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The Fugitive Dismissal Rule: *Ortega-Rodriguez* Takes the Bite Out of Flight

I. INTRODUCTION

In the 1993 movie "The Fugitive,"¹ Dr. Richard Kimble faces a conviction in connection with the murder of his wife. Rather than experience a lifetime of imprisonment, Kimble chooses to live as a fugitive. Under the current Fugitive Dismissal Rule,² if Kimble returned to the jurisdiction, his right to appeal his conviction would depend solely on whether he had filed a notice of appeal. Had he done such, Kimble's ability to appeal his conviction would be lost.³ If he fled prior to filing a notice of appeal, however, Kimble's right to appeal would remain completely intact.⁴

In balancing the management of the appellate process with the fugitive's ability to file an appeal, courts have been torn in two distinct directions: on one hand, the judicial system strives to deter escape and punish those who flee;⁵ on the other hand, courts have fought to remain loyal to legal precedent and adhere to established law attempting to provide due process for all.

1. THE FUGITIVE (Paramount Pictures 1993) was based on the original 1960s television series starring David Jansen.

2. The Fugitive Dismissal Rule, as affirmed by the Supreme Court in *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993), can generally be defined as follows: "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Id.* at 1203.

3. See *Molinero v. New Jersey*, 396 U.S. 365 (1970) (per curiam) (stating the courts ability to dismiss an appeal of a defendant who escapes during the pendency of his appeal); *United States v. Amado*, 754 F.2d 31, 32 (1st Cir. 1985) (holding that courts possess the ability to dismiss an appeal with prejudice if appellant escapes after filing the appeal); *Shaw v. Estelle*, 542 F.2d 954, 955 (5th Cir. 1976) (per curiam) (stating that appeals of defendants who escape during pendency of appeal are subject to immediate dismissal with prejudice).

4. See *Ortega-Rodriguez*, 113 S. Ct. at 1209 (holding a former fugitive's status lacks the requisite "connection to the appellate process" to warrant dismissal of his appeal).

5. See *Estelle v. Dorrrough*, 420 U.S. 534, 541 (1975) (stating that deterring felony escapes is one of the primary goals of the Fugitive Dismissal Rule).

The ability of the courts to dismiss the appeal of a fugitive who escapes after filing a timely appeal is well established in the Fugitive Dismissal Rule.⁶ Since the turn of the century, however, the Supreme Court had yet to address the effect of a pre-appeal escape on the right of a former fugitive to appeal his conviction. Finally in *Ortega-Rodriguez v. United States*, the Court first addressed the effects of such an escape on the appellate rights of a former fugitive.⁷ The Court's holding in *Ortega-Rodriguez* severely limits the authority of the courts to enforce procedural rules establishing reasonable conditions on the exercise of appellate jurisdiction.⁸ As a result of the Court's holding, defendants who flee after filing a notice of appeal lose the right to appeal their conviction; those who escape prior to filing, however, can appeal an unfavorable judgment.⁹

This Note takes the position that while the Court's intended purposes for affirming the Fugitive Dismissal Rule are sound, the holding fails to satisfy the intended goal and will instead result in long-term negative impacts.¹⁰ The aims of the Court and the interests of society would be better served by a modified version of the Fugitive Dismissal Rule.¹¹ This Note proposes a "Discretionary Dismissal Rule for Fugitives" which would leave the ability of fugitives to appeal their convictions to the discretion of the courts.¹² This determination would be based on a three-factor, case-by-case analysis.¹³

This Note examines *Ortega-Rodriguez v. United States* in depth and discusses the ramifications and repercussions of the case. Part II dis-

6. See *Molinaro*, 396 U.S. at 366 (1970) (stating that courts may dismiss the appeal of a defendant who escapes during the pendency of his appeal); *Bonahan v. Nebraska*, 125 U.S. 692, 692 (1887) (asserting appellate courts may refuse to hear the appeal of a defendant who escapes during the pendency of his appeal); *Smith v. United States*, 94 U.S. 97, 97 (1876) (declaring the courts ability to dismiss appeals of fugitives who have filed for appeal); *Amado*, 754 F.2d at 32 (holding that courts possess the ability to dismiss the appeal of a defendant who escapes after filing a notice of appeal); *Estelle*, 542 F.2d at 955 (stating that appeals of defendants who escape during pendency of appeal are subject to immediate dismissal with prejudice).

7. 113 S. Ct. at 1199.

8. *Id.* at 1209.

9. *Id.* at 1209-10.

10. See *infra* notes 276-310 and accompanying text.

11. See *infra* notes 292-310 and accompanying text.

12. See *infra* notes 294-310 and accompanying text.

13. This author's "Discretionary Dismissal Rule for Fugitives" is based on three factors, weighed by appellate courts in order to determine whether dismissal is appropriate under the circumstances. The factors are:

- (1) the length and effect of the fugitivity;
- (2) the voluntary or involuntary return of the fugitive; and
- (3) the nature of the claim asserted.

See *infra* notes 294-310 and accompanying text.

cusses the historical background of the Fugitive Dismissal Rule, including the power of appellate courts to decide such issues.¹⁴ Part III examines the facts of *Ortega-Rodriguez* and the constitutional issues presented by the case.¹⁵ Part IV analyzes the majority and dissenting opinions of the Court.¹⁶ Part V discusses the impact of the decision on the former fugitives' ability to file an appeal, and provides a recommended approach for future cases involving this issue.¹⁷ Finally, Part VI will provide a brief conclusion.¹⁸

II. HISTORICAL BACKGROUND

The Fugitive Dismissal Rule originated in the late 1870s and has continued to evolve and expand ever since.¹⁹ Prior to examining the formation and development of this rule, it is important to understand how the basis for the courts' authority to create and enforce such a rule emerged. For this reason, this section will begin with a brief discussion of the courts' authority to institute rules affecting the appellate rights of criminal defendants. It will then examine the development and evolution of the Fugitive Dismissal Rule from its inception in 1876²⁰ to its most recent refinement by the Supreme Court.

A. *Power of the Appellate Courts*

Courts traditionally interpret the United States Constitution as providing no absolute right to an appeal.²¹ Instead, courts of appeal possess the power to enforce procedural rules placing reasonable conditions on the exercise of their appellate jurisdiction.²² The Supreme Court first established this principle in *Thomas v. Arn*,²³ where the Court held

14. See *infra* notes 19-97 and accompanying text.

15. See *infra* notes 98-117 and accompanying text.

16. See *infra* notes 118-275 and accompanying text.

17. See *infra* notes 276-310 and accompanying text.

18. See *infra* notes 311-15 and accompanying text.

19. See *Smith v. United States*, 94 U.S. 97 (1876) (providing the first use of the Fugitive Dismissal Rule). Despite its importance, few legal scholars or commentators have discussed the Fugitive Dismissal Rule.

20. *Id.*

21. See *Thomas v. Arn*, 474 U.S. 140, 146-47 (1985) (establishing the courts' authority to adopt rules conditioning the ability to appeal); *Abney v. United States*, 431 U.S. 651, 656 (1977) (stating there is no constitutional right to an appeal).

