



Sentencing Guidelines Council

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# **Fail to Surrender to Bail**

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**Definitive Guideline**



## FOREWORD

In accordance with section 170(9) of the Criminal Justice Act (CJA) 2003, the Sentencing Guidelines Council issues this guideline as a definitive guideline. By virtue of section 172 of the CJA 2003, every court must have regard to a relevant guideline. This guideline applies to the sentencing of offenders convicted of failing to surrender to bail who are sentenced on or after **10 December 2007**.

Bail Act offences are committed in significant numbers each year and are a major cause of disruption, delay and unnecessary cost for the criminal justice system. A prime objective of courts is to bring criminal proceedings to a conclusion as soon as practicable, and a rigorous and consistent response when offenders fail to answer bail is needed to help achieve this. This, in turn, may help to discourage future offending.

Where it is not possible to dispose of the original offence, sentencing for a Bail Act offence should normally be undertaken separately and carried out as soon as appropriate in light of the circumstances of an individual case.

When a Bail Act offence has been committed, the sentence must be commensurate with the seriousness of the offence and must take into account both the reason why the offender failed to surrender and the degree of harm intended or caused. For these purposes, 'harm' is not only that caused to individual victims and witnesses but includes the consequential effect on police and court resources and the wider negative impact on public confidence in the criminal justice system.

As the considerations for offences committed by youths will differ markedly from those relevant for adult offenders, this guideline relates to the sentencing of adult offenders only.

The Council has appreciated the work of the Sentencing Advisory Panel in preparing the advice on which this guideline is based and is grateful to those who responded to the consultation of both the Panel and Council. The advice and this guideline are available on [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) or from the Sentencing Guidelines Secretariat at 4th Floor, 8-10 Great George Street, London SW1P 3AE. A summary of the responses to the Council's consultation also appears on the website.

Chairman of the Council  
November 2007



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## FAIL TO SURRENDER TO BAIL

### A. Statutory provision

1. Section 6 of the Bail Act 1976 states:

*“1) If a person who has been released on bail in criminal proceedings fails without reasonable cause to surrender to custody he shall be guilty of an offence; and*

*2) If a person who:*

- (a) has been released on bail in criminal proceedings, and*
- (b) having reasonable cause therefor, has failed to surrender to custody, fails to surrender to custody at the appointed place as soon after the appointed time as is reasonably practicable, he shall be guilty of an offence.”*

2. An offence under subsection (1) or (2) is punishable either on summary conviction or, in the Crown Court, as if it were a criminal contempt of court. The maximum sentence in a magistrates’ court is 3 months imprisonment.<sup>1</sup> If the matter is committed to the Crown Court for sentence, or dealt with there, the maximum sentence is 12 months custody and the sentence is subject to the usual appellate procedures.<sup>2</sup>

### B. Assessing Seriousness

3. When assessing the seriousness of an offence, the court must consider the offender’s culpability and any harm which the offence caused, was intended to cause or might foreseeably have caused.<sup>3</sup>
4. In assessing **culpability**, a court will need to consider whether the failure to surrender was intended to cause harm and, if so, what level of harm. In assessing **harm**, a court will need to consider to what extent the failure to surrender impeded the course of justice. When applied to Bail Act offences, “harm” includes not only the harm caused to individual victims and witnesses but the consequential drain on police and court resources and the wider negative impact on public confidence in the criminal justice system.
5. The same *approach* to sentencing should be adopted whether the offence is committed contrary to section 6(1) or to section 6(2). However, the offence contrary to section 6(2) requires that there had been a reasonable excuse not to attend on the original date and so the degree of harm arising from the failure to attend as soon as reasonably practicable after that date is likely to be less. Accordingly, the seriousness of the offence is likely to be less also.

