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MUST WE ALL BE BOLD AS LIONS? UNFAIR PREJUDICE FROM EVIDENCE OF FLIGHT AND ALTERNATIVE STANDARDS

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I. INTRODUCTION

A dramatic escape from a rehabilitation hospital, a high-speed car chase resulting in a crash, and an admission of fleeing to avoid jail.[1] Despite fitting the description of an action movie, *State v. Strizich* presented a conundrum for the Montana Supreme Court, one that created substantial disagreement among the justices on whether evidence of the defendant's flight should be admitted at trial.[2]

One major disagreement was whether to apply the four inferences test used by the federal courts, whereby courts determine the probative value of flight evidence—and therefore, its admissibility at trial—by assessing:

> the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.[3]

The inferences test was first introduced by the Fifth Circuit in *United States v. Myers* and has since been widely adopted throughout the federal courts.[4] To rephrase the test, the inferences are intended to only allow evidence of flight if a judge can confidently infer:

> (1) the defendant was actually fleeing, (2) they were fleeing because they felt guilty, (3) they felt guilty about the charged crime, and (4) they felt guilty about the crime charged because they actually committed the crime.[5]

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1. State v. Strizich, 499 P.3d 575, 579, 581, 583 (Mont. 2021).

2. *Id.* at 582–90.

3. United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977); *see Strizich*, 499 P.3d at 589–90 (McKinnon, J., dissenting). *See also* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); MONT. R. EVID. 403 (substantially the same as Federal Rule 403).

4. *See generally* United States v. Jackson, 572 F.2d 636 (7th Cir. 1978); United States v. Peltier, 585 F.2d 314 (8th Cir. 1978); United States v. Silverman, 861 F.2d 571 (9th Cir. 1988); United States v. Dillon, 870 F.2d 1125 (6th Cir. 1989).

5. *Myers*, 550 F.2d at 1049.

At the Montana Supreme Court, the four inferences test has only made one other appearance—in a 1996 concurrence cautioning against the low probative value of evidence of flight.[6]

The Court's opinion in *Strizich* was primarily an analysis of relevance and undue prejudice, leaving the jury to infer whether the actions were flight and why.[7] The majority responded to the defendant's objection under Montana Rule of Evidence 401, determining the flight was relevant because it showed consciousness of guilt; after all, Strizich admitted he fled to avoid prosecution.[8] The majority avoided ruling on unfair prejudice and probative value because they determined Strizich failed to preserve his right to appeal any issues related to Rule 403 by not making a specific objection during trial.[9] While the majority acknowledged there was little probative value in the lurid facts of the flight, they determined Strizich had not met his burden to show that admitting the evidence resulted in a "fundamentally unfair" trial.[10]

The three-justice dissent determined that the district court abused its discretion by allowing evidence of the flight into trial.[11] The dissent, utilizing the four inferences test, argued it "fail[ed] to see how Strizich's departure . . . in a vehicle driven by [his friend], three weeks after the burglary offenses occurred, is an admission . . . of the burglary."[12]

How should this split be interpreted? This comment analyzes evidence of flight, as applied before and after the adoption of the four inferences test, and how the lack of concrete standards and protections for criminal defendants has resulted in the admission of unfairly prejudicial evidence. Part II considers Montana's past applications of evidence of flight. Part III analyzes the evolution of flight evidence under the federal system, with particular attention to the adoption of the four inferences test and cases that have stretched its applicability. Part IV looks at how the United States Supreme Court and other states have grappled with evidence of flight, particularly how "immediacy" is weighed. Part V discusses criticism of the four inferences and the failure of courts to adapt the analysis to account for a changing culture. Part VI proposes three potential alternatives to the four infer-

6. State v. Patton, 930 P.2d 635, 643–44 (Mont. 1996) (Leaphart, J., concurring).

7. *Strizich*, 499 P.3d at 583–87.

8. *Id.* at 575, 583–84; *see* MONT. R. EVID. 401 ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.").

9. *Strizich*, 499 P.3d at 584–87.

10. *Id.* at 586.

11. *Id.* at 595 (McKinnon, J., dissenting).

12. *Id.* at 590.

ences test that may result in a more just criminal process. Part VII concludes this comment.

II. Evading Elaboration: Flight's History in the Montana Judiciary

Montana's jurisprudence on flight is largely without any deep analyses of what value this evidence provides. Flight can include both attempts to flee from the police after the commission of a crime and attempts to avoid sentencing.[13] While the admissibility of flight evidence has seen little change in how it is treated by Montana courts, Montana eventually conformed to the Ninth Circuit's determination that courts should not issue flight jury instructions but should, instead, leave comment to counsel.[14] Discussions of flight at the Montana Supreme Court have largely bypassed issues of probative value or unfair prejudice and have played with an alternative standard of the jury's right to know.[15] While there has been some reduction in the power of flight through the elimination of jury instructions,[16] Montana largely considers flight in the same manner as it did throughout the 20th century.

The earliest mention of flight in Montana case law was in 1900, where the Montana Supreme Court merely clarified that evidence of flight was admissible.[17] The next occasion came in 1907, in a challenge to flight jury instructions.[18] There, the Court explained that if a jury determines a crime actually occurred, then it can use evidence showing the defendant fled in determining whether the defendant was the party guilty of committing the offense.[19] The Court later clarified this type of instruction is only useful when there are several potential culprits; otherwise, it assumes the guilt of the accused.[20] The Court also noted that flight can only be applied to the crime from which the defendant fled.[21] For example, if a defendant fled from a murder, the flight would not be probative of tax evasion.[22]

13. *See* State v. Walker, 419 P.2d 300, 302–03, 306 (Mont. 1966) (defendant fled and hid in the trunk of a car while being sought for burglary); State v. Burk, 761 P.2d 825, 827–828 (Mont. 1988) (flight evidence introduced when defendant failed to show up to trial and claiming an implausible story as an excuse).

14. State v. Hall, 991 P.2d 929, 937 (Mont. 1999).

15. State v. Moore, 836 P.2d 604, 607 (Mont. 1992).

16. *Hall*, 991 P.2d at 937.

17. State v. Lucey, 61 P. 994, 997 (Mont. 1900).

18. State v. Paisley, 92 P. 566, 571 (Mont. 1907).

19. *Id.*

20. State v. Bonning, 199 P. 274, 275 (Mont. 1921).

21. *Id.*

22. *Id.*

Montana's next confrontation with flight resulted in a more expansive definition: "leaving or concealment under a consciousness of guilt and for the purpose of evading arrest."[23] This definition gave more latitude to judges by explaining that flight evidence only requires an attempt to escape—not speed, method, or any significant distance.[24] Ulterior motives for the flight were still left to the jury to decide.[25] By the 1980s, the Court had settled on three general rules relating to flight: (1) immediacy is the most important issue in determining whether flight evidence is admissible, although this is less important when there is some other precipitating event that sparks the defendant's flight such as his approaching trial; (2) flight evidence has probative value; and (3) the burden is on the defendant to dissipate any prejudice.[26]

The question of whether jury instructions should address evidence of flight has been consistently framed around whether the jury is entitled to consider this evidence rather than an issue of probative value and unfair prejudice.[27] The Court has explained the rationale for the admissibility of flight evidence by noting that flight is often inseparable from the commission of the crime and the defendant's responsibility for it.[28] When the elements of a crime include the mental state of "knowingly," the Court has determined that juries are entitled to hear what happened immediately before and after the commission of the crime, creating an exception to the Rule 404(b) character evidence bar.[29]

