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DisAPPEARing Act: Arkansas's Circularly-Defined Default

Judge Victor A. Fleming

ESSAY: DISAPPEARING ACT: ARKANSAS'S CIRCULARLY-DEFINED DEFAULT

Judge Victor A. Fleming[*]

I. INTRODUCTION

"Dannie Danielson? Dannie Danielson. Is there a Dannie Danielson in the courtroom?"

During my first few years on the bench, I developed the practice of calling a person's name three times before announcing that a failure-to-appear (FTA) warrant would be issued. For twenty years, traffic cases were all I handled. It seemed odd to me that the charge I saw more than any other was not impaired driving, speeding, or inattention, but rather FTA.

Most people who monitor the administration of justice agree that FTA is a significant problem in courts nationwide. This, in fact, was an observation in a 2011 report commissioned by the United States Department of Justice.[1] From dealing with about 5,000 FTA defendants per year since 1997, I can vouch for the fact that it *is* a problem in Pulaski County, Arkansas.

According to the records of Little Rock Traffic Court (now officially known as Little Rock District Court–Second Division, a "department" of the Thirty-First State District Court[2]) maintained by the Arkansas Administrative Office of the Courts, in a recent ten-year period (2009-2018), the court in which I preside disposed of 224,182 citations.[3] Those citations included

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1. BRIAN H. BORNSTEIN ET AL., REDUCING COURTS' FAILURE TO APPEAR RATE: A PROCEDURAL JUSTICE APPROACH 1 (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf. This report, which examined the effectiveness of various written reminders to reduce FTA rates in misdemeanor cases in fourteen Nebraska counties, concluded essentially that reminders "significantly reduced FTA overall, and more substantive reminders were significantly more effective than a simple reminder" and that people who do show up in court tend to have a higher regard for the system than those who do not. *Id.* The concepts addressed by that report are outside the scope of this essay.

2. *See* ARK. CODE ANN. §§ 16-17-1113(m)(1), (2)(B)(ii) (2019). Effective January 1, 2021, the Thirty-First District, which previously consisted of Pulaski County, will comprise Pulaski and Perry Counties. It has twelve departments served by eight judges. *Id.* §§ 16-17-1113(m)(1)–(3).

3. Email letter from Syed Ameenuddin, Court Data Quality Analyst, Arkansas Administrative Office of the Courts, to Jessica Bennett, Court Administrator, Little Rock District Court–Second Division (Sept. 30, 2019) (copy on file with UA LITTLE ROCK LAW REVIEW).

352,307 charges[4] other than failure to appear, failure to pay,[5] or failure to comply with court orders.[6] During that same time frame, the court disposed of 50,352 charges of FTA.[7] Do the math: On average, more than twenty percent of citations dealt with included at least one charge of FTA.

I used to call FTA and its two "kissing cousins"—failure to pay[8] and failure to comply[9]—"the three F's." And, while I might be able to write a book about my experiences in presiding over proceedings involving these offenses, this essay is concerned only with FTA. The Arkansas General Assembly has enacted *two* laws that address FTA. One is contained in Title 5, "Criminal Offenses," and, aptly, defines an offense and stipulates sentences. The other is contained in Title 16, "Practice, Procedure, and Courts," and, for the most part, empowers judges, beyond the sentencing provisions of Title 5, to sanction those who do not show up in court after being duly notified to do so. In contrast, only one federal statute[10] addresses FTA; it, of course, is never applicable in state court.

In my view, Arkansas's statutory law regarding FTA should be amended. One statute ought to be enough, and it should set forth, in easily-understandable language, what FTA is and how it is to be punished. The federal statute on the topic is instructive and could perhaps be considered in the amendment process.

II. *STATE V. DANIELSON*, LARGE ROCK DISTRICT COURT

Let's begin with a hypothetical, in a fictional court, that might serve to illustrate how FTA often comes into play in a relatively simple traffic case.

4. *Id.*
5. *See* ARK. CODE ANN. §§ 16-13-701–703 (2019).
6. *See id.* § 16-10-108(a)(3) (2019).
7. Ameenuddin, *supra* note 3.
8. *See* ARK. CODE ANN. §§ 16-13-701–703 (2019).
9. *See id.*
10. *See* 18 U.S.C. § 3146 (2019).

On January 1, 2019, Dannie Danielson receives an electronic citation[11] ("the Ticket"). She is charged with a violation of Arkansas Code Annotated section 27-51-104, which is captioned "Careless and prohibited driving." The Ticket reads in part as follows:

> Court Appearance Information — Date — Time
> LARGE ROCK D.C. — 01/23/2019 — 9:00 AM
> 600 MARKED MAN ST
> LARGE ROCK, AR 77777
>
> Defendant must appear in court at said time and place or otherwise comply with the provisions of this complaint and instructions of the NOTICE part of this ticket.
> NO SIGNATURE REQUIRED
> Pursuant to §27-50-603[12]

A. The Arraignment FTA

On January 23, 2019, court is called to order in the Large Rock District Court (LRDC) courtroom at 8:30 a.m. Dannie's case is among those that are called. Dannie is not present. When court concludes at 11:30 a.m., Dannie has not been seen. To the observation of the judge, and other court officials, Dannie has not been present at any time during the court's session. No letters or pleadings have been received from her or from anyone on her behalf.