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1 Police and Justice Act 2006, s.34 amends various sections of the Criminal Justice Act 2003 so that this maximum sentence is not affected by the general provisions relating to custodial sentences of less than 12 months when in force

2 Administration of Justice Act 1960, s.13

3 Criminal Justice Act 2003, s.143(1)

**(i) Culpability**

6. The obligation on a person who is granted bail is to surrender to custody at the court or the police station as required. The assessment of culpability requires consideration of the immediate reason why the defendant failed to appear. This can range from forgetfulness (comparable to the category of culpability described as “negligence” in the Council guideline on seriousness<sup>4</sup>) or fear of the outcome of the hearing through to a deliberate act. Where the failure to surrender was deliberate, it will be relevant whether it was designed to disrupt the system to the defendant’s advantage or whether the defendant simply gave no thought at all to the consequences.

**(ii) Harm**

7. Some degree of harm, even if only a minor delay or inconvenience to the authorities, will always be caused when a defendant fails to surrender. The degree of harm *actually* caused will vary considerably depending on the particular circumstances of the offence. The harm that the offence might foreseeably have caused<sup>5</sup> must also be taken into account.

8. **Failure to surrender to a court** for any reason (whether bail is granted by the police or by a court) inevitably delays justice. Potentially, it will result in additional distress to victims and witnesses. It will almost always waste public money in the form of court time and the resources of the prosecution, the police and the defence.

- (a) Where a defendant fails to appear for a first court hearing but attends shortly afterwards, the only harm caused is likely to be the financial cost to the system. Procedural delays may also be caused by the prosecution, the defence or the Courts Service at various stages of the process and, where a case could not have proceeded even if the defendant had surrendered to bail, this should be taken into account when assessing the harm actually caused.
- (b) Where a defendant appears for trial on the wrong day but enters a late guilty plea enabling the case to be disposed of to some degree at least (albeit with some delay and disruption), the harm caused by the delay may be offset by the benefits stemming from the change of plea.
- (c) The most serious harm is likely to result when a defendant fails to appear for trial, especially if this results in witnesses being sent away. A lengthy aborted trial in the Crown Court will be more harmful than a short hearing in a magistrates’ court though each situation has the potential to affect public confidence in the system.
- (d) Where a court decides not to proceed to trial in the absence of the defendant (see paragraphs 34-39), interference with the course of justice may be particularly acute. Memories may become less certain with the passage of time. Victims and witnesses, many of whom find the prospect of preparing for and attending court daunting, are likely to be caused distress and/or inconvenience. They may find it more difficult to attend court on the second or subsequent occasion, to the extent that they may not even appear at all. In such circumstances the harm is very high because justice will be prevented. Victims of violent or sexual offences are particularly likely to be distressed to learn that the accused is ‘at large’ in defiance of the court.

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4 Overarching Principles: Seriousness, page 4, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

5 Criminal Justice Act, s.143(1)

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- (e) The level of harm is likely to be assessed as high where an offender fails to appear for sentence and is also seen to be flouting the authority of the court, such as where the avoidance of sentence results in the consequential avoidance of ancillary orders such as disqualification from driving or from working with children or vulnerable adults, the payment of compensation or registration as a sex offender. This may increase the level of harm whenever the offender continues to present a risk to public safety.
9. In general terms, the same approach to sentencing should be adopted whether the offence involves a failure to surrender to a court or to a police station since the legal obligation is the same. However, the harm that results from failure to surrender to a court will usually be greater than that resulting from failure to surrender to a police station and this will affect the assessment of the seriousness of an individual offence.
10. **Failure to surrender to a police station** results in police time being wasted and the course of justice being impeded; potentially, it can also result in victims and witnesses being distressed and concerned about their safety and the ability of the system to protect the public and deliver justice. However, the circumstances in which such bail is granted are less formal than the grant of court bail and the history of the individual case should be examined. There may be less culpability where bail has been enlarged on a number of occasions and less harm if *court* proceedings are not significantly delayed.
- (iii) Nature and seriousness of original offence**
11. Failure to surrender to custody is an offence in its own right and the sentence imposed should be proportionate to the seriousness of the offending behaviour itself. Where the Bail Act offence is sentenced in advance of the offence in relation to which bail was granted the assessment of seriousness will take place without reference to the seriousness of, or likely sentence for, the original offence.
12. However, the specific nature of the original offence may significantly affect the harm or likelihood of harm caused by the failure to surrender. Particular types of offence (such as violent or sexual offences) may have implications for public protection and safety and the offender's failure to surrender might cause fear and distress to witnesses.
13. Seriousness is not reduced automatically by subsequent acquittal of the original offence. Whilst it may seem harsh that a defendant before the court for an offence of which he is not guilty should be punished for the ancillary offence of failure to surrender during the course of the prosecution of that offence, both the culpability and the likely harm – delay, distress and inconvenience to witnesses, and additional costs – are the same. Moreover, one of the most serious effects of a Bail Act offence can be that a trial cannot take place because of the failure to surrender and it will often be invidious to expect a court to identify genuinely innocent defendants.