In a special concurrence in *State v. Patton*, Justice Leaphart noted the Seventh Circuit had adopted the four inferences standard and the U.S. Supreme Court had expressed their lack of confidence in flight's probative value.[30] Justice Leaphart, therefore, urged the Court to reconsider whether flight jury instructions were appropriate.[31] Three years later, in *State v. Hall*, the Court took the opportunity to address whether a flight jury instruction was a prejudicial application of the more general instruction on circumstantial evidence.[32] There, the Court noted that numerous other states and the Ninth Circuit committee responsible for drafting the model jury instructions had expressed the view that flight jury instructions were unnecessary

23. State v. Walker, 419 P.2d 300, 306 (Mont. 1966).
24. *Id.* at 306.
25. *Id.*
26. State v. Burk, 761 P.2d 825, 827–28 (Mont. 1988).
27. State v. Patton, 930 P.2d 635, 642 (Mont. 1996) (citing *Walker*, 419 P.2d at 306).
28. State v. Moore, 836 P.2d 604, 607 (Mont. 1992).
29. *Id.*
30. *Patton*, 930 P.2d at 643–44 (Leaphart, J., concurring).
31. *Id.* at 644.
32. State v. Hall, 991 P.2d 929, 936–37 (Mont. 1999).

and argumentative.[33] The Court agreed and determined that the rule would be to leave comment to counsel.[34]

One other aspect of note in Montana's flight jurisprudence is that flight evidence—on its own or with other weak circumstantial evidence—is insufficient to find guilt.[35] Besides *Strizich*, the Montana Supreme Court has only revisited flight evidence when denying *Hall*-based appeals—because either the trial at issue occurred before *Hall* or the defendant failed to object with specificity to the flight instruction.[36] Even in *Strizich*, the majority echoed its numerous findings since *Hall* by refusing to reconsider the unfair prejudice of flight evidence—in particular, because Strizich had not made a specific objection to flight on grounds of Rule 403.[37] The history of flight in Montana demonstrates very little has changed since the Court first considered the question in 1900.[38] The Court has not placed special weight on the issue of flight evidence,[39] and the probative value of such evidence has not faced significant challenge. Due to the inertia of jurisprudence on the issue in Montana, it is worth considering Justice McKinnon's suggestion that Montana adopt the four inferences test.[40] To understand if and how Montana should adopt this standard, we must consider how the inferences came about, how they are applied, and the existing critiques and alternatives.

33. *Id.* at 937.

34. *Id.*

35. State v. Giant, 37 P.3d 49, 59–60 (Mont. 2001).

36. *See* State v. Hatten, 991 P.2d 939, 949–50 (Mont. 1999) (defendant did not object that the flight instruction was an improper comment so the Court did not assign error); State v. Davis 5 P.3d 547, 553 (Mont. 2000) (defendant objected that there was no evidence of flight in the case, but the Court determined that the specific *Hall* error had not been raised and refused to assign error); State v. Baker, 15 P.3d 379, 383 (Mont. 2000) (defendant argued *Hall* should be applied retroactively, but he objected at trial by arguing the instruction was not supported by evidence, so the Court refused to review it); State v. Nolan, 62 P.3d 1118, 1120–21 (Mont. 2003) (defendant objected at trial that the instruction was not timely filed and not warranted in this case, later raising a claim under *Hall*, but since the objection was not raised at trial and the trial occurred before *Hall* was decided, the Court would not assign error); State v. Stiffarm, 67 P.3d 249, 254–55 (Mont. 2003) (the Court did not assign error because the defendant failed to object and the trial occurred one month before *Hall* was decided).

37. State v. Strizich, 499 P.3d 575, 584–85 (Mont. 2021).

38. State v. Lucey, 61 P. 994, 997 (Mont. 1900) (holding the jury may consider acts and conduct and "draw such inference from them as experience and observation of human conduct may suggest"); State v. Patton, 930 P.2d 635, 641–42 (Mont. 1996) (maintaining Montana law permits the jury to consider flight as "a circumstance that tends to prove consciousness of guilt").

39. *Hall*, 991 P.2d at 937.

40. *Strizich*, 499 P.3d at 589–90 (McKinnon, J., dissenting).

III. When No Man Pursueth: Flight in the Federal Court System

A. Scarcely Evidence: Flight before Myers

While the four inferences standard established in *United States v. Myers* dominates in federal jurisprudence on flight evidence, earlier decisions at the U.S. Supreme Court reveal this outcome was not inevitable. Until *Myers*, flight evidence had become increasingly disfavored because it allowed juries to impose their own prejudices on the trial.[41]

The U.S. Supreme Court addressed flight in 1896, when it checked the abuse of discretion of a judge who relied on the Bible to instruct the jury as follows:

> [T]he law recognizes another proposition as true, and it is, that "The wicked flee when no man pursueth, but the innocent are as bold as a lion." That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it in this case. Therefore, the law says that if after a man kills another that he undertakes to fly . . . you have a right to take that fact into consideration, because it is a fact that does not usually characterize an innocent act.[42]

The Court strongly refuted this instruction by noting that innocent men may resort to evasion and deception when they fear for their safety or freedom.[43] The Court reasoned that the proper place of flight is as mere circumstantial evidence, dethroned from its presumption of infallible evidence of guilt.[44] Within the same year, the Court was faced with a similar question and noted that while flight is a circumstance that might tend to prove guilt, "it scarcely comes up to the standard of evidence . . . [but] has been allowed upon the theory that the jury will give it as much weight as it deserves."[45] The Court then moderated its view by clarifying that flight was still a proper circumstance to place before the jury "as having a tendency to establish guilt."[46]

Several decades later, flight evidence was at its lowest ebb. The Supreme Court determined, yet again, that flight had weak probative value because the defendant's conduct was ambiguous in circumstances where the officer did not clearly identify their office or mission.[47] The D.C. Circuit approvingly applied this standard when it held that flight should only be cautiously admitted with acknowledgment of its weakness and, even then,

41. Bailey v. United States, 416 F.2d 1110, 1115–16 (D.C. Cir. 1969).
42. Hickory v. United States, 160 U.S. 408, 416 (1896).
43. *Id.* at 417.
44. *Id.* at 420.
45. Alberty v. United States, 162 U.S. 499, 510 (1896).
46. Allen v. United States, 164 U.S. 492, 499 (1896).
47. Wong Sun v. United States, 371 U.S. 471, 482 (1963).

only for the narrow purpose of inferring the defendant's consciousness of his own guilt.[48] Of note, the court considered flight to be "ambiguous evidence" which gave undue latitude to the jury to impose its own opinions, conjectures, and suspicions upon the defendant.[49]

B. Consciousness of Guilt and Thus Guilt Itself: The Evolution of the Four Inferences

The suspicion of flight evidence persisted and acquired a new twist in the Fifth Circuit. In *Myers*, the court of appeals applied the four inferences test to evidence of flight while maintaining the skepticism of other sources that "evidence of flight . . . is only marginally probative."[50] While flight is inherently unreliable and prejudicial, it could be admitted if there was sufficient evidence to support all four of the necessary inferences: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged."[51] Notably, even before their adoption in *Myers*, the four inferences had been subject to the criticism that "the second and fourth inferences are not supported by common experience."[52] The *Myers* court cited several decisions illustrating that "not supported by common experience" requires that any consideration of flight evidence must account for the limited value of circumstantial evidence and the many potentially innocent reasons for flight.[53] This criticism suggests the second inference—that flight reflects guilt—and the fourth inference—that guilt suggests guilt of the crime charged—may be too peripheral in probative value for a jury to consider.

48. Bailey v. United States, 416 F.2d 1110, 1115 (D.C. Cir. 1969).

49. *Id.* at 1116.