So, now what happens? First, we must ask what law or laws apply. Section 5-54-120 of the Arkansas Code reads:

> (a) As used in this section, "pending charge" means a charge that results from an arrest or issuance of a citation or criminal summons, or after the filing of a criminal information or indictment and that has not been resolved by acquittal, conviction, dismissal, or nolle prosequi.[13]

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11. A "citation" is a "written order or electronic ticket issued by a law enforcement officer . . . requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date and time." ARK. CODE ANN. § 16-10-202(1) (2019). An "electronic ticket" is "an electronic citation or warning printed by a law enforcement officer and issued to a person accused of violating the law." *Id.* § 16-10-202(3).

12. Section 27-50-603(d)(2) of the Arkansas Code provides that "If issued an electronic citation," a defendant "acknowledges receipt of the notice to appear in court and gives his or her promise to appear in court by acceptance of the electronic citation." *Id.* § 27-50-603(d)(2).

13. Act 322 of the 2019 General Assembly (codified at ARK. CODE ANN. § 5-54-120(a) (2019)) amended the definition of *pending charge* in this statute. Act 538 of 2015 had defined *pending charge* as one "that results from an arrest or after the filing of [*sic*] a criminal information or indictment and that has not been resolved . . . ." The 2019 amendment inserted

> (b) A person commits the offense of failure to appear if he or she fails to appear without reasonable excuse subsequent to having been:
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> (1) Cited or summonsed as an accused; or
>
> (2) Lawfully set at liberty upon condition that he or she appear at a specified time, place, and court.[14]

Subsection (c) then classifies FTA on an irregularly sliding scale: FTA on a violation is a Class C misdemeanor.[15] On a Class B or C misdemeanor, FTA is a Class B misdemeanor.[16] On a Class A misdemeanor, FTA is a Class A misdemeanor.[17] For an unclassified misdemeanor, FTA is an "unclassified misdemeanor with the same penalty."[18] For felonies, FTA is either a Class B or C felony, depending on whether or not a probation revocation is involved.[19] This section concludes by stipulating that none of the above applies "to an order to appear imposed as a condition of suspension or probation under § 5-4-303."[20]

Perhaps this irregularly structured approach to punishment for those found guilty of FTA has some basis in logic. However, in over twenty-three years of working with this law, I have not been able to figure it out. It's confusing.

In the case of misdemeanors, which are all I deal with where sentencing is concerned, I would recommend that the penalty range be analogous to a Class-A misdemeanor. That is, a fine of up to $1,000, imprisonment of up to one year, or both.[21] In felony cases, I'd recommend a similar approach, with a harsher range: a fine of not less than $1,000 nor more than $10,000, imprisonment of not less than one year nor more than ten years, or both.

I would recommend that FTA not be classified with a letter designation or even that it be called a misdemeanor or felony. I would simply spell out

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the language "or issuance of a citation or criminal summons," along with a comma, between *arrest* and *or*. Apparently, the drafters of the 2015 definition overlooked that, in district court, lots of folks manage to get court dates without there having been an arrest, an information, or an indictment. Both the 2015 and the 2019 measures are afflicted with a lack of parallelism. As I see it, subsection (a) should read, in pertinent part, "a charge that results from an arrest, from the issuance of a citation or criminal summons, or from the filing of a criminal information or indictment and that has not been resolved . . . ." Which is to say that there are three causes of a pending charge, each described [preposition] [article] [noun]—i.e., with appropriate parallelism.

14. ARK. CODE ANN. §§ 5-54-120(a)–(b) (2019).
15. *Id.* § 5-54-120(c)(7) (2019).
16. *Id.* §§ 5-54-120(c)(4), (5) (2019).
17. *Id.* § 5-54-120(c)(6) (2019).
18. *Id.* § 5-54-120(c)(3) (2019).
19. *Id.* §§ 5-54-120(c)(1), (2) (2019).
20. ARK. CODE ANN. § 5-54-120(d) (2019).
21. *Id.* § 5-54-120(c)(6) (2019).

the possible punishment. This would give the trier of fact considerable latitude to determine the relative seriousness of the offense on a case-by-case basis.

Another provision that may apply, eleven titles further in, is section 16-17-131, which provides:

> (a) A person required to appear before a district court in this state, having been served with any form of notice to appear for any criminal offense, traffic violation, or misdemeanor charge, shall appear at the time and place designated in the notice.[22]
>
> (b)(1) If a person fails to appear as required in subsection (a) of this section, the presiding judge may suspend the person's driver's license.
>
> (2) The license shall be suspended until the person appears and completes the sentence ordered by the court.
>
> (3) After the person satisfies all requirements of the sentence, the Department of Finance and Administration shall assess the current fees for reinstatement of a driver's license.[23]

Suspending the driver's license (DL) of one who does not show up for court is permissible but not mandatory.[24] Nonetheless, pursuant to standard LRDC procedure, a warrant is issued, charging Dannie with failure to appear (FTA) under section 5-54-120, and her license is suspended.