**(iv) Aggravating and mitigating factors**

14. Since “recent and relevant” previous convictions aggravate the seriousness of an offence,<sup>6</sup> defendants who repeatedly fail to attend court are likely to receive more severe sentences.
15. The period of time for which a defendant absconds is also likely to influence the court when considering sentence. Whilst being absent for a long period of time will aggravate an offence, the fact that a defendant arrives at court only a few days, or even only a few hours, late, is not a factor that will necessarily mitigate sentence; in many cases, the harm will already have been done (for example, the trial may have been put back, witnesses may have been inconvenienced and there may be an increased likelihood that witnesses will fail to attend at a future hearing).
16. Leaving the jurisdiction is an aggravating factor as are other actions designed to avoid the jurisdiction of the court such as changing identity and appearance.
17. **The following aggravating factors are particularly relevant to an offence of failing to surrender to bail:**
  - Repeat offending
  - Offender’s absence causes a lengthy delay to the administration of justice
  - Determined attempt to avoid the jurisdiction of the court
18. Prompt voluntary surrender might mitigate sentence where it saves police time in tracing and arresting an offender. It may also be an indication of remorse. This must be weighed against the degree of harm caused by the offence, which may still be significant. Surrender initiated by the offender merits consideration as a mitigating factor. Surrender in response to follow up action has no significance.
19. The fact that an offender has a disorganised or chaotic lifestyle, which may be due to a dependency on drugs or alcohol, does not of itself reduce the seriousness of the offence. Depending on the particular facts, it may be regarded as personal mitigation.
20. A misunderstanding (which does not amount to a defence) may be a mitigating factor but must be differentiated from a mistake on the part of the defendant, where the error must be regarded as his or her own responsibility.<sup>7</sup>
21. Where an offender has literacy or language difficulties, steps should normally be taken by the police or the court to address this when bail is granted. Such difficulties may be mitigation (where they do not amount to a defence but contribute to the offender failing to surrender to bail) where potential problems were not identified and/or appropriate steps were not taken to mitigate the risk in the circumstances as known at the time that bail is granted.

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<sup>6</sup> *ibid.* s.143(2)

<sup>7</sup> see, for example, *Laidlaw v Atkinson* Queen’s Bench Division CO/275/86

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22. An offender's position as the sole or primary carer of dependant relatives may be personal mitigation when it is the reason why the offender has failed to surrender to custody.
23. **The following mitigating factors are particularly relevant to an offence of failing to surrender:**
- **prompt voluntary surrender;**
- and, where they are not sufficient to amount to a defence:**
- misunderstanding;
  - a failure to comprehend the requirements or significance of bail;
  - caring responsibilities.