50. United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977) (quoting United States v. Robinson, 475 F.2d 376, 384 (D.C. Cir. 1973)) (internal quotation marks omitted).

51. *Id.* at 1049–50.

52. *Id.* at 1049.

53. *See Robinson*, 475 F.2d at 384 (the use of flight instruction language emphasizing that flight does not create a presumption of guilt meant a defendant's claim of error "border[ed] on frivolous"); Wong Sun v. United States, 371 U.S. 471, 483–84 (1963) (defendant's flight down the hallway from unauthorized intrusion was not probative of guilt); United States v. Register, 496 F.2d 1072, 1077–78 (5th Cir. 1974) (no error when jury was properly instructed that there were many innocent reasons for flight and it was a not to receive special emphasis); Vick v. United States, 216 F.2d 228, 232–33 (5th Cir. 1954) (overturning conviction that was based on ambiguous flight evidence and noting a conviction can be sustained on circumstantial evidence only when it is "inconsistent with every reasonable hypothesis for his innocence"); United States v. Craig, 522 F.2d 29, 31–32 (6th Cir. 1975) (determining flight, as a suspicious circumstance alone, was insufficient to uphold a conviction when there was a lack of other evidence).

Despite the numerous cautions in the *Myers* opinion about the four inferences, their use spread quickly. The following year, in *United States v. Jackson*, the Seventh Circuit adopted the four inferences test despite recognizing the warnings from *Myers*, stating, "This court has, on numerous occasions, approved the admission of flight evidence under the general rule that flight of the accused may be admissible as evidence of consciousness of guilt and thus guilt itself."[54] The Seventh Circuit dedicated additional analysis to the third inference by noting its importance and establishing a factor of either immediacy or knowledge.[55] The more immediate the flight is to the crime, the stronger the inference of the consciousness of guilt of the crime charged.[56] Alternatively, if there was evidence the defendant knows they are sought for the charged crime, then immediacy was irrelevant.[57]

The same year as *Jackson*, the Eighth Circuit adopted the four inferences test in *United States v. Peltier*, albeit with much less analysis.[58] The Eighth Circuit's use of the inferences was notable for the lack of caution from the court in determining whether evidence of flight should be admitted, noting only that the Supreme Court had expressed doubt as to its probative value.[59] The court then performed a perfunctory analysis of the evidence supporting the four inferences test, determining that, since there was evidence that the defendant was actively avoiding arrest and evidence he committed the crime, evidence of flight was "highly probative."[60] The court even utilized a key piece of evidence to determine the flight was relevant enough to be admissible.[61] To follow the logic of the court: evidence that the defendant *committed* the crime is important in making the inferences required to admit evidence that the defendant was *fleeing* the crime—which, of course, is being admitted as evidence that the defendant *committed* the crime. While there may be problems with the court's reasoning, *Peltier* shows the adoption of the four inferences test had become widespread and was quickly rising to become *the* standard for the admissibility of flight evidence.

Despite the warnings in *Myers*, most analysis has followed *Jackson* in focusing on the immediacy requirement. In *United States v. Hernandez-Miranda*,[62] the Ninth Circuit promulgated the Seventh Circuit's approach in

54. United States v. Jackson, 572 F.2d 636, 639 (7th Cir. 1978).
55. *Id.* at 640–41.
56. *Id.*
57. *Id.* at 641.
58. United States v. Peltier, 585 F.2d 314, 323 (8th Cir. 1978).
59. *Id.*
60. *Id.*
61. *Id.*
62. 601 F.2d 1104 (9th Cir. 1979).

Jackson by holding that the immediacy requirement of the third inference could be satisfied by a precipitating event—for example, when the defendant flees immediately before his trial.[63] Additionally, while the *Hernandez-Miranda* court was limited to plain error analysis, it determined that flight need not be proven beyond a reasonable doubt and should be considered by the jury as circumstantial evidence.[64] In the same way a prosecutor may strengthen the immediacy inference by showing knowledge, the defendant may weaken the inference by showing either ignorance or that the defendant was thwarted in their attempt to cooperate.[65]

One year after the Ninth Circuit's opinion in *Hernandez-Miranda*, the Sixth Circuit attempted to combine the second and third inferences into a more unified factor: "that the defendant is afflicted with a guilty consciousness of the crime charged."[66] This inference requires the court to infer the flight indicated a sudden onset or increase of the defendant's fear that they would be apprehended, accused, or convicted of the crime charged.[67] The Sixth Circuit continues the trend of emphasizing the third inference with only a brief discussion of the first and fourth, noting that the evidence was admissible if the jury could make the inferences without "conjecture and speculation."[68] The Sixth Circuit has maintained this model, adding only that evidence of actual guilt is sufficient to establish the fourth inference.[69]

The Second Circuit has similarly adopted the four inferences test but has articulated an evidentiary basis with which to make the inferences.[70] The court recognized that evidence of flight can be difficult to obtain since flight is the absence of the defendant's presence.[71] The Second Circuit determined that evidence does not need to meet a high standard; it can be as simple as testimony from people with whom the defendant is familiar who have not seen the defendant for some time, evidence the defendant has left their usual residence, or evidence that those searching for the defendant have failed to find him.[72] The court notes this type of evidence will often suffice but it must clearly appear in the record.[73]

63. *Id.* at 1107.

64. *Id.*

65. United States v. Silverman, 861 F.2d 571, 581–82 (9th Cir. 1988).

66. United States v. Dillon, 870 F.2d 1125, 1128 (6th Cir. 1989).

67. *Id.*

68. *Id.* (quoting United States v. Myers, 550 F.2d 1036, 1050 (5th Cir. 1977)).

69. United States v. Oliver, 397 F.3d 369, 376 (6th Cir. 2005); United States v. Perez-Martinez, 746 Fed. App'x 468, 477 (6th Cir. 2018).

70. United States v. Sanchez, 790 F.2d 245, 252–53 (2d Cir. 1986); United States v. Al-Sadawi, 432 F.3d 419, 424 (2nd Cir. 2005) (quoting *Myers*, 550 F.2d at 1050).

71. *Sanchez*, 790 F.2d at 252.

72. *Id.*

73. *Id.*

Flight evidence has been admitted in federal courts for reasons outside of establishing consciousness of guilt, although still subject to Federal Rule of Evidence 403.[74] In *United States v. Benedetti*, the First Circuit acknowledged that flight evidence could be used to establish the defendant's guilt, while further permitting its use for rebutting arguments from the defense about a lapse in time.[75] The evidence of flight was further admissible for impeaching the credibility of defense witnesses who had known the defendant fled the jurisdiction, but had not come forward to attempt to clear the defendant's name as having been wrongly accused.[76] The facts in *Benedetti* could be considered the circumstances that most strongly favor admissibility: a clear consciousness of guilt on the part of the defendant, that was put at issue by the defendant, and is probative for witness credibility, while accompanied by a cautionary jury instruction.[77] Notably, the probative value of this evidence was so strong—for purposes other than showing consciousness of guilt—the inferences were not even mentioned.[78]

While the standard utilized by the federal courts of appeals entails a consistent application of the four inferences test, the paradigm has shifted toward a presumption of admissibility for any immediate flight.[79] Decisions spanning from the 19th century through the mid-20th century consistently disfavored evidence of flight and attempted to narrow and limit its introduction to combat unfair prejudice and its lack of probative value.[80] *Myers*'s four inferences test was yet another attempt to limit the admission of flight evidence to only those cases where the flight was a blatant demonstration of consciousness of guilt.[81] Subsequent courts, applying the four inferences test, have largely bypassed the first two inferences and, instead, presume a guilt-driven flight by focusing on immediacy.[82] The jump to immediacy may seem insignificant because it is easy to believe that someone who runs

74. United States v. Benedetti, 433 F.3d 111, 116–17 (1st Cir. 2005).

75. *Id.* at 117 (defense counsel made repeated references during cross-examination to a five-year gap between indictment and trial which would allow the jury to infer the government was "trumping up" charges against the defendant).