B. The Plea Bargain

A few days after an FTA warrant was issued, Dannie appears with counsel in LRDC. She has not yet been arraigned on the original charge of careless and prohibited driving, a violation punishable by a fine of up to $100.[25] And now, in addition to that, she faces a charge of FTA—a Class C misdemeanor punishable by a fine of up to $500, plus up to thirty days in jail.[26] She has the right, of course, to plead not guilty to both charges.

Further compounding the issue is that Dannie was issued an *electronic* citation. Differently than was the case for many years before enactment of

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22. A circular definition (see note 31, *infra*) provides that one who is *required to appear*, because she was served with a *notice to appear*, shall *appear*. Why section 5-54-120 is not mentioned I cannot say.

23. ARK. CODE ANN. § 16-17-131 (2019). Issues involved with DL suspension and reinstatement are outside the scope of this essay. In many courts, it is routine procedure to suspend a defendant's DL each time he or she fails to show up in court.

24. ARK. CODE ANN. § 16-17-131(b)(1) (2019).

25. *Id.* § 27-51-104(c).

26. *Id.* § 5-4-201(b)(3); *id.* § 5-4-401(b)(3).

the statute authorizing electronic citations,[27] Dannie's signature does not appear beneath the words "I promise to appear in court . . . ." Whether and to what extent the legislature viewed this aspect of the statute as problematical, I cannot say, but section 27-50-603(d) shows that there was at least some awareness of the issue:

> (1) If issued a written citation, the arrested person in order to secure release, as provided in this section, must give his or her written promise so to appear in court by signing in duplicate the written notice prepared by the arresting officer . . . .
>
> (2) If issued an electronic citation, the arrested person in order to secure release, as provided in this section, acknowledges receipt of the notice to appear in court and gives his or her promise to appear in court by acceptance of the electronic citation.[28]

Assuming we can get past the issue of Dannie's being an *arrested person*, how are we to determine whether Dannie *accepted* the citation? Law enforcement officers who issue citations are typically not present for arraignments, and prosecutors have few, if any, details at hand about the case at that stage of a proceeding. Thus, the issue of whether Dannie *accepted* the citation for the primary charge looms. If she did *not* accept the citation, where does that put us?

A Class C misdemeanor being punishable by incarceration,[29] it is not unreasonable to think that Dannie—as well as thousands of others in her shoes—will exercise the right to remain silent at arraignment, as her defense counsel takes the position that there is a Due Process issue as to notice of the date, time, and place of the first court date. While some electronic citations mirror the hypothetical prototype set forth above, others do call for a signature.[30] "Acceptance" is not a defined term in the statute. Questions that might arise in the courtroom include:

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27. *Id.* § 27-50-601 et seq.

28. *Id.* § 27-50-603(d).

29. *See id.* §§ 5-4-201(b)(3), 5-4-401(b)(3).

30. In my experience, it is not uncommon for a citation, electronic or otherwise, to contain some erroneous data. A frequent item that is input inaccurately is the arraignment date and time. Court staff is trained to look for this, and clerks send a letter to defendants with the correct date and time. Notice so sent is only as good as the address to which it is sent. In my observation, a disproportionate percentage of people who do not show up in court as and when called for in a letter sent to them by the court will, when offering reasons for their absence, cite address issues. *E.g.*, frequently, the address on the citation—and, therefore, the address to which the court sent the letter—is not where they live now. No, they typically do *not* know that Arkansas law calls for them to notify the State when they change addresses. Yes, they were *certainly* going to get this fixed when the time came to renew their licenses.

- Whether physical receipt of a copy of an electronic citation constitutes acceptance under all circumstances;
- Whether the citation ceases to be *electronic* if it is printed out on a piece of paper; and
- If the preceding issue is answered *yes*, whether a written promise to appear is then required to convict someone of FTA.

These issues have been omnipresent in my courtroom since the onset of electronic citations, and have not yet been litigated in a full adversarial proceeding.

As with all criminal offenses, the burden of proof on the FTA charge lies with the prosecution. If a defendant pleads not guilty to FTA, then the prosecution must be prepared to prove all elements of the offense. What, then, are the elements of FTA? In addressing FTA, the Arkansas General Assembly has given the State a classical circular definition.[31] The words "fails" and "appear" are parts of the definition:

> (b) A person commits the offense of failure to appear if he or she fails to appear without reasonable excuse subsequent to having been:
>
> (1) Cited or summonsed as an accused; or
>
> (2) Lawfully set at liberty upon condition that he or she appear at a specified time, place, and court.[32]

So, literally, this law says that a person commits "failure to appear" if he or she *fails* to *appear*. In fairness to the law-writers, though, the statute also provides that the subject's absence must be lacking a legitimate reason. Despite the circuitousness, perhaps we may identify the elements of the offense:

(1) The person has been properly "cited" or "summonsed;"

(2) The citing or summonsing has occurred in a criminal context—that is, the person must have received the citation or summons "as an accused;" *or*

(1) The person has been "lawfully set at liberty"

(2) On the condition that he or she show up at a specified "time, place, and court"; *and*

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31. This practice is frowned upon by those who instruct on how to write definitions. *See* PURDUE ONLINE WRITING LAB, *Writing Definitions*, https://owl.purdue.edu/owl/general_writing/common_writing_assignments/definitions.html (last visited Dec. 13, 2019) ("Do not define a word by mere repetition or merely restating the word.").