## C. Procedural issues

### (i) When to sentence

24. The key principle is that a court should *deal* with a defendant who fails to surrender as soon as is practicable even if the trial or other hearing for the offence that led to the grant of bail is adjourned.<sup>8</sup> The following factors are relevant to the decision as to what is practicable:
- when the proceedings in respect of which bail was granted are expected to conclude;
  - the seriousness of the offence for which the defendant is already being prosecuted;
  - the type of penalty that might be imposed for the breach of bail and for the original offence;
  - any other relevant circumstances.
25. Whether or not the defendant is guilty of a Bail Act offence should be determined as soon as possible. It will be central to the issue of whether bail should now be granted or refused. Even where the offence is denied, a trial is normally short; it should be held on the first appearance after arrest or surrender, unless an adjournment is necessary (for example, for the defence to obtain medical evidence).
26. When there is a plea or finding of guilt, sentence should be imposed as soon as practicable. The point at which it becomes possible to sentence an offence and the point at which it is practicable to do so will vary widely from case to case; a decision about timing is best made according to individual circumstances.
27. A key relevant circumstance is whether the substantive offence is to be adjourned, either for a pre-sentence report or for trial, and whether the remand is to be on bail or in custody.

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<sup>8</sup> See Consolidated Criminal Practice Direction last revised April 2007 - [www.hmcourts-service.gov.uk/cms/pds.htm](http://www.hmcourts-service.gov.uk/cms/pds.htm).

28. Where the defendant is remanded in custody, the sentencing options for the Bail Act offence are limited.
29. Where the defendant is to regain his or her liberty, there is the possibility of a non-custodial sentence. A community order, including an electronically monitored curfew requirement and, perhaps, a supervision requirement or an activity requirement, may be helpful in ensuring attendance at future court hearings.
30. In more serious cases in which the custody threshold has been passed, a suspended sentence order could serve the same purpose.
31. These factors support sentencing without delay or with a short delay for a pre-sentence report. On the other hand, there will be occasions when it is more appropriate that all outstanding matters should be dealt with on one sentencing occasion. This may be where the totality of offending may affect sentence type (for example where two or more offences together pass the custody threshold, but individually do not) or where the harm caused by the failure to surrender cannot be assessed at an early stage (for example, where witnesses may no longer be available).
32. A magistrates' court will be constrained by the maximum sentence available. In certain circumstances, Bail Act offences that would normally be dealt with in a magistrates' court may be committed to the Crown Court to be dealt with.<sup>9</sup>

**(ii) Consecutive and concurrent custodial sentences**

33. Where a custodial sentence is imposed for the original offence and a custodial sentence is also deemed appropriate for a Bail Act offence, a court should normally impose a consecutive sentence. However, a concurrent sentence will be appropriate where otherwise the overall sentence would be disproportionate to the combined seriousness of the offences.

**(iii) Conducting trials in the absence of the defendant**

34. A defendant has a duty to surrender to bail and a right to be present at his or her trial. However, where a defendant is absent voluntarily, having breached the duty to surrender, a court may proceed to hear a case in the defendant's absence. In a magistrates' court this is a statutory power.<sup>10</sup> While some sentences may be imposed in a defendant's absence, it is not possible to impose a custodial sentence or a community order, and it is undesirable to impose a disqualification from driving.
35. The Consolidated Criminal Practice Direction<sup>11</sup> reinforces the encouragement to courts to proceed in absence and identifies factors to be taken into account before so doing which include:
  - the conduct of the defendant;
  - the disadvantage to the defendant;
  - the public interest;
  - the effect of any delay; and
  - whether the attendance of the defendant could be secured at a later hearing.