76. *Id.*

77. *Id.* at 117–18.

78. *Id.* at 116–18.

79. *See* United States v. Jackson, 572 F.2d 636, 640–41 (7th Cir. 1978); United States v. Hernandez-Miranda, 601 F.2d 1104, 1106–07 (9th Cir. 1979); United States v. Borders, 693 F.2d 1318, 1325–27 (11th Cir. 1982) (holding flight evidence is "substantially weakened" if the defendant was not aware they were under criminal investigation or there was a significant delay between the crime and the flight); United States v. Touchstone, 726 F.2d 1116, 1118–19 (6th Cir. 1984) (determining the immediacy requirement is important but can be replaced if there is evidence of knowledge by the defendant that they are being sought); United States v. Ajijola, 584 F.3d 763, 765–66 (7th Cir. 2009) (noting greater proximity in time is proportional to the strength of the inference of guilt).

80. Hickory v. United States, 160 U.S. 408, 416 (1896).

81. United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977).

82. *See* United States v. Dillon, 870 F.2d 1125, 1128 (6th Cir. 1989); *Jackson*, 572 F.2d at 640–41.

away when approached by the police is "in flight" and that there is no reason to flee unless they feel guilty. However, the application of the four inferences test in this manner ignores the questionability of flight's probative value, as there are many innocent reasons to flee.[83] The reduction of the four inferences to immediacy returns evidentiary law to a pre-20th-century standard.

IV. Outside the Circuits: How the Inferences Have Influenced SCOTUS and State Courts

A. Silence from SCOTUS

The last word from the U.S. Supreme Court on flight was notable for its limited scope. In *Illinois v. Wardlow*, a five-justice majority said nothing about the four inferences test but found the probative value of flight is strongly increased by two factors: being in a "high crime area" and constituting "[h]eadlong flight."[84] First, the defendant's presence in a high crime area when the flight occurs is treated as essentially equivalent to "nervous, evasive behavior" for determining reasonable suspicion.[85] Second, the Supreme Court stated that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion."[86] The Court determined flight is not "going about one's business," and flight may justify police response even when the conduct of the flight was "ambiguous."[87] While the Court does admit flight is more than a refusal to cooperate, the reference to the person in flight as a "fugitive"[88] suggests the Court based its reasoning on an assumption in *Hickory* v. *United States* that "[t]he wicked flee when no man pursueth."[89]

The dissent in *Wardlow*, while not expressly mentioning the four inferences test, summarized the issue of flight well: "The question in this case

83. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 128–29 (2000) (Stevens, J., with Souter, Ginsburg & Breyer, JJ., concurring in part and dissenting in part) (discussing confrontation in a high-crime area by the police may spur many people to flee out of fear for their safety); *Hickory*, 160 U.S. at 417–18 (noting even the innocent would be scared to stand trial if there was a risk to their life, freedom, or property); Bailey v. United States, 416 F.2d 1110, 1115–16 (D.C. Cir. 1969) (ambiguous evidence left too much room for jury speculation when there was not sufficient evidence to establish a link between the flight and the crime); *Myers*, 550 F.2d at 1049 (impossible to tell for which crime defendant fled).

84. *Wardlow*, 528 U.S. at 124–25.

85. *Id.* at 124.

86. *Id.* The "headlong" nature of the flight is unclear in both the Court's opinion and the petitioner's briefing, both of which simply state Wardlow immediately ran away upon seeing police. Headlong is, therefore, synonymous with the act of literally "running" away. Neither the Court nor the petitioner elaborate on whether any aspects of the flight itself contribute to the connotation of headlong, although the high crime area and nervous behavior may be implicated as circumstances indicating the flight was headlong. Brief for Petitioner at 4–6, *Illinois v. Wardlow*, 528 U.S. 119 (2000) (No. 98-1936).

87. *Wardlow*, 528 U.S. at 125.

88. *Id.*

89. Hickory v. United States, 160 U.S. 408, 416 (1896).

concerns . . . what commonsense conclusions can be drawn respecting the motives behind that flight."[90] The dissent articulated a number of innocent and criminal reasons a defendant may break into a run, but ultimately determined the facts and circumstances of any given flight are more important than a per se rule.[91] Despite refusing to endorse such a bright-line rule, the dissent outlined several issues the majority failed to consider.[92] For example, Justice Stevens acknowledged:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.[93]

The dissent finished by noting the majority's conclusion—that flight in a high-crime area raises the presumption of guilt—is antithetical to the reality of life in such areas where many factors exist to provoke a person to take flight for innocent reasons.[94]

Without mentioning the four inferences test, the majority opinion drew upon the same logic for admitting evidence of flight: can guilt be inferred from the time and manner of the flight?[95] The immediacy standard was substituted for the more circumstantial inferences drawn from the crime rate of the area and how the defendant attempted to avoid contact with the police.[96] While not mirroring the language of the third inference, this conclusion aligned with the looser interpretation of courts after *Myers* that guilt can be readily inferred if it seems the defendant had a reason to flee.[97] Absent from the discussion of the majority is whether guilt could really be assessed. Instead, guilt is merely inferred by the fact that a "headlong" flight occurred—i.e., a greater than reasonable attempt to avoid the po-

90. *Wardlow*, 528 U.S. at 128 (Stevens, J., with Souter, Ginsburg & Breyer, JJ., concurring in part and dissenting in part) (internal quotation marks omitted).

91. *Id.* at 128–30.

92. *Id.* at 131–35.

93. *Id.* at 132–34.

94. *Id.* at 139.

95. *Id.* at 124–25 (majority opinion) (defendant's flight immediately upon noticing the police, combined with his nervous and evasive behavior, were circumstances contributing to reasonable suspicion).

96. *Wardlow*, 528 U.S. at 124–25.

97. *See* United States v. Borders, 693 F.2d 1318, 1325–27 (11th Cir. 1982).

lice[98]—and the defendant was in a high-crime area.[99] The majority apparently believed flight was most suspicious when encounters with the police were most likely to occur frequently. The dissent rightly criticized this standard as narrow-sighted because there are many innocent reasons to flee and the Court ignored the myriad of circumstances that may cause someone to justifiably run. As such, *Wardlow* issued another blow to federal flight evidence standards.

B. State Flight Standards and Their Immediacy Predicament

Despite the widespread adoption of the four inferences test among the federal courts of appeals, state courts are far from a consensus on when flight is probative. A general pattern emerges showing those states that either (1) ignore making the inference of consciousness of guilt, or (2) assume it, are more likely to allow evidence and instructions of flight than states that engage with the inferences.[100]

The New York Court of Appeals requires a linkage between flight and a crime before it allows flight as evidence of a crime.[101] Even in situations where the flight was extreme and seemingly unprovoked, the court primarily considers whether the police had sufficient basis for linking the conduct

98. This definition of "headlong" is this comment's interpretation of the term as it is used in *Wardlow*, 528 U.S. at 124, and based on the three example cases used below in Part VI which illustrate unreasonable attempts to avoid police.

99. *Wardlow*, 528 U.S. at 124–26 (discussing that the Court does not require "scientific certainty" from judges or law enforcement and allows reasonable suspicion to be determined from judgment and inference).

