*

B. The Stricter Standard

Another court has lifted the joinder benchmark in cases involving failure to appear. In *Guthrie v. State*, A jury convicted David Guthrie of failure to appear in connection with his fourth-degree assault.²² After the State indicated its intention to consolidate the trial, Guthrie asked the court to sever the charges.²³ The court denied this request.²⁴ The Court of Appeals of Alaska later reversed in part, noting:

[m]any 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).²⁵

The Court of Appeals of Alaska then suggested:

[a]mong 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 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.²⁶

V. 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

²² 222 P.3d 890, 891 (Alaska Ct. App. 2010).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 894.

²⁶ *Id.*

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, then 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 trials does not alleviate doubts concerning whether jurors will conclude the defendant must necessarily be guilty of the crime charged (or he would not have jumped bail), then the failure to appear joinder benchmark should be lifted.

A. 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 other sanctions should be? The Court of Appeals of Alaska in *Guthrie* relied on *State v. Haag* and indicated:

[w]hile 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 to the jury to infer consciousness of guilt from Guthrie's failure to appear.²⁷

But the court rejects the concern that joinder of the failure to appear was proper and notes, "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 to reversal of his assault conviction."²⁸

The Commentary accompanying Standard 4.6 indicates that "[w]hile 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."²⁹ 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. For instance:

²⁷ *Id.* at 895 n.7. (citing *See State v. Haag*, 176 Mont. 395, 578 P.2d 740, 746 (1978)).

²⁸ *Guthrie*, 222 P.3d at 895.

²⁹ National Association of Pretrial Services Agencies, *supra* note 14, at 75 (2020).

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, “[t]his is your last break.”³⁰

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 think the People, the lawyer for the People even thought she was going to get her life together.³¹

Conversely, it is uniquely easy to create, and difficult to attend to absences from court. In *Swisher v. U.S.*,³² 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] willful 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.³³

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 willful failure, and when you get

³⁰ See *e.g.*, *State v. Bryant*, 89 Wash. App. at 863 (1998).

³¹ See *e.g.*, *People v. Zaring*, 8 Cal. App. 4th 362, 367–77 (Cal. Ct. App. 1992).

³² 572 A.2d 85 (D.C. 1990).

³³ *Id.* at 87.

entangled in the criminal justice system, allegedly, I assume for Mr. Swisher, driving into D.C. to take advantage of those open air drug markets, and provide that market, making this city a shambles, then you have to be willing to abide by the consequences of being required to show up in court on time.³⁴

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 Honor, 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 Honor, 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—³⁵

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

[w]e 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 defense.³⁶

In addition, it is exceptionally easy to fail to arrange transportation to court. Such a feat might consist of life not always being predictable, which can be accomplished by something as simple as it is snowing that day or more complex like not having a driver's license, and the neighbor being unable to leave her children at home.³⁷ In the end, the proof of the ease of appearing to jump bail is largely in the pudding. The Court of Appeals of Washington reversed a bail jumping conviction where Delphine Jackson testified she attempted to get to the hearing, missed the hearing because her truck brown 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.³⁸

³⁴ *Id.* at 88 n.4.

³⁵ *Id.* at 88.

³⁶ *Id.* at 92.

³⁷ *E.g.*, *Abell v. Commonwealth*, 2007 WL 737540 (Va. Ct. App. 2007).

³⁸ *State v. Jackson*, 188 Wash. App. 1053, 1–2 (Wash. Ct. App. 2015).

B. 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.³⁹ 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 Standard 10-5.5 provides:

This Standard outlines two possible responses when a defendant has willfully failed to appear for a scheduled court date or violated another condition of release. It provides that a willful violation of release conditions may be prosecuted as criminal contempt. In addition, it encourages jurisdictions to criminalize a willful failure to appear in court without just case.⁴⁰

1. *The Contempt Hearing*

First, “[t]he judicial officer may order a prosecution for contempt if the person has willfully failed to appear in court or otherwise willfully violated a condition of pretrial release.”⁴¹ In *People v. Douglas*,⁴² a hearing hinged on the willfulness of Jack Douglas not being able to secure a ride to court, attempting to hitchhike, giving up hitchhiking, and starting for home.⁴³ The Appellate Court of Illinois held 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.”⁴⁴

In the 21st century, however, the extraordinary has become ordinary, and the notion that many events will not appear that stop people from attending court seems quaint. And yet, many courts deem people willfully failed to appear based upon the assumption people did not want to be on time. In *Thompson v. U.S.*,⁴⁵ the judge remarked that “this is at least ... [the] fourth or fifth time in the course of Mr. Thompson’s many appearances before this

³⁹ *Guthrie*, 222 P.3d at 894.