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<sup>9</sup> Bail Act 1976, s.6(6)

<sup>10</sup> Magistrates' Courts Act 1980, s.11

<sup>11</sup> last revised April 2007 – [www.hmcourts-service.gov.uk/cms/pds.htm](http://www.hmcourts-service.gov.uk/cms/pds.htm)

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36. Additional factors for a magistrates' court to consider include:
- there is less risk of either a magistrate or a district judge drawing an impermissible inference from a defendant's absence than would be the case with a jury; and
  - in a magistrates' court the finder of fact may ask questions and test the evidence of prosecution witnesses.
37. The overriding concern of the court is to ensure that a trial conducted in the absence of the defendant is as fair as circumstances permit and, in particular, that the defendant's rights under Article 6 of the European Convention on Human Rights (ECHR)<sup>12</sup> are not infringed.
38. Proceeding to trial in the absence of the defendant may reduce the harm arising from a Bail Act offence. When considering the degree to which this should influence sentence, it must be borne in mind that the position in a magistrates' court is different from that in the Crown Court. An appeal against conviction from a magistrates' court can result in a re-hearing, whereas that is not the case after a jury trial. There is also the discretionary power under section 142 of the Magistrates' Courts Act 1980 to set aside a conviction and order a re-hearing in a magistrates' court. If an application to set aside a conviction is successful, witnesses will be required to give evidence again at a later date. It will be relevant to an assessment of harm whether either of those provisions has been used.
39. Where it has proved possible to proceed to trial or conclude proceedings in the absence of the defendant, this should have no bearing on *culpability* for a Bail Act offence as the intention of the defendant remains unchanged. It may, however, be relevant to the assessment of *harm* as this may have been reduced or avoided because of the decision to proceed in absence.

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<sup>12</sup> Right to a fair trial

## D. Sentencing ranges and starting points

- (i) This guideline applies to a first time offender who has been **convicted after a trial**. A first time offender is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
- (ii) The guideline establishes levels of seriousness based upon both offender culpability and the resulting consequences. These are set out in the column headed “nature of failure and harm”.
- (iii) A court will identify the description that most nearly matches the particular facts of the offence and this will identify a **starting point** from which the sentencer can depart to reflect any aggravating or mitigating factors affecting the *seriousness of the offence* to reach a **provisional sentence**.
- (iv) The **sentencing range** is the bracket into which the provisional sentence will normally fall. The particular circumstances may, however, make it appropriate that the provisional sentence falls outside the range.
- (v) Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the provisional sentence beyond the range given particularly where there are significant other aggravating factors present.
- (vi) Once the provisional sentence has been identified by reference to those factors affecting the seriousness of the offence, the court will take into account any relevant factors of personal mitigation, which may take the sentence beyond the range given.
- (vii) Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. Again, this reduction may take the sentence below the range provided.
- (viii) A court must give its reasons for imposing a sentence of a different kind or outside the range provided in the guidelines.<sup>13</sup>

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<sup>13</sup> Criminal Justice Act 2003, s.174(2)(a)

## The Decision Making Process

The process set out below is intended to show that the sentencing approach for the offence of failing to surrender to custody is fluid and requires the structured exercise of discretion.

### **1. Identify the appropriate starting point**

Identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed.

### **2. Consider relevant aggravating factors, both general and those specific to the type of offence**

This may result in a sentence level being identified that is higher than the suggested starting point, sometimes substantially so.

### **3. Consider mitigating factors and personal mitigation**

There may be offence or offender mitigation which could result in a sentence that is lower than the suggested starting point (possibly substantially so), or a sentence of a different type.

### **4. Reduction for guilty plea**

Apply any reduction for a guilty plea following the approach set out in the Council's Guideline "*Reduction in Sentence for a Guilty Plea*" (revised July 2007).

### **5. The totality principle**

Review the total sentence to ensure that it is proportionate to the offending behaviour and properly balanced.

### **6. Reasons**

When a court moves from the suggested starting points and sentencing ranges identified in the guidelines, it should explain its reasons for doing so.