100. *See* State v. Scales, 204 Vt. 137, 141–144 (Vt. 2017) (finding admission of flight evidence was error after defendant's conduct of lying about his identity was not clearly linked to an attempt to avoid prosecution); State v. Wilson, 878 N.W.2d 203, 211–19 (Iowa 2016) (engaging in a detailed analysis of the four inferences and finding one instance of flight supported a reasonable inference of consciousness of guilt, while another instance was not admissible because the unfair prejudice substantial outweighed any probative value due to a weak inference); Rodriguez v. Commonwealth, 107 S.W.3d 215, 218–20 (Ky. 2003) (quoting Hord v. Commonwealth, 13 S.W.2d 244, 246 (Ky. Ct. App. 1928)) ("It has long been held that proof of flight . . . is admissible because 'flight is always some evidence of a sense of guilt.'"); Schlimme v. Commonwealth, 427 S.E.2d 431, 433–35 (Va. Ct. App. 1993) (finding two separate flight instructions were proper when there was strong evidence linking appellant to the scene of the crime); Ex parte Jones, 541 So.2d 1052, 1052–53, 1057 (Ala. 1989) (finding flight evidence was admissible when the defendant fled several days later but threw away a wad of bills while fleeing that had marked bills from the charged robbery, indicating the defendant fled to avoid prosecution of the robbery).

101. People v. Holmes, 619 N.E.2d 396, 397 (N.Y. 1993) (finding that "[f]light alone . . . or even in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry"); People v. Moses, 472 N.E.2d 4, 9 (N.Y. 1984) (citing People v. Reddy, 185 N.E. 705, 708 (N.Y. 1933)) (determining flight evidence requires some strong corroborating evidence, such as presence at the scene when the crime was committed, to be more than "weak and inconclusive").

to a crime.[102] For example, in *People v. Howard*,[103] the court determined there was an insufficient basis for probable cause where the male defendant (1) quickly walked away from officers when they approached him carrying a woman's vanity bag, (2) continued walking away when the officers identified themselves, (3) began sprinting away while clutching the vanity when the officers got out of their car, (4) climbed an iron fence, and (5) threw the vanity into a trash heap.[104] While *Howard* dealt with probable cause, the holding relied on an analysis similar to inferences two and three, noting that flight alone is insufficient when there is little or no probability a crime has been committed.[105] The determination that the circumstances at the time of the flight did not justify an arrest is directly parallel to how strong of an inference could be made that the defendant fled because they felt guilty.[106] In other words, without police knowing there was a crime committed, it was unreasonable to draw an inference to either consciousness of guilt or consciousness of guilt to the crimes charged.[107]

It is worth noting that courts often consider two distinct questions when determining how to utilize evidence of flight. The first question considers whether flight is admissible as consciousness of guilt for the crime charged ("CC flight").[108] The second question considers whether flight is admissible to show consciousness of guilt for determining whether the police had probable cause or reasonable suspicion ("PC flight").[109] While it appears, at first glance, that these issues should be separated to analyze the evidentiary standard of flight as consciousness of guilt for the crime charged, this comment takes the position that the considerations of flight under either context are inextricably linked. As such, any attempt to distinguish them here would be without purpose.

The constitutional question raised by PC flight is determined on the same evidentiary grounds as CC flight.[110] Indeed, the form of the flight is

102. People v. Kreichman, 339 N.E.2d 182, 187–88 (N.Y. 1975) (determining there was sufficient probable cause because officers personally viewed contraband and flight from police endangered lives and property).

103. 408 N.E.2d 908 (N.Y. 1980).

104. *Id.* at 911, 914.

105. *Id.*

106. *Id.* at 914.

107. *Id.* (determining "[d]efendant's flight, had there also been indicia of criminal activity, would have been an important factor in determining probable cause" (internal citation omitted)).

108. *See generally* State v. Strizich, 499 P.3d 575 (Mont. 2021).

109. *See* Illinois v. Wardlow, 528 U.S. 119, 119–20 (2000) (reasonable suspicion); In re V., 517 P.2d 1145, 1147–48 (Cal. 1974) (probable cause).

110. Kenneth J. Melilli, *The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. CAL. L. REV. 901, 925, 934–39 (2002) (explaining the exercise of the constitutional right to dispute probable cause requires the introduction of flight evidence, which itself can be unfairly prejudicial and require testimony as to consciousness of guilt; therefore, defendants incur a "penalty" when attempting to exercise their constitutional rights).

often the foremost consideration for whether there is probable cause to answer the constitutional challenge and is heavily tied to the perceived probative value of the CC flight evidence.[111] Because PC flight falls into an exception for categorical exclusion, it defaults to an evidentiary standard resulting in essentially the same considerations as CC flight.[112]

Pennsylvania took an entirely different approach when its highest court held that evidence of flight is *generally* admissible for consciousness of guilt.[113] This approach explicitly performs what most circuits do when they jump to immediacy—assumes such a consciousness exists.[114] Notably, in *Commonwealth v. Johnson*, the appellant argued that admission of the flight evidence was in error because he fled due to possession of marijuana rather than to escape arrest for the charged shooting.[115] The court made three conclusions when finding there was no error: (1) the challenge was about probative value, not relevancy; (2) the prejudicial effect of the admission of marijuana was minimal compared to the shooting; and (3) the trial court had carefully drawn instructions.[116] This holding is most interesting for the second conclusion: hypothetically, under the four inferences test, the first two inferences relating to (1) flight and (2) consciousness of guilt of *a* crime—possession of marijuana—would have been satisfied.[117] Satisfaction of the third inference would have been unlikely because he presented another plausible reason to flee—to avoid being charged with possession—weakening the third inference of consciousness of guilt for attempted murder. However, because the court was not using the four inferences, the court dismissed the significance of this possibility by noting it was only a minor prejudice for the appellant to present that to the jury.[118] It is worth noting that, in *Myers*, evidence of flight was excluded because the defendant had committed two crimes, and it required too weak of an inference to determine *which* crime he was fleeing from.[119] Aligned with flight evidence's general admissibility, Pennsylvania has essentially turned the third inference over to the jury.[120] This opinion seemingly allowed the admission of

111. *Id.* at 934–35.

112. *Id.* at 937–38.

113. Commonwealth v. Johnson, 910 A.2d 60, 66 (Pa. 2006).

114. *See, e.g.*, *Wardlow*, 528 U.S. at 128–29 (Stevens, J., with Souter, Ginsburg & Breyer, JJ., concurring in part and dissenting in part); Hickory v. United States, 160 U.S. 408, 417–18 (1896); United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977); Bailey v. United States, 416 F.2d 1110, 1115–16 (D.C. Cir. 1969).

115. *Johnson*, 910 A.2d at 65.

116. *Id.* at 66.

117. *Id.* at 65.

118. *Id.*

119. *Myers*, 550 F.2d at 1050.

120. *Johnson*, 910 A.2d at 65.

highly prejudicial evidence without even questioning whether it was related.