22. See *Thomas*, 474 U.S. at 146-47.

23. *Id.* at 140.

that absent a conflict with the Constitution or a statute, a court of appeal may exercise its supervisory power to formulate "procedural rules governing the management of litigation."²⁴ Failure to abide by rules promulgated by appellate courts may result in the loss of the right to statutory appeal.²⁵ These rules have customarily provided the authority to dismiss appeals of defendants who become fugitives after filing an appeal of their lower court convictions.²⁶ These rules may be implemented and enforced by the appellate courts provided that they are (1) not inconsistent with the Constitution or a statute; (2) within the authority of the courts to establish through adjudication; and (3) reasonable in light of the interests they seek to promote.²⁷ The Fugitive Dismissal Rule complies with all three requirements.

1. The Fugitive Dismissal Rule is not Inconsistent with the Constitution or any Statute

It is well established that there is no constitutional right to appeal a criminal conviction.²⁸ The Court, in *Abney v. United States*,²⁹ determined that the right to appeal "is purely a creature of statute."³⁰ Therefore, it must be determined whether the rule granting appellate courts the authority to dismiss the appeal of a fugitive is inconsistent with any statute. It appears that it is not.³¹ The statute providing criminal defendants the right to appeal bestows jurisdiction upon the appellate court "from all final decisions of the district courts of the United States."³²

While this rule grants jurisdiction to the appellate courts, it does not set forth the procedural rules that must be followed in order to exact an appeal. The courts administer this task through judicially styled rules³³ and adjudication.³⁴ The rules developed have created conditions upon which the statutory right to appeal may be exercised. They

24. *Id.* at 146.

25. *Id.* at 147.

26. *See supra* note 6 and accompanying text.

27. *See Thomas*, 474 U.S. at 145-48.

28. *See Abney v. United States*, 431 U.S. 651, 656 (1977); *see also Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (stating that a "state is not required by Federal Constitution to provide appellate courts or a right to appellate review at all"); *McKane v. Durston*, 153 U.S. 684, 687-88 (1894) (holding "[a]n appeal from a judgment of conviction is not a matter of absolute right . . .").

29. *Abney*, 431 U.S. at 651.

30. *Id.* at 656.

31. *See supra* notes 24-27 and accompanying text.

32. 28 U.S.C. § 1291 (1988 & Supp. 1993).

33. The rules referred to are the Federal Rules of Appellate Procedure.

34. *See infra* notes 36-38 and accompanying text.

are not, however, inconsistent with the appellate jurisdiction granted by 25 U.S.C. § 1291.³⁵

2. It is Within the Authority of the Courts to Establish the Fugitive Dismissal Rule Through Adjudication

Traditionally, the courts of appeal have been granted broad rule-making authority.³⁶ Rule 47 of the Federal Rules of Appellate Procedure grants courts of appeal with the power, through adjudication, to initiate procedural rules, in addition to those legislatively mandated.³⁷ Rule 47 provides that, "[i]n all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with the [Federal Rules of Procedure]."³⁸ The Fugitive Dismissal Rule is not inconsistent with these federal rules, and therefore, is properly developed through the course of adjudication.

3. A Fugitive Dismissal Rule Serves the Valid Interests Which it Seeks to Promote

The Fugitive Dismissal Rule has expanded significantly since the late nineteenth century. The Court first addressed this issue in *Smith v. United States*.³⁹ In *Smith*, a criminal defendant filed an appeal of a conviction by the state supreme court.⁴⁰ The defendant, however, fled prior to its resolution.⁴¹ The Court held that it was within its discretion to "refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."⁴² Therefore, the Court ordered the defendant's

35. See *Thomas v. Arn*, 474 U.S. 140, 146-47 (1985) (stating that the Court has the power to "mandate procedures deemed desirable from the viewpoint of sound judicial practice").

36. See *infra* notes 37-38 and accompanying text.

37. FED. R. APP. P. 4; see also *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1210 (1993) (Rehnquist, J., dissenting) (illustrating the Court's ability to initiate a procedural rule developed through adjudication).

38. FED. R. APP. P. 4.

39. 94 U.S. 97 (1876).

40. James R. Grippando, Comment, *Fear of Flying—The Fugitive's Fleeting Right to a Federal Appeal*, 54 *FORDHAM L. REV.* 661, 664 (1986).

41. *Id.*

42. *Smith*, 94 U.S. at 97. It is interesting to note that the Court reached its decision with relative ease, using only one half of one page to relate its holding and reasoning. *Id.*

appeal dismissed unless he surrendered himself to the jurisdiction of the court.⁴³ This holding paved the way for the development of the Fugitive Dismissal Rule. Shortly after the Court decided *Smith*, it was again faced with this issue. In *Bonahan v. Nebraska*,⁴⁴ the defendant, who appealed his conviction, fled prior to its settlement.⁴⁵ Again, as in *Smith*, the Court held that the defendant must be within the jurisdiction of the court prior to the last day of the term if the appeal was to be considered.⁴⁶ Because the defendant was not within the jurisdiction, the Court dismissed the appeal.⁴⁷

The Court's decision in *Smith* created two important principles both arising from the absence of the defendant. First, based on the defendant's status as a fugitive, the Court could not force him to respond to a judgment.⁴⁸ Second, because of the court's inability to enforce its decision, it would be performing a vain and useless act.⁴⁹ This second tenet was founded upon the rationale that if the defendant refused to return for his appeal, he might decline to reappear for a retrial if the court found in his favor.⁵⁰ The Court in *Bonahan*, however, determined that the principle concerning the court performing a vain and useless act, was not always applicable.⁵¹ In that case, the defendant claimed a violation of the Double Jeopardy principle.⁵² As a result, he sought acquittal rather than retrial.⁵³ Based on this holding, the Court

43. *Id.* The Court established the first day of the following term as the deadline for the defendant to surrender himself to the jurisdiction of the court. After that date, the opportunity to appeal his conviction would be lost. *Id.*

44. 125 U.S. 692 (1887).

45. *Id.*

46. *Id.* Again, the Court provided very little reasoning to explain how it reached the aforementioned holding.

47. *Id.* In defining "being within the control of the court," Justice Waite stated that either being in custody, or being out on bail, which constitutes constructive custody, would suffice. *Id.*; see also *Smith*, 94 U.S. at 97 (interpreting "within the control of the court" as meaning either in custody or out on bail).

48. *Smith*, 94 U.S. at 97.

49. *Id.* The Court reasoned that it would be performing a useless act because in reality no matter what it decided, the defendant was unlikely to respond to the judgment. *Id.* If the Court affirmed the criminal conviction the defendant would not likely surrender himself, and if it reversed and ordered a new trial, the defendant still might decide not to return. *Id.*

50. *Id.* The Court determined that a favorable decision for the defendant during an appeal in his absence would result in a retrial of his case. *Id.*

51. See *Bonahan v. Nebraska*, 125 U.S. 692 (1887) (illustrating that the court only requires that it to be unable to enforce the decision in order to dismiss an appeal).

52. *Bonahan v. Nebraska*, 24 N.W. 390 (Neb. 1886).