32. ARK. CODE ANN. § 5-54-120(b) (2019).

(3) The person does not show up in court as she was cited or summonsed to do, or as she was supposed to do as a condition of being lawfully set at liberty.

In my opinion, those three elements are clear. But now we must consider and deal with element number 4:

(4) The person's not showing up is not due to circumstances recognized by law as superseding the obligation created by the citation, summons, or conditional release.[33]

In essence, FTA, in the criminal context, is not being physically present where and when one has been lawfully ordered to be physically present unless one has a reason that the law will recognize as "reasonable" for the absence. And what a term "reasonable excuse"[34] is! Nowhere does the Code define it or either of its component parts.[35]

The issue of whether one who does not show up for court has what the law will recognize as a reasonable justification for her absence is an unusual and separate issue. Once the first three elements are proved, or admitted, must the defense then somehow get into the record the reason she was not there when she was supposed to be? If not, is the State's proof of notice and non-appearance sufficient to carry the day? It is clear from federal jurisprudence that notice and non-appearance, standing alone, are *not* sufficient to convict for FTA. But the analogous federal statute differs from the Arkansas statute by its use of the word "knowingly."[36]

Given the terminology "without reasonable excuse," the prosecution should do something to communicate to the court that there has been no communication from the defendant to the court regarding an excuse, if that is the case. If the defendant has in some manner communicated an excuse to either the court or the prosecution, then some showing should be made rela-

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33. That's my definitional description of "without reasonable excuse."

34. A discussion of the term "reasonable excuse," as interpreted in a different context may be found in an unrelated case from another jurisdiction, in which the judge opined:

> [T]he "reasonable excuse" standard . . . continues to be elusive because its application is largely dependent on the particularities of each case. Courts have found that ignorance of the law, operating under the impression that the issue could be resolved without litigation, failure to retain or effectively communicate with counsel, counsel's own negligence or delay in complying with the [law], ongoing medical treatment, and injuries that do not hinder the claimant's ability to communicate with others, are not, by themselves, sufficient to support a finding of "reasonable excuse."

Faulknor v. Virgin Islands, 60 V.I. 65, 76 (Super. Ct. 2014) (footnotes and citations omitted).

35. "Reasonable" is a defined term in Rule 1.0 of the Arkansas Code of Professional Responsibility, but the analogy is hardly apt.

36. *See* 18 U.S.C. § 3146(a)(1) (2019).

tive to its credibility if the prosecutor disbelieves it or as to its reasonableness if the prosecutor is prepared to accept what the defendant offers as true.

The point is that element four of the offense cannot be ignored.[37] The prosecution must prove the first three elements with affirmative proof and, as to element four, somehow demonstrate either that the defendant has never explained why he was absent or that the defendant's proffered excuse is not of such a caliber as to excuse the absence. It is up to the court then to determine whether the excuse is reasonable, and that will almost always require some degree of evidence and testimony.

In some circumstances, it may be deemed by a court that, after the prosecution proves (1) proper notice to the defendant; (2) the defendant's absence; and (3) no contemporaneously-communicated excuse, a presumption has arisen that element four has been established *prima facie*. Some presentation from the defense is then needed to rebut the presumption with some excuse. If the defense rebuts the presumption, the burden then shifts back to the prosecution to challenge the excuse as not being reasonable. Obviously, these are issues for the trier of fact to take up.

There is not much state case law on this issue. In *Clark v. State*,[38] a jury conviction of the appellant Clark for failure to appear was reversed. The salient fact was that, in an order granting a continuance, the trial was reset to a date certain (March 11, 2014), but was "conspicuously void of a specified time."[39] Court had convened at 8:30 a.m. The judge released the jury at 9:00 a.m. Clark arrived about 9:05, with a long and colorful story regarding how and why he had run late. The appellate court found that there was not "substantial evidence that Clark was informed of the specific time of his trial."[40]

In an earlier case, *Harris v. State*,[41] the court held that when a defendant was present with counsel at arraignment where a trial date, in which no start-time was mentioned, was announced, Due Process was not violated by charging him with FTA. The record therein reflected, though, that, as the trial date approached, neither defense counsel nor the sheriff nor the bail bondsman could locate Harris. And Harris's stated reason at trial for not

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37. The federal counterpart to this *reasonable excuse* standard is *uncontrollable circumstances*. *See* 18 U.S.C. § 3146 (c) (2019).