Massachusetts accepts flight evidence but is more skeptical of its value for determining consciousness of guilt than other courts.[121] The Massachusetts Supreme Judicial Court has stated it "perceive[s] a factual irony in the consideration of flight as a factor in the reasonable suspicion calculus. Unless reasonable suspicion for a threshold inquiry already exists, our law guards a person's freedom to speak or not to speak to a police officer."[122] The court views flight as inculpatory and a factor for reasonable suspicion, but awards it little probative value when the suspect is not obligated to respond to law enforcement—so as to protect the rights of people to avoid encounters with the police.[123] The court noted the importance of race in police interactions as its other primary consideration.[124] Acknowledging the repeated pattern of racial profiling, coupled with disproportionate invasive searches and repeated encounters, the court determined the racial element should be given its due weight when considering whether the flight justifiably resulted in reasonable suspicion.[125] While the court declined to remove flight as a factor for Black males, it determined:

> Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus.[126]

Massachusetts, like New York, emphasizes the second factor as being salient to admissibility.[127] Massachusetts's analysis is unique because it makes explicit what is implicit: the vastly different reality Black men face when stopped by the police.[128]

Meanwhile, in Montana, the four inferences test remains murky. The Montana Supreme Court recognizes immediacy as an element in any consideration of flight.[129] However, Montana has grappled with attenuated

121. *Compare* Commonwealth v. Karen K., 199 N.E.3d 860, 873–74 (Mass. 2023) (determining there must be a consideration of circumstances in addition to flight when determining reasonable suspicion), *with* Rodriguez v. Commonwealth, 107 S.W.3d 215, 218 (Ky. 2003) ("flight is always some evidence of a sense of guilt").

122. Commonwealth v. Warren, 58 N.E.3d 333, 341 (Mass. 2016).

123. *Id.* at 341–42.

124. *Id.* at 342.

125. *Id.*

126. *Id.*

127. *See* Commonwealth v. Karen K., 199 N.E.3d 860, 874 (Mass. 2023); People v. Kreichman, 339 N.E.2d 182, 187–88 (N.Y. 1975).

128. *Warren*, 58 N.E.3d at 342.

129. State v. Strizich, 499 P.3d 575, 583 (Mont. 2021); State v. Burk, 761 P.2d 825, 827 (Mont. 1988).

flight when immediacy is not an element.[130] In both instances, where there was not an issue of immediacy, the Montana Supreme Court has only permitted flight evidence when either (1) the defendant admitted they fled to avoid jail or (2) the defendant's story was inherently unbelievable.[131] Generally, Montana has fallen into the federal immediacy trap that weighs flight evidence as admissible, but the Court will conduct a flight analysis that is attenuated from the crime if there is a precipitating event and the defendant cannot present reasonable justifications.[132]

The different tactics of state courts reveal a clear finding: the admissibility of flight evidence lives and dies on the second inference. In states that require a clear linkage between the flight and guilt, flight evidence is highly disfavored because it often fails to prove consciousness of guilt.[133] Even under Pennsylvania law—where flight is generally admissible—courts presume the second inference and leave the remainder of the inferences to the jury.[134] Montana is somewhere in the middle—formally adopting the immediacy element but adopting its own procedures when it is an attenuated flight.[135] Defendants in states that abridge the four inferences test by jumping to immediacy face the task of offering innocent reasons for flight when it is presupposed that only the wicked flee.[136]

V. The Myriad Deviants: How Immediacy Determines Normality

The four inferences test is explicit at the federal level and their influence is felt heavily in state courts. While some courts have been exacting in the application of the inferences, requiring evidence to tie the flight to guilt, others have relied on commonsense applications that presume how the normal, innocent person would react. While the dissent in *Wardlow* noted there may be innocent reasons to take flight, the connection between flight and guilt is already a normative assumption.[137]

130. *See Strizich*, 499 P.3d at 583; *Burk*, 761 P.2d at 827 (citing several other cases from other jurisdictions and noting most flight determinations involve immediacy).

131. *Strizich*, 499 P.3d at 583; *Burk*, 761 P.2d at 827–28.

132. *See Burk*, 761 P.2d at 827–28 (determining flight is usually a question of immediacy and only considering guilt of the crime charged to the extent the defendant's explanation "seem[ed] inherently unbelievable").

133. *See Warren*, 58 N.E.3d at 341–42; State v. Scales, 164 A.3d 652, 654–656 (Vt. 2017); State v. Wilson, 878 N.W.2d 203, 211–19 (Iowa 2016); People v. Holmes, 619 N.E.2d 396, 397 (N.Y. 1993).

134. Commonwealth v. Johnson, 910 A.2d 60, 65–66 (Pa. 2006).

135. *Burk*, 761 P.2d at 827.

136. *See* State v. Freeney, 637 A.2d 1088, 1093–94 (Conn. 1994) (determining flight is admissible even if there are ambiguities or innocent explanations).

137. Illinois v. Wardlow, 528 U.S. 119, 131, 139 (2000) (Stevens, J., with Souter, Ginsburg & Breyer, JJ., concurring in part and dissenting in part).

As noted by both the Massachusetts Supreme Judicial Court[138] and Justice Stevens's dissent in *Wardlow*,[139] flight and its motivations are difficult to determine and are often informed by numerous circumstances, evading the helpfulness of bright-line rules.[140] One prominent issue with existing flight analysis is that the attempts to create conformity using the inferences and other special considerations obscure the actual analysis of flight: relevance, probative value, and undue prejudice.[141]

The four inferences test has been subject to strong criticism on racial grounds, and this is especially true for the third inference: consciousness of guilt to consciousness of guilt concerning the crime charged.[142] The first issue stemming from the third inference is that racial policing and stereotyping create a "Black tax" on defendants of color who must testify, and subject themselves to Federal Rule of Evidence 609 or its equivalents, to rebut the third inference.[143] This is problematic because a prior criminal record is a significantly prejudicial piece of evidence and has been consistently shown to bias jurors.[144] This finding is troubling because there is little correlation between the purpose and effect of offering prior convictions to impeach credibility.[145] People of color are often subjected to additional policing and more regularly charged with low-level crimes, which result in an escalation of offenses as they find themselves unable to pay fines, attend court, or work.[146] This has a compounding effect on defendants of color because a prior conviction, coupled with race, allows jurors "to engage in reasonable racism."[147]

The second critique of the third inference is that flight is only relevant if it is assumed to deviate from standard behavior.[148] People of color are more likely to be subjected to stop-and-frisks, arrests for low-level offenses, uses of force, and police shootings.[149] Such systematic suspicions afflicting communities of color are similarly demeaning and humiliating when people

138. *Warren*, 58 N.E.3d at 538–540.

139. *Wardlow*, 528 U.S. at 128–130.

140. *Warren*, 58 N.E.3d at 538–540; *Wardlow*, 528 U.S. at 128–130.

141. Melilli, *supra* note 110, at 935–36.

142. Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2270–71 (2017).

143. *Id.* at 2271–73; Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 528, 530–536, 540–43, 551–554, 568–82 (2009).

144. Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357–61 (2009).

145. *Id.* at 1388–89.

146. Gonzales Rose, *supra* note 142, at 2276–77.

147. *Id.* at 2273.

148. *Id.* at 2280.