53. *Id.* *Bonahan* based his request on the fact that retrial after reversal would be a violation of the Double Jeopardy clause of the Constitution. *Id.*; see, e.g., *Burks v. United States*, 437 U.S. 1, 18 (1978) (holding that retrial after reversal of a conviction would violate the Double Jeopardy clause, and as a result acquittal was the only

determined that it need only be unable to enforce its decision as a basis in order to dismiss the defendant's appeal.⁵⁴ The second criteria, consisting of the performance of a useless act, need no longer be present.⁵⁵

The Court later affirmed, in *Allen v. Georgia*⁵⁶ the rationale for dismissal developed in *Smith* and clarified in *Bonahan*. In *Allen*, the defendant filed a writ of error to the state supreme court concerning his murder conviction and death sentence.⁵⁷ Subsequent to his filing this motion, but prior to a decree, the defendant fled the jurisdiction. As a result, the state court dismissed his appeal.⁵⁸ The defendant then filed a writ of error to the United States Supreme Court, asserting that the state court's dismissal of his appeal based on his fugitive status was a denial of due process.⁵⁹ The Court affirmed the dismissal by the lower court, holding that his escape eliminated his ability to appeal his conviction.⁶⁰

*Molinaro v. New Jersey*⁶¹ is a more recent case that examined and applied the principles created in *Smith* and *Bonahan*. In *Molinaro*, the defendant was convicted for abortion and conspiracy to commit abortion.⁶² As in the previous cases, the defendant fled during the pendency

remedy available under the circumstances).

54. *Bonahan*, 125 U.S. at 692.

55. *See id.* (illustrating that the Court considers the lack of enforceability the only requirement for dismissal).

56. 166 U.S. 138 (1897).

57. *Id.*

58. *Id.* at 139. It is interesting that the Court in *Allen* retreated in one respect from the holdings in *Smith* and *Bonahan* by reducing the deadline for the defendant to return from the last day of the term to 60 days. *Id.*

59. *Id.* The Court denied the defendant's due process claim. The Court stated:

To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists . . . it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process.

Id. at 140. The Court thus rejected the defendant's argument that dismissal of a writ of error was a deprivation of fundamental rights which would allow the Court to intervene. *Id.* at 141.

60. *Id.* After finding no violation of due process, the Court used the justifications set forth in *Smith* and *Bonahan* to warrant dismissal of the defendant's appeal. *Id.*

61. 396 U.S. 365 (1970) (per curiam).

62. *Id.*

of his appeal.⁶³ Based on the defendant's escape, the Court refused to hear his appeal.⁶⁴ The Court stated, "[w]hile such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims."⁶⁵ This holding affirmed the decisions reached in *Smith* and *Bonahan*, while simultaneously expanding the rule concerning dismissal of a fugitive's appeal in two significant areas.

First, the two earlier decisions required the court to postpone dismissal until the last day of the term, while awaiting the fugitive's return to the lower court's jurisdiction. In contrast, *Molinaro* featured immediate dismissal.⁶⁶ The Court stated that "[t]he dismissal need not await the end of the Term or the expiration of a fixed period of time, but should take place at this time."⁶⁷

Second, *Bonahan* and *Smith* allowed the defendant to reinstate his appeal if he returned to the jurisdiction prior to the last day of the term.⁶⁸ The *Molinaro* court gave no indication that an appeal may be reinstated.⁶⁹ As a result of the Court's holding in *Molinaro*, the appeal of a defendant who flees after filing a notice of appeal may be dismissed immediately, with prejudice, if he cannot be made to comply with the court's decision.⁷⁰

63. *Id.* In this case, the defendant was free on bail, which *Smith* and *Bonahan* regard as constructive custody. See *Smith v. United States*, 94 U.S. 97, 97 (1876); see also *Bonahan v. Nebraska*, 125 U.S. 692, 692 (1887) (stating bail is equivalent to constructive custody). When he failed to surrender himself to the court, the defendant's bail was revoked and he was considered "a fugitive from justice." *Molinaro*, 396 U.S. at 365.

64. *Molinaro*, 396 U.S. at 366. The Court referred to *Smith* and *Bonahan* as providing justification for its dismissal of the defendant's appeal. *Id.* at 365.

65. *Id.* at 366.

66. *Id.* In *Smith*, the Court waited until the first day of the following term to dismiss the appeal. *Smith v. United States*, 94 U.S. 97, 98 (1876). In contrast, the *Bonahan* Court struck the appeal from the docket on the last day of the current term. *Bonahan*, 125 U.S. at 692.

67. *Molinaro*, 396 U.S. at 366. This followed the progression that had been developing in cases of this type. In *Smith*, the Court dismissed the appeal on the first day of the subsequent term. *Smith*, 94 U.S. at 98. In *Bonahan*, the Court moved the date up to the last day of the term during which the controversy arose. *Bonahan*, 125 U.S. at 692. In *Allen v. Georgia*, 166 U.S. 138 (1897), the Court again shortened the deadline to allow only 60 days for defendants to surrender to the lower court's jurisdiction. *Id.* at 142. Immediate dismissal, as permitted in *Molinaro*, seemed to follow the logical progression of the law. *Molinaro*, 396 U.S. at 366.

68. See *Bonahan*, 125 U.S. at 692 (declaring the defendant's appeal may be placed on the docket if he returns to the jurisdiction on or before the last day of the term); see also *Smith*, 94 U.S. at 98 (stating the defendant may reinstate his appeal if he returns to the jurisdiction).

69. *Molinaro*, 396 U.S. at 366.

70. See *United States v. Amado*, 754 F.2d 31, 32 (1st Cir. 1985) (relying on

On the heels of *Molinaro*, the Court reviewed *Estelle v. Dorough*,⁷¹ which upheld a statute mandating automatic dismissal of appeals by defendants who escaped during the pendency of their appeal.⁷² The Court justified its holding in *Estelle* by stating that the statute met the intended goal of discouraging felony escapes, while encouraging voluntary surrenders.⁷³ In addition, the statute promoted the dignified operation of the court of appeals.⁷⁴ This deviation from a theory of disentanglement, toward promoting the dignified operation of the appellate courts and discouraging felony escapes, provided additional justification for the Fugitive Dismissal Rule.

Since *Estelle*, the most significant case concerning a court's authority to dismiss the appeal of a fugitive is *United States v. Holmes*.⁷⁵ In

Molinaro the court stated "[t]here can be no doubt of our authority to dismiss the appeal with prejudice."); cf. *Joensen v. Wainwright*, 615 F.2d 1077, 1079 (5th Cir. 1980) (reasoning that a state court should have the same rights as the Supreme Court in unconditionally dismissing an escapee's appeal); *Shaw v. Estelle*, 542 F.2d 954, 955 (5th Cir. 1976) (per curiam) (holding that the defendant's appeal was subject to immediate dismissal with prejudice); *United States v. Shelton*, 508 F.2d 797, 798 (5th Cir.) (stating that in *Molinaro*, the Supreme Court altered its own practice by dismissing a fugitive's appeal without first waiting to see if he returned to the jurisdiction), cert. denied, 423 U.S. 828 (1975).

71. 420 U.S. 534 (1975).

72. *Id.* at 544. The statute referred to is Vernon's Texas Code of Criminal Procedure Annotated, Article 44.09. The statute provides in pertinent part:

If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the court shall . . . dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; and in cases where the punishment inflicted by the jury is death . . . the court may in its discretion reinstate the appeal if the defendant is recaptured or voluntarily surrenders within thirty days after such escape.