38. 2015 Ark. App. 142, 457 S.W.3d 305.

39. *Id.* at 6, 457 S.W.3d at 309.

40. *Id.* at 5–6, 457 S.W.3d at 309 ("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.").

41. 6 Ark. App. 89, 638 S.W.2d 698 (1982).

showing up on his original trial date was that he thought the charges were going to be dropped.[42]

In *Atkins v. State*,[43] the Supreme Court reversed a burglary conviction with a ten-year sentence while affirming a conviction for failure to appear with a four-year sentence. Atkins claimed he was advised by his lawyer not to show up for his first sentencing hearing on the burglary charge.[44] Justice Newbern's take on this was that "[e]ven if Atkins had proven conclusively that he was advised by his lawyer not to appear, it is our opinion his failure to appear . . . would not have been excused. He is arguing he committed this crime because his lawyer told him to, and thus his conviction should be vacated because his lawyer was [therefore] ineffective."[45]

Thus, the FTA case law is not definitively helpful on the issue of how this concept of "reasonable excuse" comes into play procedurally. And that may be a primary reason for FTAs being treated as they are treated on a day-to-day basis in high-volume courts.

In my high-volume traffic court, ninety percent of all cases are resolved by plea bargains.[46] This includes the numerous cases in which a defendant is charged with FTA. I would venture that closer to 99% of all FTA charges are resolved via plea bargain.

When a defendant comes in shortly after an arraignment FTA has been issued, the prosecution will almost always recommend dismissal of the FTA if the defendant is willing to plead guilty to the underlying primary charge—especially if there is a Due Process notice issue because of an electronic citation's not containing a written promise to appear. In Little Rock Traffic Court, the majority of FTA charges are resolved by dismissal when there is only one offense. Where there is more than one FTA in one case, a no-contest plea for a stipulated fine to one, with a dismissal of others, is often approved as part of a plea agreement.

I almost never sit as the trier of fact in an actual hearing on whether an excuse for not showing up is reasonable. That said, the excuses I've heard over time include being in another court on another case, waiting in the wrong courtroom in the same building, having to deal with an unexpected illness or death, getting one's "days mixed-up" or other phraseology that suggests a scheduling error, not being able to get off work, forgetting, not having transportation, having transportation issues while traveling toward the courthouse, losing one's job, and moving out of town or out of state. No,

42. Harris v. State, 6 Ark. App. 89, 91–92, 638 S.W.2d 698, 699 (1982).
43. 287 Ark. 445, 701 S.W.2d 109 (1985).
44. *Id.* at 447, 701 S.W.2d at 110.
45. *Id.*
46. "In cases in which it appears that it would serve the interests of the public in the effective administration of justice, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement." ARK. R. CRIM. P. 25.1(a).

the reasons are not always logically related to the offense. Yes, if everyone who failed to appear was convicted and sentenced to even a short term in jail, there would not be enough jail space.

In Dannie's case, a plea of no contest is accepted to the traffic offense. She is fined $100. The FTA is dismissed. And the court orders her DL to be reinstated without fee, as she was not convicted of the FTA charge.

III. THE TWO ARKANSAS FTAS

For the next few paragraphs, I will refer to a violation of Ark. Code Ann. § 5-54-120(b) as a "Title 5 FTA" and a violation of Ark. Code Ann. § 16-17-131 as a "Title 16 FTA." One might rationally ask whether a Title 16 FTA is independent of, and separate from, its Title 5 counterpart, and whether the elements of a Title 5 FTA are inherent in its Title 16 counterpart.

Within a Title 16 FTA is the provision that if the presiding judge suspends the DL of the FTA subject, then the license shall remain suspended "until the person appears."[47] This suggests that the court is authorized to suspend the license before the subject is convicted of the charge of FTA. The subsection's latter clause—providing that the license suspension continues until sentence is completed—implies that the suspension continues until a finding of guilt or innocence on the charge of FTA. If the finding is guilty, then the suspension is to continue until the FTA sentence is completed. But if the finding is not guilty, then logic dictates that the suspension be lifted.

There is no case law applicable to this section to provide guidance. But if the defendant is not convicted of FTA, she therefore has no sentence to serve for that offense. The term "sentence" logically cannot apply unless and until the person is convicted. Given the concept of a *conviction*, the inescapable logic is that the Title 5 FTA is necessarily the charge for which the conviction stands. After all, Title 5 is subtitled "Criminal Offenses," and Title 16, by contrast, is subtitled "Practice, Procedure, and Courts."

One might question the propriety of the legislature's inclusion of language in the Title 16 FTA statute that effectively adds punishment to the sentencing possibilities under the Title 5 FTA: DL suspension is not *per se* authorized as part of a sentence for a Title 5 FTA. But that issue is outside the scope of this essay. Moreover, while this essay does not address DL suspension and reinstatement, it seems to me that a DL reinstatement fee is to be charged only when a license is suspended as part of a sentence.[48]

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47. ARK. CODE ANN. § 16-17-131(b)(2) (2019).