⁴⁰ Criminal Justice Section, “Pretrial Release Black Letter With Commentary”, *supra* note 6, at 116.

⁴¹ *Id.* at 115.

⁴² 73 Ill. App. 3d 520 (Ill. App. Ct. 1979).

⁴³ *Id.* at 521.

⁴⁴ *Id.*

⁴⁵ 690 A.2d 479 (D.C. 1997)

court that he has been late, without even presenting anything remotely passing as a satisfactory excuse.”⁴⁶ When the court reconvened the same day to consider the 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.”⁴⁷ The judge stated:

these past latenesses 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.⁴⁸

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

[w]hen 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 evidence relating to October 25, 1994, falls short of proving willfulness or recklessness.⁴⁹

Additionally, as was the case for David Guthrie, Robert Williams’s case started and ended with 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 twenty-four hours 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.⁵⁰ No findings were made that his failure to appear was willful; the judge stated only that, although Williams might be in the military, his nonappearance was “not acceptable to me.”⁵¹ The District Court of Appeal of Florida found:

[w]e 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’s nonappearance for calendar call was willful and whether there are any reasonable conditions of release which would assure Williams’s presence at trial.⁵²

⁴⁶ *Id.* at 480.

⁴⁷ *Id.* at 481.

⁴⁸ *Id.*

⁴⁹ *Id.* at 484–85.

⁵⁰ *Williams v. State*, 59 So.3d 387 (Fla. Dist. Ct. App. 2011).

⁵¹ *Id.* at 387–88.

⁵² *Id.* at 388.

In order for any of these rulings to hold water, it would have to be extraordinary for people to miss court with 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.⁵³ In *Thompson*, the District of Columbia Court of Appeals acknowledged:

[o]ther 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.⁵⁴

Moreover, in *Williams*, Williams, as a member of the Florida National Guard, was called up by his special forces unit and was given only twenty-four hours notice to go into Africa.⁵⁵ The court did not hold that Williams did not have more than enough reason for his nonappearance to be something other than willful.

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 that allows for failure to appear joinder. For instance, in *Bouie v. State*,⁵⁶ the extent of the proceedings were 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.

⁵³ See *Douglas*, 73 Ill.App.3d at 521 (“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.”).

⁵⁴ 690 A.2d. at 485.

⁵⁵ See *Williams*, 59 So.3d at 387.

⁵⁶ 784 So.2d 521 (Fla. Dist. Ct. App. 2001).

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?

DEFENSE COUNSEL: No objection.

COURT: Alright, I just want him to be sentenced to time served on that failure to appear.⁵⁷

The District Court of Appeal of Florida reversed, noting:

The proceedings in this case indicate a lack of due process. 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 3.830.⁵⁸

Bouie reflects the reality that failing to appear in court might not really make the defendant guilty of contempt. Accordingly, courts should rely on something more than a broad “No objection” from the defense or state to find people guilty of contempt for failure to appear.

2. *The Failure To Appear*

Second, Standard 10-5.5 indicates that “Willful failure to appear in court without just cause after pretrial release should be made a criminal offense.”⁵⁹ In *State v. Khadijah*,⁶⁰ the Appellate Court of Connecticut reversed a failure to appear jury verdict finding:

[w]orking 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 absenting 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 fall

⁵⁷ *Id.* at 522.

⁵⁸ *Id.* at 523.

⁵⁹ Criminal Justice Section, “Pretrial Release”, *supra* note 6.