Id. at 535 n.1 (quoting TEX. CRIM. PROC. CODE ANN. § 44.09 (West 1966) (since repealed and replaced by Texas Rule of Appellate Procedure 60(b))).

73. *Id.* at 537 (citing *Rodriguez v. State*, 457 S.W.2d 555, 556 (Tex. Ct. Crim. App. 1970)). This was the first time the Court proposed deterring felony escapes and encouraging voluntary surrender as a valid basis for dismissing the appeal of a criminal defendant who flees.

74. *Id.* In *Estelle*, the Court considered for the first time, along with discouraging felony escapes and promoting voluntary surrender, the validity of the dignified operation of the courts as a basis for dismissal.

75. 680 F.2d 1372 (11th Cir. 1982) (per curiam), cert. denied, 460 U.S. 1015 (1983), overruled by *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993).

Holmes, the district court convicted the defendant on several charges, including the violation of federal narcotics laws and possession of a firearm by a convicted felon.⁷⁶ The defendant escaped, however, before the date set for sentencing.⁷⁷ Two years later, after his recapture, the court sentenced the defendant for the crimes he committed, and the defendant appealed.⁷⁸ The government moved to dismiss his appeal based on his status as a former fugitive.⁷⁹ This marked the first attempt by the court to dismiss the appeal of a defendant who escaped after his conviction yet prior to filing for an appeal. The government argued that although factually distinguishable from earlier cases, identical policy considerations warranted dismissal in this case.⁸⁰ In its holding, the court dismissed *Holmes*' appeal, stating "a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control."⁸¹

It is interesting that the court's decision in *Holmes* centers around its proposed reliance on *Molinaro*. First, the court stated that it relied on *Molinaro* in reaching its conclusion that the right to appeal is purely statutory and can be waived by an escape, thereby postponing the appeal for years after conviction.⁸² The court concluded that the delay caused by the defendant's flight provided sufficient basis to for dismissal of an appeal filed after their recapture.⁸³ Second, the court stated that "it would fly in the face of common sense and sound reason" to allow former fugitives "to seek relief from the very legal system that

76. *Id.* at 1373.

77. *Id.* In *Holmes*, the "escape" was failure to appear for sentencing by a defendant who was free on bail. Determining that bail functions as constructive custody, the court ordered *Holmes*' bond forfeited and issued a warrant for his arrest. *Id.*; see also *Bonahan v. Nebraska*, 125 U.S. 692, 692 (1887) (asserting that a defendant free on bail is actually in constructive custody and within the control of the court); *Smith v. United States*, 94 U.S. 97, 97 (1876) (equating bail with constructive custody).

78. *Holmes*, 680 F.2d at 1373.

79. *Id.* The government relied on several cases illustrating that the court may dismiss the appeal of a defendant who flees during the pendency of his appeal. See *Estelle v. Dorough*, 420 U.S. 534 (1975); *Molinaro v. New Jersey*, 396 U.S. 365 (1970); *Estrada v. United States*, 585 F.2d 742 (5th Cir. 1978); *United States v. Smith*, 544 F.2d 832 (5th Cir. 1977); *United States v. Shelton*, 508 F.2d 797 (5th Cir.), *cert. denied*, 423 U.S. 828 (1975).

80. *Holmes*, 680 F.2d at 1373; see also Brief for Petitioner at 13-14, *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993) (No. 91-7749).

81. *Holmes*, 680 F.2d at 1373. The Court expressly excluded from the scope of its decision appeals based on an error in sentencing. *Id.*

82. *Id.* at 1373-74; see also *Abney v. United States*, 431 U.S. 651, 656 (1977) (providing "[t]he right of appeal . . . is purely a creature of statute").

83. *Holmes*, 680 F.2d at 1374.

they previously had seen fit only to defy.⁸⁴ Although these statements purported to rely on *Molinaro*, in actuality, they represented new criteria for dismissing the appeal of a former fugitive who is recaptured prior to filing a notice of appeal.

The power of the courts to unconditionally dismiss the appeal of a former fugitive was expanded further by the Eleventh Circuit in *United States v. London*.⁸⁵ In *London*, the defendant fled during the course of the district court trial in which he and eleven other defendants faced drug smuggling charges.⁸⁶ Despite the defendant's absence, the court continued the trial and convicted the defendant *in absentia*.⁸⁷ Three years later authorities recaptured the defendant and returned him to the jurisdiction for sentencing.⁸⁸ Subsequent to his sentencing hearing, the defendant filed a timely notice of appeal.⁸⁹ Based on the Fugitive Dismissal Rule, the government moved to dismiss the appeal, and the court granted the motion.⁹⁰ The court determined that flight during trial was no different than flight following conviction but prior to sentencing.⁹¹

84. *Id.*

85. 723 F.2d 1538 (11th Cir.), *cert. denied*, 467 U.S. 1228 (1984).

86. *Id.* The indictment, which covered approximately 100 pages, charged the 12 defendants with 36 counts related to drug smuggling. *Id.*

87. *Id.* Under Rule 43(b) of the Federal Rules of Criminal Procedure, "a defendant may be tried in absentia when he voluntarily absents himself after the trial has commenced." *Id.* at 1539 n.1 (quoting FED. R. CRIM. P. 43(b)(1)); *see also* Taylor v. United States, 414 U.S. 17, 18-20 (1973) (*per curiam*) (stating that the power of the trial court to proceed in absentia is narrow); United States v. Gallo, 763 F.2d 1504, 1529 (6th Cir. 1985) (stating that the defendant can waive the right to be present at trial by failing to make a timely objection, by voluntary absence, or through court permission), *cert. denied*, 474 U.S. 1068 (1986); United States v. Benavides, 596 F.2d 137, 139 (5th Cir. 1979) (asserting that a defendant may, upon court permission to be excused, waive his right to be present at trial); United States v. Brown, 571 F.2d 980, 987 (6th Cir. 1978); United States v. Jones, 514 F.2d 1331, 1332-33 (D.C. Cir. 1975) (indicating that the trial may also be continued, absent the defendant, if he fails to make a timely objection to the proceeding continuing in his absence).

88. *London*, 723 F.2d at 1539.

89. *Id.*

90. *Id.* Curiously, the court in *London* made no mention of its earlier dismissal of the appeal of one of London's co-defendants. *See* United States v. Phillips, 664 F.2d 971, 985 n.1 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982). This dismissal, however, was distinguishable because the co-defendant filed his appeal and the court dismissed it while he was still at large. *London*, 723 F.2d at 1539.