48. ARK. CODE ANN. § 27-16-808(a) (2019) currently provides that the Arkansas Department of Finance and Administration Office of Driver Services "shall charge a fee . . . for

Under the Title 5 FTA definition, one would think, only following a trial in which a defendant's proffered reasoning for not showing up was addressed, and determined by the court not to be reasonable—or a knowing and intelligent waiver of one's right to such a trial has been received by the trial court—would a defendant have a *sentence* due to a conviction for FTA.

The Title 16 FTA language allows a presiding judge to suspend a person's DL preliminarily (perhaps for the purpose of incentivizing the defendant to get herself into court quickly following the FTA) and to leave the suspension in place following a conviction until sentence is served. If there is no sentence ordered for the FTA—because the defendant was not convicted of the charge—then, the DL suspension should be lifted.[49] While the law does not specify that the conviction must be for FTA,[50] it does seem clear from context that such conviction should either be for a Title 5 FTA, for a moving traffic violation under Ark. Code Ann. § 27-50-306, or for any other offense for which DL suspension is authorized or imposed.[51]

In summary, Arkansas's criminal law on FTA makes it illegal to not show up in court without a reasonable excuse. The term *reasonable excuse* is not defined and has not been directly interpreted in applicable case law. Permissible sentences follow an irregularly sliding scale, dependent upon the severity of the underlying offenses. Available punishments for FTA as set forth in the Title 5 FTA law run the gamut from a fine of up to $500 plus jail time of up to 30 days (Class C Misdemeanor)[52] to a fine of up to $15,000 plus 5–15 years in prison (Class B Felony).[53] And Title 16 permits preliminary suspension of DL for failure to appear, based on a non-express standard

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reinstating a driver's license suspended *because of a conviction* for violation of any offense" (emphasis added).

49. The relevant section provides:

> The reinstatement fee under this section shall be calculated by multiplying one hundred dollars ($100) by each separate occurrence of offenses under any other provision of the law resulting in:
>
> (i) A court order directing the office to suspend the driving privileges of the person; or
>
> (ii) The [ODS's] entering a suspension order.

ARK. CODE ANN. § 27-16-808(c)(1)(A).

50. Again, the statute directs assessment of "a fee . . . for reinstating a driver's license suspended because of a conviction for violation of *any offense*." *Id.* § 27-16-808(a) (emphasis added).

51. Other statutes that authorize, or automatically impose, DL suspension, either as part of a sentence or as part of a pre-conviction administrative sanction, include ARK. CODE ANN. §§ 5-36-120 (theft of motor fuel); 5-54-125 (fleeing); 5-65-104 (driving or boating while intoxicated); 5-65-204 (underage driving or boating under the influence); 5-65-304 and 310 (refusal to submit to chemical testing); 5-65-402(d)(2)(B) in tandem with 3-3-203(e) (purchase of possession by minor); 5-27-503(d)(3) (possession of fraudulent ID card).

52. *Id.* §§ 5-4-201(b)(3), 5-4-401(b)(3).

53. *Id.* §§ 5-4-201(a)(1), 5-4-401(a)(4).

of proof, directing that the suspension shall, if the judge declares it, remain in effect until some *sentence* is completed.

IV. FTA IN FEDERAL COURT

While not altogether without flaws, the treatment of FTA in the United States Code is direct, straightforward, to the point, and, relatively speaking, easy to understand. Before the basic FTA section[54] in the Code are several sections that expressly deal with situations in which a person might be ordered conditionally released.[55]

Judges, plus a few other officials, "before whom an arrested person is brought"[56] or before whom a convicted person stands "shall order that such person be released or detained"[57] pending trial, sentencing, or appeal.[58] 18 U.S.C. § 3142 specifically speaks to the authority of trial courts to release defendants pending trial. This section contains over 2,800 words, none of which touch on the issue of informing the defendant of the day, date, and time of the defendant's trial. 18 U.S.C. § 3143 addresses the issue of releasing convicted defendants pending appeal. Interestingly, the court is to lean heavily in favor of detaining those who have been found guilty.[59]

And then there is 18 U.S.C. § 3146, titled "Penalty for failure to appear." In it Congress does not define, circularly or otherwise, what *failure to appear* means. Instead, it just seems clear, from its wording, that it is only going to apply to people who knew where they were supposed to be and when:

> (a) Offense.—Whoever, having been released under this chapter knowingly—
>
> (1) fails to appear before a court as required by the conditions of release; or
>
> (2) fails to surrender for service of sentence pursuant to a court order;
>
> shall be punished as provided in subsection (b) of this section.

54. 18 U.S.C. § 3146 (2019).
55. 18 U.S.C. §§ 3141–3145.
56. 18 U.S.C. § 3141(a).
57. 18 U.S.C. § 3141(a)–(b).
58. 18 U.S.C. §§ 3141–3142.
59. Language to the effect that the subject is to be detained unless, among other things, "the judicial officers finds by clear and convincing evidence that the person is not likely to flee" appears twice. 18 U.S.C. §§ 3143(a)(1), 3143(a)(2)(B), 3143(b)(2)(A) (2019).