## E. Factors to take into consideration

1. Whilst the approach to sentencing should generally be the same whether the defendant failed to surrender to a court or to a police station and whether the offence is contrary to section 6(1) or 6(2), the court must examine all the relevant circumstances.
2. Whilst the seriousness of the original offence does not of itself aggravate or mitigate the seriousness of the offence of failing to surrender, the circumstances surrounding the original offence may be relevant in assessing the harm arising from this offence.
3. Where it has proved possible to conclude proceedings in the absence of the defendant, this may be relevant to the assessment of harm caused.
4. Where the failure to surrender to custody was 'deliberate';
  - at or near the bottom of the range will be cases where the defendant gave no thought at all to the consequences, or other mitigating factors are present, and the degree of delay or interference with the progress of the case was not significant in all the circumstances;
  - at or near the top of the range will be cases where any of aggravating factors 1 – 3 are present if there is also a significant delay and/or interference with the progress of the case.
5. Only the most common aggravating and mitigating factors specifically relevant to Bail Act offences are included in the guideline. When assessing the seriousness of an offence, the courts must always have regard to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.<sup>14</sup>
6. A previous conviction that is likely to be "relevant" for the purposes of this offence is one which demonstrates failure to comply with an order of a court.
7. Acquittal of the original offence does not automatically mitigate this offence.
8. The fact that an offender has a disorganised or chaotic lifestyle should not normally be treated as mitigation of the offence, but may be regarded as personal mitigation depending on the particular facts of a case.
9. Once the provisional sentence has been identified by reference to factors affecting the seriousness of the offence, the court will take into account any relevant factors of personal mitigation, and any reduction where a guilty plea was entered.<sup>15</sup>
10. The sentence for this offence should normally be in addition to any sentence for the original offence. Where custodial sentences are being imposed for a Bail Act offence and the original offence at the same time, the normal approach should be for the sentences to be consecutive. The length of any custodial sentence imposed must be commensurate with the seriousness of the offence(s).<sup>16</sup>
11. If an offence is serious enough to justify imposition of a community order, a curfew requirement with an electronic monitoring requirement may be a particularly appropriate part of such an order in any of the three sentencing ranges.
12. Power exists for magistrates' courts to impose one day's detention in appropriate cases.<sup>17</sup>

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14 Overarching Principles: Seriousness, pages 6-7, published 16 December 2004, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

15 Reduction in sentence for a guilty plea (revised), published July 2007, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

16 Criminal Justice Act 2003, s.152(2)

17 Magistrates' Courts Act 1980, s.135

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## BAIL ACT 1976, ss. 6(1) & 6(2)

**Maximum penalty:** 12 months imprisonment in the Crown Court  
3 months imprisonment in a magistrates' court

**The following starting points and sentencing ranges are for a first time offender aged 18 or over who pleaded not guilty. They should be applied as set out on pages 8/9 above.**

Nature of failure & harm	Starting point	Sentencing range
<p>Deliberate failure to attend causing delay and/or interference with the administration of justice.</p> <p><i>The type and degree of harm actually caused will affect where in the range the case falls.</i></p> <p><i>See guidance in paragraphs 8-10 and on the facing page.</i></p>	<b>14 days custody</b>	<p><i>Crown Court</i> <b>Community order (medium) – 40 weeks custody</b></p> <p><i>Magistrates' courts</i> <b>Community order (low) – 10 weeks custody</b></p>
Negligent or non-deliberate failure to attend causing delay and/or interference with the administration of justice.	<b>Fine</b>	<b>Fine – Community order (medium)</b>
Surrenders late on day but case proceeds as planned.	<b>Fine</b>	<b>Fine</b>

Additional aggravating factors	Additional mitigating factors
<ol style="list-style-type: none"> <li>1. Lengthy absence</li> <li>2. Serious attempts to evade justice</li> <li>3. Determined attempt seriously to undermine the course of justice</li> <li>4. Previous relevant convictions and/or repeated breach of court orders or police bail</li> </ol>	<ol style="list-style-type: none"> <li>1. Prompt voluntary surrender</li> </ol> <p><i>When not amounting to a defence:</i></p> <ol style="list-style-type: none"> <li>2. Misunderstanding</li> <li>3. A failure to comprehend bail significance or requirements</li> <li>4. Caring responsibilities*</li> </ol>

\* Please refer to paragraph 22 for further detail.