91. *Id.* As a matter of fact, the court stated, "the situation created by a defendant who voluntarily absents himself during trial is even more problematic than those encountered when the defendant absconds after the trial has concluded but prior to sentencing." *Id.*

This holding further clarified and expanded the holding in *Holmes*. The court in *Holmes* focused on both the defendant's defiance of the legal system and on the delay caused by the defendant's escape.⁹² In contrast, the court in *London* focused solely on the defendant's disregard for the integrity of the judicial process.⁹³ Thus, the court in *London* firmly established preservation of the integrity of the judicial system as independent grounds for dismissal.⁹⁴

In the early cases of *Smith*, *Bonahan*, and *Molinaro*, the Supreme Court established a rule permitting dismissal where a fugitive fled after filing a notice of appeal.⁹⁵ In more recent cases, the lower federal courts have expanded this rule to provide courts with the authority to dismiss the appeal of a fugitive prior to filing an appeal, and in some circumstances to former fugitives subsequent to their recapture.⁹⁶ This expansion, allowing for the dismissal of a former fugitive's appeal, is a reasonable exercise of the supervisory power of the courts. In *United States v. Ortega-Rodriguez*, the Supreme Court again addressed the Fugitive Dismissal Rule and its boundaries.⁹⁷

III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 8, 1988, Jose Antonio Ortega-Rodriguez, along with two other crew members of the vessel *Wilfred*, were arrested by the Coast Guard while fishing off the coast of Florida.⁹⁸ The three were tried and convicted of possession of narcotics with the intent to distribute, in addition to conspiring to possess with the intent to distribute over five kilograms of cocaine.⁹⁹ Prior to sentencing on June 15, 1989, Ortega-Rodriguez fled.¹⁰⁰ He was sentenced *in absentia* to a prison term of nineteen years and seven months, to be followed by five years of proba-

92. *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983).

93. See *supra* notes 82-84 and accompanying text.

94. See *supra* notes 85-93 and accompanying text.

95. See *supra* notes 39-70 and accompanying text.

96. The two major cases in which the federal courts have dismissed the appeal of a fugitive who flees prior to filing a notice of appeal are: *United States v. London*, 723 F.2d 1538 (11th Cir.), *cert. denied*, 467 U.S. 1228 (1984); *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983).

97. See *infra* notes 98-117 and accompanying text.

98. *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1202 (1993). The three defendants were seized from the vessel headed toward Cuba. *Id.* The defendants claimed that they, like many others, were fishing for dolphin. *Id.*; see also *United States v. Mieres-Borges*, 919 F.2d 652, 655-57 (11th Cir. 1990) (providing a detailed description of the facts surrounding the defendants' arrest), *cert. denied*, 499 U.S. 980 (1991).

99. *Ortega-Rodriguez*, 113 S. Ct. at 1202.

100. *Id.*

tionary release.¹⁰¹ Although Ortega-Rodriguez's co-defendants appealed their convictions, no such appeal was filed on his behalf.¹⁰²

On May 24, 1990, eleven months after Ortega-Rodriguez's escape, the authorities recaptured him pursuant to an arrest warrant issued by the district court.¹⁰³ The court found Ortega-Rodriguez guilty of contempt of court and failure to appear, and resentenced him to an additional twenty-one months to run subsequent to his sentence for the cocaine charges.¹⁰⁴ This sentence was to be followed by a three-year period of supervised probation.¹⁰⁵ Following his recapture, "his attorney filed a 'motion to vacate sentence and for resentencing,' as well as a motion for judgment of acquittal."¹⁰⁶ The district court denied this motion for acquittal; however, the court granted the motion to vacate the earlier sentence and to resentence.¹⁰⁷ The defendant was resentenced to a prison term of fifteen years and eight months, followed by five years of probation.¹⁰⁸ Immediately following the newly-entered judgment and resentencing, Ortega-Rodriguez filed a timely appeal.¹⁰⁹ By now, the court of appeal had already heard his co-defendants' appeals, with one conviction affirmed and the other overturned because of insufficient evidence.¹¹⁰

The government moved to dismiss Ortega-Rodriguez's appeal based on the fact that he had become a fugitive following conviction but prior to initial sentencing.¹¹¹ They argued that because of his fugitive status

101. *Id.* If a defendant voluntarily absents himself from the proceedings of a trial, the trial court may continue in his absence. See Travis H.D. Lewin, *Criminal Procedure*, 35 SYRACUSE L. REV. 240, 247 (1984).

102. *Ortega-Rodriguez*, 113 S. Ct. at 1202.

103. *Id.*

104. *Id.* The resentencing took place pursuant to the Sentencing Reform Act, 18 U.S.C. §§ 3551-3665, 3673, 3742 (1984). *Id.*

105. *Id.*

106. *Id.* at 1202-03.

107. *Id.* at 1203.

108. *Id.*

109. *Id.* This series of events made Ortega-Rodriguez's situation "somewhat unusual." *Id.* Applicable time limits would have barred his filing a timely appeal on his initial sentence had the district court denied his motion for resentencing. Resentencing, however, actually allowed Ortega-Rodriguez to file a timely appeal of the second sentence. *Id.* at 1203 n.9.

110. *Id.* at 1202; see *United States v. Mieres-Borges*, 919 F.2d 652, 660-63 (11th Cir. 1990) (overturning the conviction of Becerra-Flores due to insufficient evidence and affirming the conviction of Mieres-Borges), *cert. denied*, 499 U.S. 980 (1991).

111. *Ortega-Rodriguez*, 113 S. Ct. at 1203.

“[u]nder the holding in *Holmes*, he cannot now challenge his 1989 conviction for conspiracy and possession with intent to distribute cocaine.”¹¹² The court of appeal granted the motion to dismiss.¹¹³ On June 15, 1992, following a decision by the court of appeal to deny a motion to reinstate the appeal and to reconsider the order dismissing the appeal,¹¹⁴ the Supreme Court granted certiorari.¹¹⁵ The Court in a five-four decision held that the defendant is not automatically precluded from appealing a conviction when he is a fugitive during the pendency of a district court proceeding but is recaptured before initiating an appeal.¹¹⁶ Thus, the Court vacated the judgment of the court of appeal, dismissing Ortega-Rodriguez’s appeal and remanded the case for further proceedings consistent with its opinion.¹¹⁷

IV. ANALYSIS

A. *Majority Opinion*

The majority considered many important issues in its careful analysis of *Ortega-Rodriguez*.¹¹⁸ The Court, however, appeared to focus its conclusions on the connection between the appellate process and the fugitive status of the defendant. The Court’s holding that the flight of a defendant prior to filing a notice of appeal lacks the requisite connection to the appellate process to warrant the automatic dismissal of the former fugitives appeal, merits further discussion.

First, the majority explained the basis for granting certiorari. The Court began by restating the rule set forth in *Holmes*, whereby “a defendant who flees following conviction, but prior to sentencing waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control.”¹¹⁹ The majority then recognized that although the court of appeal for the Eleventh Circuit, in *Holmes*, examined the right to an appeal of a defendant who flees post conviction, but prior to sentencing, the Supreme Court had never considered whether flight during the pendency of a district

112. *Id.* (citations omitted).

113. *Id.* The Court granted the motion in the form of a *per curiam* order. *Id.*

114. Brief for Petitioner at 6, *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993) (No. 91-7749).

115. *Ortega-Rodriguez*, 113 U.S. at 1200. The parties argued the case on December 7, 1992 and the case was decided on March 8, 1993. *Id.*

116. *Id.* at 1209-10.

117. *Id.* at 1210.

118. Justice Stevens wrote the majority opinion. Joining in the opinion were Justices Blackmun, Scalia, Kennedy and Souter. *Id.* at 1201.