(b) Punishment.—(1) The punishment for an offense under this section is—

(A) if the person was released in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction for—

(i) an offense punishable by death, life imprisonment, or imprisonment for a term of 15 years or more, a fine under this title[60] or imprisonment for not more than ten years, or both;

(ii) an offense punishable by imprisonment for a term of five years or more, a fine under this title or imprisonment for not more than five years, or both;

(iii) any other felony, a fine under this title or imprisonment for not more than two years, or both; or

(iv) a misdemeanor, a fine under this title or imprisonment for not more than one year, or both; and

(B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both.

(2) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense.

(c) Affirmative defense.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

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60. 18 U.S.C. § 3571, titled "Sentence of fine," provides, in subsection (a) that one "who has been found guilty of an offense may be sentenced to pay a fine." Subsection (b), covering "Fines for Individuals," provides:

> Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—
> (1) the amount specified in the law setting forth the offense;
> (2) the applicable amount under subsection (d) of this section;
> (3) for a felony, not more than $250,000;
> (4) for a misdemeanor resulting in death, not more than $250,000;
> (5) for a Class A misdemeanor that does not result in death, not more than $100,000;
> (6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or
> (7) for an infraction, not more than $5,000.

> (d) Declaration of forfeiture.—If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) of this title or is subject to the release condition set forth in clause (xi) or (xii) of section 3142(c)(1)(B) of this title, the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States.[61]

The terms and conditions that may be found in federal conditional release orders is addressed at length in 18 U.S.C. § 3142 (and are beyond the scope of this essay). The word *knowingly* in 18 U.S.C. § 3146(a) is significant and, arguably at least, provides one of two primary defenses to federal bail-jumping, the other being the affirmative defense of *uncontrollable circumstances* contemplated by subsection (c).

The key to convicting a person for failure to appear is adequate notice to the person of what is expected of her—that is, when to show up and where. A 1979 case[62] originating in California indicates that there are five elements in the federal FTA: (1) that the defendant was released; (2) that the defendant was required to appear in court, (3) that the defendant was aware of the required appearance; (4) that the defendant failed to appear as required; and (5) that the defendant was willful in his or her failure to appear.[63]

In *United States v. Ott*,[64] an Eighth Circuit case that originated in Arkansas, Ms. Ott was found guilty of failure to appear and sentenced to one year and one day in prison. She had been indicted on charges of forging and uttering savings bonds in the Eastern District of Arkansas. She was arrested in Florida and there brought before a United States Magistrate Judge, who "released Ott on her personal recognizance after advising her verbally and in writing to report for arraignment to the United States Magistrate in Little Rock, Arkansas, at 10:00 a.m. on July 26, 1983."[65] The Magistrate Judge in Florida also told Ms. Ott to "reside at her parents' home in Little Rock pending final disposition of the charges" and advised her on the record that "failure to comply with these directions could subject her to separate criminal penalties."[66] She did not show up for her arraignment. She could not be reached at her parents' home following the date of her arraignment. And the evidence was that she had not tried to contact court officials "before or after

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61. 18 U.S.C. § 3146.
62. United States v. McGill, 604 F.2d 1252 (9th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).
63. *Id.* at 1254.
64. 741 F.2d 226, 226 (8th Cir. 1984).
65. *Id.* at 227.
66. *Id.*

her nonappearance."[67] This evidence was found "to justify the inference that defendant's failure to appear was willful."[68]

At the other end of the spectrum, it is clear from several federal cases that mere proof of a defendant's absence, standing alone, is not sufficient to establish a willful failure to appear. In *United States v. James*,[69] for instance, James was cited by the United States Park police for speeding and driving without a license. A magistrate released him on $100 bail and set a trial date. James appeared for trial and requested a continuance, which was granted. At the next setting, James was absent, but the prosecution received a continuance. "After several unsuccessful attempts to locate [James], he was found and advised of the new trial date."[70] (The opinion does not say how this notice was served.)

Again, James did not appear for trial, and a bench warrant was issued for his arrest. An additional complaint was filed charging him with failure to appear . . . ."[71] Months later, James was arrested in the District of Columbia, his case was "removed" to Maryland, and bail was set at $2,500, which he could not make, so he was incarcerated until trial. He was found not guilty of speeding, but guilty of driving without a license and FTA in front of a magistrate. For FTA, he was sentenced to a year in jail, with eleven months suspended. On appeal to the U.S. District Court, it was found that "the record before the Court in the case at bar casts no light on whether James' failure to appear was willful. It does not indicate why he failed to appear; it shows only that the Defendant was notified of the new trial date, but failed to present himself on the appointed day. A conviction based solely on this record would require reversal because it would not be supported by substantial evidence."[72] There was a further complication in that the magistrate over-participated in the trial, as there was no prosecuting attorney.[73] But the gist of it is that the prosecution must prove willfulness by something other than notice and non-appearance.