149. *Id.* at 2275–77.

of color are wrongfully treated as suspects to a crime.[150] Because of the numerous factors creating fear and hostility towards the police in communities of color,

> black and brown flight is often more likely to stem from fear and self-preservation than from guilt. Because of high levels of racial profiling, as well as racially targeted police harassment and brutality, flight from police by people of color is often rational. Fleeing from the police in many African American, Latino, and Native American communities has arguably become the norm in some communities. For many people of color, flight is a reflexive response to a police encounter on the street. History and experience have taught people of color that the police cannot be trusted and that avoiding them is usually the best option. Parents of color teach their children about "safe" behavior around police, which may include . . . running from them.[151]

Because flight from the police in communities of color may be a learned, normalized, and reinforced behavior, it is less probative of consciousness of guilt.[152]

There is increasing awareness among the larger population of police violence.[153] The D.C. Court of Appeals has noted there may be a "myriad" of reasons innocent people flee from the police, such as past experience or fear of being brutalized, harassed, or wrongfully apprehended as the guilty party.[154] The court also noted it lacks the capacity to know how often innocent people flee to avoid detainment by the police, while acknowledging it is not insignificant.[155] The D.C. court has further recognized that police encounters are based on the "experience and expectations" of an individual person.[156] The court has also subtly shifted the standard to incorporate an awareness of individual experience—rather than normative ideas based on deviations from "standard" behavior—by acknowledging that police confrontation "would be startling and possibly frighting to many reasonable people."[157] While the court has not necessarily adopted a more lenient standard, it has tilted the inference toward excluding evidence of flight if there was a possible reason besides consciousness of guilt, particularly for people of color.[158]

Furthermore, in considering the high-crime factor from *Wardlow*, the D.C. Court of Appeals held that a Black man in a high-crime area who is

150. *Id.* at 2276.
151. *Id.* at 2279–80.
152. Gonzales Rose, *supra* note 142, at 2280.
153. Miles v. United States, 181 A.3d 633, 641–42 (D.C. 2018).
154. *Id.* at 641.
155. *Id.* at 642.
156. Mayo v. United States, 266 A.3d 244, 260 (D.C. 2022).
157. *Id.* at 263 (quoting *Miles*, 181 A.3d at 644).
158. *Id.* at 263–264.

repeatedly questioned or feels he is being targeted would not feel that a police encounter was "voluntary."[159] The court held that because the defendant did not feel free to leave, he would not believe he could terminate the encounter in the same voluntary manner as a person who felt they were not under suspicion.[160] Because of these factors, the court held when there is a totality of circumstances demonstrating the defendant felt coerced into flight to avoid arrest from a police encounter, testimony about the flight is inadmissible.[161]

These numerous critiques suggest the evidentiary standard of flight, informed by the four inferences test, fundamentally fails because it presumes everyone will have "normal" behavior when encountered by the police.[162] The two crucial inferences, the second and third, would require a fundamentally different and more flexible standard to consider different circumstances.[163] The race of the defendant, absent any other consideration, would significantly change how the inferences should be made to create fairness.[164] The four inferences avoid bright lines and clear standards. While the Montana Supreme Court has yet to explicitly grapple with these considerations, these issues may become more pronounced as Montana continues to become more populated and diverse.[165] Therefore, it is worth the Court's while to consider various standards that may be more fairly and consistently applied.

VI. Fleeing from Flight: Potential Standards for the Admission of Flight Evidence

The admissibility of flight evidence already requires judicial discretion, but their application should be consistent.[166] Without a universalizable standard, the decision of whether to admit evidence of flight relies on the

159. Dozier v. United States, 220 A.3d 933, 943 n.12 (D.C. 2019); *see also* Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

160. *Dozier*, 220 A.3d at 944–45.

161. *Id.* at 947.

162. *See Wardlow*, 528 U.S. at 132–34 (Stevens, J., with Souter, Ginsburg & Breyer, JJ., concurring in part and dissenting in part); Wong Sun v. United States, 371 U.S. 471, 483–84 (1963); United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977) (noting the four inferences have been criticized because the second and fourth inferences are outside of the common experience); People v. Moses, 472 N.E.2d 4, 9 (N.Y. 1984). *See also* Gonzales Rose, *supra* note 142, at 2279–80.

163. *See* United States v. Borders, 693 F.2d 1318 (11th Cir. 1982) (finding immediacy is important and, if satisfied, there must be a defect that would render it inadmissible); United States v. Howze, 668 F.2d 322, 324–25 (7th Cir. 1982) (finding where there was no immediacy or clear knowledge, flight evidence must be suppressed).

164. *See* Gonzales Rose, *supra* note 142 142, at 2279–80. **R**

165. America Counts Staff, *Montana Population Topped the 1 Million Mark in 2020*, U.S. Census Bureau (Aug. 25, 2021), https://perma.cc/C95N-J55Q

166. Gonzales Rose, *supra* note 142, at 2270–71.

judge's assumptions of normal behavior. However, such assumptions do not reflect reality for many defendants.[167] Because the four inferences offer no bright-line rules for determining admissibility, other tests ought to be considered.

The first possibility is a recalibrating of evidentiary focus to avoid the presumption of probative value under the four inferences test. The inference analysis outlived its usefulness when it obstructed the more applicable rule from Federal Rule of Evidence Rule 403—weighing probative value against unfair prejudice and needlessly presenting cumulative evidence.[168] Montana is already doing this, at least nominally, but has tended to throw out objections if the party did not specifically name the rule and places the burden on the defendant to show prejudice.[169] Even in 1896, the U.S. Supreme Court questioned the probative value of evidence of flight, noting it "scarcely comes up to the standard of evidence," and only allowed it under the assumption that juries would properly weigh the evidence.[170] However, this assumption was later undermined by the D.C. Circuit's finding that admitting flight evidence created too much jury speculation.[171]

Even without considering racial prejudice, evidence of flight needlessly presents cumulative evidence.[172] Particularly noteworthy for this problem is the Eighth Circuit's opinion in *Peltier*, where flight constituted a pointless stacking of evidence when it was used to show the defendant possessed a consciousness of guilt because he was in possession of the victim's service revolver after the victim died in a shootout.[173] The problem of flight evidence being cumulative becomes clear in *Peltier* because the act of labeling a set of actions as flight already raises the perceived significance of the actions.[174] By obfuscating these issues behind the inferences—primarily the third inference—the courts miss a more effective balancing test in the form of Rule 403.

One alternative is to acknowledge that flight evidence will almost never be without prejudice and is often only marginally probative.[175] A

167. *Id.* at 2280–81.

168. *See* FED. R. EVID. 403.

169. *See* State v. Strizich, 499 P.3d 575, 584 (Mont. 2021); State v. Davis 5 P.3d 547, 553 (Mont. 2000); State v. Hatten, 991 P.2d 939, 949–50 (Mont. 1999); State v. Burk, 761 P.2d 825, 828 (Mont. 1988).

170. Alberty v. United States, 162 U.S. 499, 510 (1896).

171. Bailey v. United States, 416 F.2d 1110, 1116 (D.C. Cir. 1969).

172. United States v. Brown, No. 97-30082, 1998 U.S. App. LEXIS 8264, at *2–3 (9th Cir. Apr. 24, 1998) (determining challenge based on unfair prejudice and cumulative evidence was harmless error even if true).

173. United States v. Peltier, 585 F.2d 314, 323 (8th Cir. 1978).

174. Dianne L. Martin, R. v. White and Côté*: A Case Comment*, 42 MCGILL L.J. 459, 463–64 (1997).

175. *Alberty*, 162 U.S. at 510.

better standard would exclude evidence when there is no strong inference for a consciousness of guilt.[176] Instead of the four inferences test, the Montana Supreme Court should consider a plausibility standard for alternative explanations.[177] This test would establish that when plausibly innocent explanations are offered, the jury is prohibited from speculating why the defendant fled.[178] Therefore, flight evidence would only be admissible when there is only one reasonable explanation for the flight—criminal consciousness of guilt.[179] This test is also aligned with the rationale of previous Montana cases, namely *State v. Burk*, where the defendant offered such an implausible—and demonstrably impossible—excuse for his absence that the court could readily allow the jury to infer guilt.[180]