119. *Id.* (citing *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982), *cert. denied*, 460 U.S. 1015 (1983)).

court trial warranted forfeiture of the right to appeal of a defendant who is recaptured prior to sentencing and appeal.¹²⁰ Thus, the majority scrutinized the facts of the case, leading into an analysis of how the facts apply to the permitted dismissal rules.¹²¹

The majority acknowledged that the facts of this case presented a rather unusual situation: the district court resentenced the defendant after recapture.¹²² Had the court refused to resentence him, his appeal would have been barred by applicable time limits.¹²³

The majority next examined the development of the Fugitive Dismissal Rule and its justifications. The Court acknowledged that the accepted dismissal rule utilized in this country for well over a century,¹²⁴ as set forth in *Smith v. United States*,¹²⁵ held that an appellate court may dismiss the appeal of a defendant who escapes during his appeal.¹²⁶ The basis for this holding was provided by the fact that there was no guarantee that any decision passed down by the court could be enforced against the defendant.¹²⁷ The Court stated that it reserved the right to refuse to hear an appeal when the defendant was absent and could not be made to respond to the judgment.¹²⁸ Thus, enforceability was the first justification for the Fugitive Dismissal Rule. The majority made it clear, however, that enforceability is not the only basis for the Fugitive Dismissal Rule.¹²⁹

120. *Id.*

121. See *supra* notes 98-117 and accompanying text.

122. *Ortega-Rodriguez*, 113 S. Ct. at 1203 n.9.

123. *Id.* The Federal Rules of Appellate Procedure provide the relevant time constraints for filing a timely appeal. Rule 4 states in pertinent part: "In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the (i) judgment or order appealed from or (ii) a notice of appeal by the Government." FED. R. APP. P. 4.

124. *Ortega-Rodriguez*, 113 S. Ct. at 1203.

125. 94 U.S. 97 (1876).

126. *Ortega-Rodriguez*, 113 S. Ct. at 1203. For more information concerning *Smith v. United States*, 94 U.S. 97 (1876), see *supra* notes 39-43 and accompanying text.

127. *Ortega-Rodriguez*, 113 S. Ct. at 1203.

128. *Id.*; see also *Eisler v. United States*, 338 U.S. 189, 190 (1949) (dismissing the appeal of the defendant because he could not be made to respond to the judgment); *Bonahan v. Nebraska*, 125 U.S. 692, 692 (1887) (asserting the court's authority to dismiss the appeal of a defendant who could not be made to comply with a judgment); *Smith*, 94 U.S. at 97 (holding defendant's appeal may be dismissed if the court is unable to enforce its decision due to his flight).

129. *Ortega-Rodriguez*, 113 S. Ct. at 1203. Other justifications for the rule proposed by the Court which will be discussed further are: disentitlement, deterring felony escapes and encouraging voluntary surrender, and promoting the efficient dignified oper-

The second premise for the rule was reiterated by the Court as it appeared in *Molinaro v. New Jersey*.¹³⁰ In *Molinaro*, the Court held that although the flight of the defendant did not divest the case of its adjudicable case or controversy, the flight “disentitles the defendant to call upon the resources of the Court for determination of his claims.”¹³¹ The Court then sought support for its assertion that enforceability is not the only ground for the Fugitive Dismissal Rule¹³² by citing *Allen v. Georgia*,¹³³ where the Court upheld the dismissal of a fugitive’s appeal and refused to reinstate it after the defendant had been recaptured where enforceability was no longer a concern.¹³⁴ The majority attempted to strengthen its contention by introducing the Court’s holding in *Estelle v. Dorrrough*,¹³⁵ where the Court upheld a Texas statute calling for the automatic dismissal of appeals brought by defendants who escaped during the pending appeal and who failed to return to the jurisdiction within ten days.¹³⁶ The Court in *Estelle* relied on the decision in *Molinaro*, stating that the statute served “similar ends” of discouraging felony escapes and encouraging voluntary surrender.¹³⁷ In addition, the Court in *Estelle* stated that the statute promoted the “efficient and dignified operation of the Texas Court of Criminal Appeals.”¹³⁸ The Court reasoned that these were further justifications for the Fugitive Dismissal Rule.¹³⁹ The majority then carefully examined the Court’s holding in *Estelle* to illustrate cases that consistently and decisively warranted the dismissal of an appeal when the appellant was a fugitive during “the ongoing appellate process.”¹⁴⁰ The majority then

ation of the courts. See *infra* notes 130-42 and accompanying text.

130. 396 U.S. 365 (1970).

131. *Ortega-Rodriguez*, 113 S. Ct. at 1204 (citing *Molinaro*, 396 U.S. at 366).

132. *Id.* (citing *Molinaro*, 396 U.S. at 365-66).

133. 166 U.S. 138 (1897).

134. *Ortega-Rodriguez*, 113 S. Ct. at 1204.

135. 420 U.S. 534 (1975).

136. *Ortega-Rodriguez*, 113 S. Ct. at 1204; see *supra* notes 71-74 and accompanying text for additional material addressing *Estelle*. See *supra* note 72 for the applicable Texas statute upheld by the court in *Estelle*.

137. *Ortega-Rodriguez*, 113 S. Ct. at 1204 (citing *Estelle*, 420 U.S. at 537). Although the Court contends that it relied on *Molinaro*, this was the first time the Court proposed deterring felony escapes and encouraging voluntary surrender as a valid basis for dismissing the appeal of a criminal defendant who flees. *Id.*

138. *Id.* (quoting *Estelle*, 420 U.S. at 537). Again, this served as the first occasion that the Court considered the dignified operation of the appellate courts as a valid basis for dismissal.

139. *Id.*

140. *Id.* (citing *Estelle*, 420 U.S. at 542 n.11). This further discussion addressed the rationale behind the Texas statute providing for the dismissal of a defendant’s appeal when flight occurs during the pendency of their appeal. *Id.* In determining that the rule was reasonable, the Court quoted a portion of the opinion from *Estelle*:

summarized the historical justifications for the Fugitive Dismissal Rule.¹⁴¹ The Court stated that dismissing the appeals of defendants who become fugitives during the appellate process, as decided in *Smith v. United States* and *Bonahan v. Nebraska*, served the legitimate interests of deterring future escapes and promoting the dignified, efficient functioning of the appellate process.¹⁴²

The majority then analyzed the development and expansion of the Fugitive Dismissal Rule which took place in 1982, in *Holmes v. United States*.¹⁴³ According to the majority the government during this period, convinced the Eleventh Circuit Court of Appeal that the rationale set forth in *Molinaro* should be extended to include "the appeal of a 'former fugitive' returned to custody prior to sentencing and notice of appeal."¹⁴⁴ The court in *Holmes* recognized that the reasoning set forth in *Molinaro* was "equally forceful" whether the escape takes place prior to, or post sentencing.¹⁴⁵ This recognition arose from the court's realization that all of the cases that the government relied upon involved defendants who had become fugitives after their appeals had already begun.¹⁴⁶ The Eleventh Circuit, in *Holmes*, focused on the prejudice that may result from lengthy delays following presentencing escapes.¹⁴⁷

Texas was free to deal more severely with those who simultaneously invoked the appellate process and escaped from its custody than with those who first escaped from its custody, returned, and then invoked the appellate process within the time permitted by law. While each class of prisoners sought to escape, the first did so in the very midst of their invocation of the appellate process, while the latter did so before returning to custody and commencing that process.