⁶⁰ 98 Conn. App. 409 (Conn. 2006).

asleep, it supports the defendant's claim of nonwilfulness.⁶¹

In another case involving willfully failing to appear, however, the prosecution only went forward with the willful failure to appear that came last—the last will and testament—that is the other counts were later dismissed. For instance, in *Foster v. U.S.*,⁶² the trial court stated:

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

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

Now [the defense has] conceded generally that, ... [Mr. Foster] was directed to appear on a date certain. He knew it and ... he did not appear. Rather [he] offer[s] a defense. The defense 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 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.⁶³

The District of Columbia Court of Appeals remanded finding:

[w]hen 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

⁶¹ *Id.* at 418–19.

⁶² 699 A.2d 1113 (D.C. 1997).

⁶³ *Id.* at 1114–15.

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. He was able to leave Montreal at 12 noon on August 8, when he received a return assignment, but could not get back in time for his scheduled trial. In short, Mr. Foster testified that he intended to appear in court on August 8, as scheduled, and did not deliberately stay away from court.⁶⁴

Meanwhile, in *State v. Ross*,⁶⁵ the Court of Appeals of Oregon reversed a failure to appear conviction noting:

[t]he legislatures'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.⁶⁶

These cases illustrate at least two problems with applying a lesser version of a joinder three prong test to failure to appear charges. In these cases, the fact that the original prosecution might not be able to convict through a jury trial or bench trial, and ultimate plea 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 verdict, courts in cases like *Foster* and *Ross* illustrate the failure to appear charge is the charge that might result in a conviction. In *Ross*, "Defendant stipulated to having not appeared, but sought to introduce as evidence in his defense 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 UUV charge."⁶⁷ In *Foster*, "[t]he case charging Mr. Foster with four misdemeanor counts was later dismissed for want of prosecution."⁶⁸ Courts such as the *Khadijah* court also seem to grasp the way that court dates work in determining failure to appear. For an attorney to defend a client's absence from court, the attorney might prepare that case separately. In *Khadijah* the transcript records the following discussion:

⁶⁴ *Id.* at 1116.

⁶⁵ 859 P.2d 569, 571 (Or. Ct. App. 1993).

⁶⁶ *Id.*

⁶⁷ *Id.* at 569.

⁶⁸ *Foster*, 699 A.2d at 1114 n.2.

DEFENSE 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 Honor. 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.

[DEFENSE COUNSEL]: I mean, Your Honor-

THE COURT: I don't think I'm inclined to do that."⁶⁹

An exchange addressed the late-to-court client:

Later that day, defense 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 defense counsel requested that the court consider the rearrest order. The court responded, "She did willfully fail to appear. She willfully failed to appear, and I don't want to hear any more. I'm not recalling the matter. Do you have any other matters?"⁷⁰

The state nolledd the first three counts, opting to prosecute only the failure to appear.⁷¹ Therefore, the fact that the defendant in *Khadijah* had a trial start with a failure to appear and other charges says 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 was the Supreme Court of Vermont in *In re Miller*.⁷² In *Miller*, the court noted that Jason Miller was required to check in daily at the Brattleboro Police Station but found about § 7559 that "[t]herefore, 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)."⁷³ In *State v. McColly*,⁷⁴ the Supreme Court of Oregon found that the failure to appear was not willful suggesting that "[b]ut 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

⁶⁹ *State v. Khadijah*, 909 A.2d 65, 66–67 (Conn. App. Ct. 2006).

⁷⁰ *Id.* at 67.

⁷¹ *Id.*

⁷² *In re Miller*, 975 A.2d 1226 (Vt. 2009).

⁷³ *Id.* at 1231–32.

⁷⁴ 435 P.3d 715 (Or. 2019).

release.”⁷⁵

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

In *Espinal v. Ryan*,⁷⁶ the District Court of Appeal of Florida granted a petition to reinstate the defendant’s bond observing:

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 were 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.⁷⁷

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.⁷⁸

A court used a similar analysis to address not appearing at a plea and arraignment. In *Stewart v. State*,⁷⁹ the Court of Appeals of Arkansas reversed a failure to appear conviction:

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 was keeping it up, but she just—the utilities and stuff was down, and the 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.⁸⁰

⁷⁵ *Id.* at 727–28.