This comment's final alternative is a test mirroring *Batson v. Kentucky*.[181] To begin this process, defendants may make a prima facie showing of unfair prejudice from introducing evidence of flight.[182] Defendants could achieve this in several ways, but for people of color, it may be demonstrated through lay or expert testimony establishing flight as common in the defendant's community.[183] Similarly, if a defendant had a criminal record and fled due to previous encounters with the police, the defendant could submit testimony that being forced to testify to the crime in front of the jury would be unfairly prejudicial.[184] Once the defendant makes this showing, the burden would then shift to the State to explain why the flight would be particularly probative or not unfairly prejudicial.[185]

The State could make this case in three ways: (1) the defendant engaged in suspicious behavior during flight, beyond the flight itself; (2) the flight was "headlong"; or (3) the defendant placed the flight at issue. The first of these accounts for cases where the act of running away is not particularly at issue, but other actions by the defendant while running away demonstrated a consciousness of guilt. For example, in *Pridgen v. United States*,[186] officers saw the defendant walking strangely and asked him if he had a gun.[187] The defendant then ran away, clutching his waistband the entire time, and dropped his cell phone without retrieving it.[188] There, the

176. Melilli, *supra* note 110, at 939.
177. *Id.*
178. *Id.*
179. *Id.*
180. State v. Burk, 761 P.2d 825, 827–28 (Mont. 1988).
181. 476 U.S. 79, 80 (1986).
182. *Id.* at 95.
183. Gonzales Rose, *supra* note 142, at 2287–88.
184. Eisenberg & Hans, *supra* note 144, at 1357–61.
185. *Batson*, 476 U.S. at 94.
186. 134 A.3d 297 (D.C. 2016).
187. *Id.* at 299.
188. *Id.*

D.C. Court of Appeals found the defendant's actions beyond the flight—running oddly while holding his side, dropping the cell phone, continuing to hold his side when officers had him cornered and shouted to get on the ground—gave sufficient cause for a reasonable suspicion that the defendant had committed a crime.[189] Essentially, the flight was circumstantial evidence reinforcing other suspicious behavior.[190] It was not necessarily the flight that was suspicious; it was the defendant's bizarre running and disregard for his own property in the act of flight.[191] If the defendant had his hand in his pocket while walking or had dropped his phone when a car was about to hit him, it would not have been suspicious behavior.[192] Evidence of the flight was not probative on its own.

The second way the State could show the flight was particularly probative is by showing the flight was "headlong."[193] This would apply to cases where the nature of the flight was so unreasonable as to foreclose the probability of innocent reasons.[194] The facts of *Pridgen* also apply in this way, namely that it was beyond normal flight to abandon property during the flight.[195] Similarly, in *United States v. Jeter*,[196] the defendant dropped his bicycle and sprinted away when police approached him.[197] This would also apply to situations where the defendant's flight was not provoked by a mere desire to avoid the police, such as in *United States v. Wilson*.[198] What made the flight probative was not the flight, but its suddenness, or "headlong" nature.[199] Lastly, if the defendant commits a crime during their attempted flight, this would be admissible.[200]

The final way for the State to introduce flight evidence—when there is a prima facie case of unfair prejudice—is to argue the defendant placed the flight at issue. An example of this is *Benedetti*, where the defendant argued by implication that the government wasted time between the indictment and

189. *Id.* at 303.
190. *Id.* at 303–05.
191. *Id.* at 304.
192. *Pridgen*, 134 A.3d at 304.
193. Illinois v. Wardlow, 528 U.S. 119, 124 (2000).
194. Melilli, *supra* note 110, at 939.
195. *Pridgen*, 134 A.3d at 299.
196. 721 F.3d 746 (6th Cir. 2013).
197. *Id.* at 750.
198. United States v. Wilson, 963 F.3d 701, 702 (7th Cir. 2020) (defendant did not avoid the police, instead remaining sitting and turning away while grabbing a bulge in his pocket; when police asked him to stand up, he immediately sprinted away because he was trying to conceal a gun).
199. *Id.* at 704; *but see* Smith v. United States, 558 A.2d 312, 313, 316–7 (D.C. 1989) (holding seizure was invalid when the defendant walked away at a "fast pace" when approached by a plain clothes policeman and continually expressed his unwillingness to cooperate before being subdued).
200. United States v. Velez, No. CR 15-00102 WHA, 2015 U.S. Dist. LEXIS 70640, at *1–2 (N.D. Cal. June 1, 2015) (when police approached defendant he attempted to hide before sprinting into an active intersection, in violation of a traffic code, and was nearly hit by a car before being subdued).

arrest so it could "trump up charges" against him.[201] By continually placing his flight at issue, the defendant waived the right to have it excluded, and the court reversed its previous ruling in limine.[202]

Flight evidence may be more objectively applied through the adoption of one of the three tests proposed: (1) discard the inferences and return to a Rule 403 balancing test; (2) create a plausible alternative rule of evidence test for excluding flight; or (3) create a *Batson*-style test that allows the defendant to rebut the presumption of deviance and then allow the State to argue for admissibility under one of the three ways to show probative value. All the tests require that the probative value of the flight outweighs the prejudice of such evidence. While each test may be more balanced than the four inferences test, Montana has historically struggled with its 403 applications to flight, and the *Batson*-style test may take a long time to refine in a jurisdiction where cases of flight are infrequent.[203] Therefore, this comment concludes that the plausibility standard, already utilized in Montana cases, is likely the best approach.

VII. Conclusion: Ideas Taking Flight

The history of flight evidence demonstrates its probative value has consistently been viewed with suspicion and controversy.[204] Montana has historically placed more probative value on flight evidence than the federal courts and favors its admissibility more than other states.[205]

The current federal test for admissibility started as a cautionary test for excluding evidence of flight, but quickly evolved into a question of immediacy that presupposes admissibility and probative value.[206] The concerns with the federal test grow as awareness and scrutiny over police interactions with the public and with communities of color continue to increase. Considering Montana's existing uncertainties over what test should apply in *Strizich* and the concerns with the prejudicial nature of flight, there is an opportunity for Montana to advance justice by adopting a new, higher standard for admitting evidence of flight.

201. United States v. Benedetti, 433 F.3d 111, 115 (1st Cir. 2005).

202. *Id.* at 117.

203. *See* State v. Strizich, 499 P.3d 575, 586–87, 590–95 (Mont. 2021); State v. Hall, 991 P.2d 929, 937 (Mont. 1999); State v. Burk, 761 P.2d 825, 827–28 (Mont. 1988).

204. *See* Illinois v. Wardlow, 528 U.S. 128 (2000) (Stevens, J., with Souter, Ginsburg & Breyer, JJ., concurring in part and dissenting in part); Wong Sun v. United States, 371 U.S. 471, 483–4 (1963); Alberty v. United States, 162 U.S. 499, 510 (1896); Hickory v. United States, 160 U.S. 408, 416 (1896); United States v. Myers, 550 F.2d 1036, 1050 (5th Cir. 1977); Bailey v. United States, 416 F.2d 1110, 1115 (D.C. Cir. 1969); Commonwealth v. Warren, 58 N.E.3d 333, 341–42 (Mass. 2016).

205. *Compare Burk*, 761 P.2d at 827–28, *with* State v. Wilson, 878 N.W.2d 203, 211–19 (Iowa 2016).

206. *See* United States v. Borders, 693 F.2d 1318, 1325–27 (11th Cir. 1982).

Based on its previous applications of a less formalized plausibility test, this comment advocates for the adoption of such a test for questions of admitting evidence of flight. The next time the Montana Supreme Court is faced with a question of flight evidence, it should consider whether the defendant can offer a reasonably plausible explanation for the flight besides committing the crime charged. If yes, then the evidence is inadmissible. If no, then the evidence is admissible. Such a test would create a much simpler standard and better serve the ends of justice and fairness.