Id. (quoting *Estelle*, 420 U.S. at 541-42).

141. *Id.* at 1204-05. The justifications discussed thus far in the opinion were: enforceability, deterrence, and the efficient, dignified operation of the appellate process. *Id.*

142. *Id.* This signified the first major shift in the development of the Fugitive Dismissal Rule. Enforceability and disentitlement were no longer the only justifications for the rule. Deterring felony escapes and promoting the dignified, efficient functioning of the appellate process were added to the existing grounds for the rule. *Id.*

143. 680 F.2d 1372 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983).

144. *Ortega-Rodriguez*, 113 S. Ct. at 1205. For additional material pertaining to *Holmes*, see *supra* notes 75-84 and accompanying text.

145. *Ortega-Rodriguez*, 113 S. Ct. at 1205 (citing *Holmes*, 680 F.2d at 1374).

146. *Id.* (citing *Holmes*, 680 F.2d at 1373).

147. *Id.* The delays mentioned by the Court would create many situations in which a meaningful appeal would be impossible. One delay is the possibility of reversal. In that case, the government may be prejudiced by its inability to locate witnesses and present evidence. *Id.* at 1205 n.13 (citing *Holmes*, 680 F.2d at 1374).

The majority continued to explore the Fugitive Dismissal Rule by examining the three key aspects in which the rule in *Holmes* differed from that in *Molinaro*.¹⁴⁸ First, unlike the rule in *Molinaro*, the rule set forth in *Holmes* reaches defendants who flee during their district court trials, as well as those who escape after filing for appeal.¹⁴⁹ Second, the rule in *Holmes* does not authorize dismissal of all appeals, but rather it warrants only the dismissal of appeals based on the fugitive's conviction.¹⁵⁰ The final difference emphasized between the rules in *Molinaro* and *Holmes* exists where *Holmes* calls for automatic dismissal without the exercise of discretion.¹⁵¹ In contrast, *Molinaro* allows discretion as to the dismissal of the fugitive's appeal.¹⁵² The majority used these differences as a foundation for their rejection of an expansion of the rule to include the dismissal of appeals filed by fugitives prior to the filing of a notice of appeal.¹⁵³ The majority recognized the Court's limited ability to review rules adopted by the appellate courts in their supervisory capacity but restated the requirement that the rules "represent reasoned exercises of the courts' authority."¹⁵⁴ The majority professed that, prior to the decision in *Holmes*, all of the justifications providing support for the dismissal of pending appeals following flight had some connection between the fugitive status of the defendant and the appellate process, which would make such dismissal reasonable.¹⁵⁵ The majority argued that the justifications set forth diminish, and in

148. *Id.* at 1205.

149. *Id.* The rule which may be extracted from *Molinaro* warrants only the dismissal of those defendant's appeals who escape during the pendency of their appeal. See *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970). This is illustrated by the court's opinion which states, "[n]o persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant *who has sought review* escapes from the restraints placed upon him pursuant to the conviction." *Id.* (emphasis added).

150. *Ortega-Rodriguez*, 113 S. Ct. at 1205. The Court rationalized this aspect of the rule by stating that "flight cannot fairly be construed as a waiver of appeal from errors occurring after recapture," and as such the former fugitive would be permitted to appeal sentencing errors. *Id.* (citing *Holmes*, 680 F.2d at 1373).

151. *Id.*

152. *Id.*

153. *Id.* at 1205-06. This rejection, as discussed *infra*, was based on the lack of connection between the appellate process and the status of the former fugitive. See *infra* notes 161-223 and accompanying text.

154. *Ortega-Rodriguez*, 113 S. Ct. at 1205. See also *Thomas v. Arn*, 474 U.S. 140, 146-48 (1985) (stating the Court's authority to review rules adopted by the appellate courts).

155. *Ortega-Rodriguez*, 113 S. Ct. at 1205-06. The reasonableness standard set forth in *Thomas*, is not the only reason for requiring such a connection. An additional reason is set forth in the Federal Rules of Appellate Procedure which limits the authority of the courts of appeals to "rules governing the practice before those courts." *Id.* at 1206 n.15 (citing FED. R. APP. P. 47).

many cases disappear, when applied in situations where the defendant's fugitive status never coincides with their appeal because his flight and recapture took place during the pendency of the district court trial.¹⁵⁶

The majority then examined application of the justifications for the rule to former fugitives in an attempt to support their rejection of the rule's expansion to such individuals. The Court began by stating that the enforceability justification, set forth in *Smith v. United States*,¹⁵⁷ could not be rationalized in the case of a former fugitive.¹⁵⁸ The principle behind the enforceability justification is that the defendant is beyond the control of the courts.¹⁵⁹ In the case of a former fugitive, he is recaptured and returned to the court, at which time the problem of enforceability disappears.¹⁶⁰

The majority then attacked the assertion that dismissing the appeal of a former fugitive serves the interests of promoting the efficient operation of the appellate courts.¹⁶¹ Admitting that any escape may "give rise to a 'flurry of extraneous matters,'" which will cause the court to "divert its attention from the merits of the case before it,"¹⁶² arguably in the case of a fugitive who is recaptured, the delay, or "flurry," caused by the escape will likely dissipate in the lower court, well before reaching the appellate process.¹⁶³ The majority reasoned that *Ortega-Rodriguez* is the perfect example of this principle wherein the delay caused by flight prior to the filing of an appeal may affect the district court, but will not reach the appellate process.¹⁶⁴

156. *Id.*

157. 94 U.S. 97 (1876).

158. *Ortega-Rodriguez*, 113 S. Ct. at 1206; *see also* *Bonahan v. Nebraska*, 125 U.S. 692 (1887) (stating enforceability is a valid basis for dismissal of a defendant's appeal who flees after filing for review).

159. *Cf. United States v. Gordon*, 538 F.2d 914, 915 (1st Cir. 1976) (dismissing the appeal of a defendant who has fled because it is unlikely that he will respond to an unfavorable judgment), *cert. denied*, 441 U.S. 936 (1979); *Bonahan*, 125 U.S. at 692 (dismissing the appeal of defendant who was not within the control of the court); *Smith*, 94 U.S. at 97 (refusing to consider the appeal of a defendant who was not "where he could be made to respond to any judgment").

160. *Ortega-Rodriguez*, 113 S. Ct. at 1206.

161. *Id.* This interest first appeared in *Estelle v. Dorough*, 420 U.S. 534 (1975).

162. *Ortega-Rodriguez*, 113 S. Ct. at 1206 (quoting *United States v. Puzanghera*, 820 F.2d 25 (1st Cir.), *cert. denied*, 484 U.S. 900 (1987)).

163. *Id.* Although the delay may exhaust itself, it is likely that the appellate process will be affected by it, either directly or indirectly.