⁷⁶ 31 So.3d 818 (Fla. Dist. Ct. App. 2010).

⁷⁷ *Id.* at 819.

⁷⁸ *Id.*

⁷⁹ 200 S.W.3d 465 (Ark. Ct. App. 2004).

⁸⁰ *Id.* at 466–67.

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.⁸¹

There is at least one problem with applying a lesser version of a joinder three prong test. According to the Commentary to Standard 4.6 “Frequently, failures to appear are not willful abscondences from court, but rather involve circumstances that can be resolved without significant change to a defendant’s bail status.”⁸² This issue, of course, could partially be remedied by two of the solutions proposed in the Commentary to 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 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.⁸³

*Clark v. State*⁸⁴ is a case in which Kirk Clark was charged with breaking and entering a vehicle in a parking lot at the University of Arkansas in Fayetteville.⁸⁵ Clark filed a motion to sever the breaking-or-entering and failure-to-appear charges, which the court denied.⁸⁶ The Court of Appeals of Arkansas noted:

Regarding notice of the time for his trial, he points out that the order resetting

⁸¹ *Id.* at 467.

⁸² Nat’l Ass’n of Pretrial Services Agencies, Standards on Pretrial Release: Revised 2020, 72 (2020), https://cdpsdocs.state.co.us/ccjj/committees/PRTF/Handout/2020_NAPSA_StandardsOnPretrialRelease.pdf.

⁸³ *Id.* at 75.

⁸⁴ 457 S.W.3d 305 (Ark. Ct. App. 2015).

⁸⁵ *Id.* at 307.

⁸⁶ *Id.*

the case merely gave a date without a time. Regarding a reasonable excuse for his tardiness, he relies on his own testimony and that of defense witness Cpl. Doc Fyte, who was working in courthouse security on March 11, 2014. Corporal Fyte testified that he encountered Clark on the elevator around 9:05 a.m. on March 11; that Clark was hurrying to get to court and told Fyte that he (Clark) was late; that on his way, Clark told his sister to alert people at court that he was running late; and that Fyte made sure Clark got to the court door. Clark testified to the same events. He added that he had thought trial was at 9:00 a.m.; he drove to the nearby town of Winslow at 5:00 a.m. to shower at a friend's house because he (Clark) had no water; his truck became stuck in the snow; and he phoned his sister, who was already at court.

We agree with Clark that there was insufficient evidence to show that he knew trial was set for 8:30 a.m.⁸⁷

The court acknowledged:

The circuit court orally announced its reason for denying the motion for severance: "Mr. Clark failed to appear for trial back when this case was set for trial. My view is his failure to appear is some evidence of consciousness of guilt.... I don't feel as though the prejudicial effect of that evidence outweighs the probative value."⁸⁸

The court reversed the conviction for failure to appear concluding that "In the present case, however, the trial court improperly denied Clark's motion to sever offenses simply upon finding that his failure to appear was "evidence of consciousness of his guilt."⁸⁹

In *State v. Haag*,⁹⁰ Calvin Haag was charged with felony issuance of bad checks in connection with a payment of past child support and felony bail-jumping.⁹¹ Haag failed to appear for his preliminary examination.⁹² After it reversed the bad check conviction on a witness basis, the Supreme Court of Montana concluded:

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. 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,

⁸⁷ *Id.* at 309.

⁸⁸ *Id.*

⁸⁹ *Id.* at 310.

⁹⁰ 578 P.2d 740 (Mont. 1978).

⁹¹ *Id.* at 742.

⁹² *Id.*

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 at most people acted negligently, or no evidence 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.

VI. CONCLUSION

Courts are increasingly at a crossroads with regard to consolidation of failure to appear. One court clings to the belief that failure to appear joinder is permissible even though the circumstances did not indicate an 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 the prosecution only goes forward with the willful failure to appear that came last—the last will and testament—where jurisdictions should not allow failure to appear joinder unless the circumstances of the failure to appear to 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.

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⁹³ *Id.* at 746.