V. CONCLUSION

There are over 100 district courts in Arkansas. I preside over one of them. I know that many of my colleagues see FTAs as often as I do. Considering the frequency, the pervasiveness, and the seriousness of this charge, it deserves ongoing attention from the Arkansas General Assembly. Weak-

67. *Id.* at 228.
68. *Id.* at 229.
69. 440 F. Supp. 1137 (D. Md. 1977).
70. *Id.* at 1138.
71. *Id.*
72. *Id.* at 1139.
73. *Id.* at 1140.

nesses and vulnerability ought to be addressed; ambiguities ought to be eliminated; clarity and respect for the Rule of Law ought to be the goals.

The current state of FTA law in Arkansas is unnecessarily complex and confusing. A plethora of issues beg to be resolved:

- What notice should be required before one may be charged with failure to appear?
- Is the absence of a reasonable excuse an element of the offense for the prosecution to prove? Or is it an affirmative defense to be raised by the defendant?
- What punishment is really appropriate, especially in an atmosphere where jail space is sparse?

And there are more.

The new law should be contained in a single title of the Arkansas Code, and not contain circular definitions. The federal FTA statute should be used as a model for the General Assembly when they redraft Arkansas FTA law. In my opinion, the legislature should ensure that all citations contain a written promise to appear, calling for a signature by the recipient.

In Appendix A, I offer a draft of a statute that I believe would be a good starting point toward resolving the issues that I have discussed in this essay.

APPENDIX A:

AN ACT REGARDING THE OFFENSE OF FAILURE TO APPEAR BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 5–54–120, concerning the criminal offense of Failure to Appear, is amended to read in its entirety as follows:

(a) ***Offense***. The offense of failure to appear—that is, not being physically present at the place, on the date, and at the time designated in legal process properly served upon an individual—is punishable as stated herein.

(b) ***Legal process***. The legal process upon which a charge of failure to appear may be based includes, but is not limited to, appearance agreements, citations, court orders, subpoenas, summonses, warrants, writs, and any other legal documents used by courts and law enforcement agencies to compel the appearance of defendants and witnesses to appear at arraignments, depositions, court hearings of any sort, sentencings, trials, depositions, or other commonly recognized proceedings related to the judicial process in criminal cases.

(c) ***Punishment***. Whoever, being required by legal process to appear on a certain date at a certain time in a certain court, or other designated location for any proceeding in a criminal case contemplated by this section, knowingly commits the offense of failure to appear shall be punished as provided in this subsection.

(1) The punishment for an offense under this section is as follows:

(A) If the required appearance was in regard to a pending charge or disposition of a felony, either before or after a determination of guilt, then failure to appear is punishable by a fine of not less than $1,000 nor more than $10,000, imprisonment of not less than one year nor more than ten years, or both.

(i) If the required appearance was in regard to an order to appear issued by a court of competent jurisdiction before a revocation hearing under § 16-93-307 and the defendant was placed on probation or received a suspended sentence for a felony, then failure to appear is punishable a fine of not less than $1,000 nor more than $10,000, imprisonment of not less than one year nor more than ten years, or both.

(ii) If the required appearance was in regard to a pending charge or disposition of any misdemeanor, either before or after a determination of guilt, then failure to appear is punishable by a fine of up to $1,000, imprisonment of up to one year, or both.

(B) If the person was released for appearance as a material witness, the failure to appear is punishable by a fine of up to $1,000, imprisonment of up to one year, or both.

(C) If the person was subpoenaed as a witness other than a material witness, then failure to appear is punishable by a fine of up to $1,000, imprisonment of up to one year, or both.

(d) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense in regard to which a defendant is sentenced in connection with the proceedings to which the failure-to-appear charge relates.

(e) ***Affirmative defense***. It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(f) ***Declaration of forfeiture***. If a person fails to appear before a court as required, and the person executed an appearance bond, a signature bond, or a surety bond, the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property of the defendant pledged in connection therewith forfeited to the State and commence such forfeiture proceedings as may be deemed appropriate against any sureties.

SECTION 2. Arkansas Code § 16-17-131, concerning presiding judges' authorization to sanction certain persons failing to appear in court, is amended to read in its entirety as follows:

If a person who has been duly served with notice contemplated by Ark. Code Ann. § 5-54-120 to appear in court for any criminal offense—including traffic and non-traffic violations, misdemeanors, and felonies—for arraignment, pre- or post-trial hearings, trial, sentencing, or any other judicial proceeding—shall fail to appear on the date, at the time, and at the place designated in the notice, the presiding judge may forthwith charge the individual with a failure to appear, a violation of § 5-54-120; issue a warrant for the immediate arrest and detention of the individual; direct expedited service of such warrant by whatever lawful means are available under the circumstances; and order the Department

of Finance and Administration Office of Driver Services to take such administrative action as may be appropriate to modify, suspend, or revoke the defendant's driving privileges based upon such statutes, rules, and regulations as may be applicable under the circumstances.