164. *Id.* at 1206 n.16. In *Ortega-Rodriguez*, the defendant's flight caused a 19 month delay in the district court. *Id.* Because the district court resentenced him and he was

The extension of the Fugitive Dismissal Rule to include former fugitives not only fails to promote the efficient operation of the court, as the Court further explained, it also does nothing to protect the "dignity of an appellate court."¹⁶⁵ The majority, however, agreed that dismissal is an appropriate punishment when escape on the part of a criminal defendant "flouts" the authority of the court.¹⁶⁶ The rationale behind the disentitlement theory, first set forth in *Molinaro*, is that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim."¹⁶⁷ Based on this view, the majority asserted that it is completely within the authority of the appellate court to dismiss the appeal of a defendant who has filed a notice of appeal prior to taking flight.¹⁶⁸ The majority, however, made it clear that this authority does not extend to fugitives who flee and are recaptured prior to filing for an appeal.¹⁶⁹ The Court reasoned that a defendant who flees anytime prior to filing a notice of appeal flouts the authority of the district court and not that of the appellate court.¹⁷⁰ Therefore, the appellate court does not have the au-

able to file a timely appeal, there was no delay in the appellate process. *Id.* The majority explained that had a notice of appeal been filed on the petitioner's behalf, the appellate process may have been affected by delays from rescheduling an appeal already on the docket. *Id.* Based on the fact that no notice of appeal had been filed, the majority stated "a lapse of time that precedes invocation of the appellate process does not translate, by itself, into delay borne by the appellate court." *Id.*

165. *Id.* at 1206; *cf. Estelle*, 420 U.S. at 537 (stating that protecting the dignity of the courts is grounds for dismissing a defendant's appeal).

166. *Ortega-Rodriguez*, 113 S. Ct. at 1206; *see, e.g., United States v. DeValle*, 894 F.2d 133, 138 (5th Cir. 1990) (holding valid the dismissal of a defendant's appeal after 8 months of fugitive status); *United States v. Persico*, 853 F.2d 134, 137-38 (2d Cir. 1988) (stating fugitivity flouts the judicial process, and thus warrants dismissal); *Ali v. Sims*, 788 F.2d 954, 958-59 (3d Cir. 1986) (asserting the Court's authority to dismiss an appeal based on the disrespect shown the judicial process by the defendant's escape); *United States v. London*, 723 F.2d 1538, 1539 (11th Cir.) (declaring that the defendant's flight during trial disentitled him to call upon the resources of the court to determine his claim), *cert. denied*, 467 U.S. 1228 (1984).

167. *Ortega-Rodriguez*, 113 S. Ct. at 1206 (quoting *Ali v. Sims*, 788 F.2d 954, 959 (3d Cir. 1986)); *see also Molinaro v. New Jersey*, 396 U.S. 365 (1970) (*per curiam*) (setting forth the disentitlement theory).

168. *Ortega-Rodriguez*, 113 S. Ct. at 1206-07; *see also Estelle*, 420 U.S. at 534 (stating that the court may dismiss the appeal of a defendant who escapes after filing a notice of appeal); *Molinaro*, 396 U.S. at 365 (1970) (holding that courts may dismiss the appeal of defendants who flee during the pendency of their appeal); *Bonahan v. Nebraska*, 125 U.S. 692 (1887) (dismissing the appeal of a defendant who fled after seeking review); *Smith v. United States*, 94 U.S. 97 (1876) (holding that the appeal of a fugitive who flees after filing a notice of appeal may be dismissed).

169. *Ortega-Rodriguez*, 113 S. Ct. at 1207.

170. *Id.*; *see United States v. Anagnos*, 853 F.2d 1, 2 (1st Cir. 1988) (declining to follow *Holmes* because the former fugitive's malfeasance occurred in the lower court and should not affect the appellate court).

thority to sanction the former fugitive, rather it is the district court which possesses this ability.¹⁷¹ Consequently, the majority refused to support an expansion of the rule extending authority to the appellate courts to levy sanctions via dismissal against former fugitives.¹⁷² This, the majority asserted, would be too broad an application, and would result in unwarranted dismissals of appeals.¹⁷³ Justice Stevens professed that none of the cases to date warrant such and expressed the majority's refusal to adopt such a wide reaching approach.¹⁷⁴ Justice Stevens continued, declaring that extending the *Holmes* rule to include former fugitives, returned to custody, cannot be based on the disentitlement theory set forth in *Molinaro*.¹⁷⁵

The majority then proceeded to attack the expansion of the rule based on the theory of deterrence set forth in *Estelle*.¹⁷⁶ They asserted that the duty to deter escape must rest with the court where jurisdic-

171. *Ortega-Rodriguez*, 113 S. Ct. at 1207. The ability to sanction a defendant who disrespects the court is granted by title 18 of the United States Code. Section 401(3) of title 18 states in pertinent part: "[A] court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree or command." *Id.* at 1202 n.3 (quoting 18 U.S.C. § 401(3) (1988)).

172. *Id.* at 1207. In support of the Court's refusal to extend the rule, the majority cites Rule 47 of the Federal Rules of Appellate Procedure. *Id.* at 1206 n.15. Rule 47 "authorizes the promulgation of rules by the courts of appeals, [and] limits that authority to rules 'governing the practice' before those courts." *Id.* (quoting FED. R. APP. P. 47).

173. *Id.* at 1207. The majority illustrated this by hypothesizing the case of an individual who flees for only a single day during their lower court trial. *Id.* The majority concluded that application of the overbroad rule would permit the dismissal of his appeal. *Id.* This type of dismissal is simply not defensible. *Id.* In support of this, Justice Stevens noted that even the Eleventh Circuit would reject such a broad application. *Id.* at 1207 n.17. Justice Stevens stated, "[i]f appellate dismissal were indeed an appropriate sanction for all acts of judicial defiance, then there would be no reason to exempt sentencing errors from the scope of the *Holmes* rule." *Id.* The majority asserted that indiscriminate dismissal by the appellate court is an inappropriate punitive measure for misconduct by criminal defendants. *Id.* This, it is alleged, is true whether or not the distinction between appeals arising from sentencing errors, and appeals initiated by convictions is "logically supportable." *Id.*; see also *Anagnos*, 853 F.2d at 2 (examining the distinction between appeals based on sentencing errors and appeals from convictions).

174. *Ortega-Rodriguez*, 113 S. Ct. at 1207.

175. *Id.* The disentitlement theory set forth in *Molinaro* is insufficient on its own to justify the dismissal of an appeal by a former fugitive. *Id.*

176. *Id.* (citing *Estelle v. Dorough*, 420 U.S. 534, 537 (1975)).

tion exists.¹⁷⁷ Until the defendant files a notice of appeal, the jurisdiction rests with the district court and any sanctions to deter escape must be imposed by the district court.¹⁷⁸ Once the offender files the notice of appeal, then and only then, is it appropriate for the appellate court to dismiss the appeal of a defendant as a means of deterring escape.¹⁷⁹ The majority then applied this argument to the case at hand. They professed that as a result of Ortega-Rodriguez's escape, the district court, as the one flouted, maintained the best opportunity to impose an appropriate punishment.¹⁸⁰ In this case punishment consisted of a term of imprisonment of twenty-one months, followed by a three year period of probation.¹⁸¹ The majority concluded this portion of its opinion by stating that flight is a separate crime which should be dealt with by the court possessing jurisdiction.¹⁸² In the case of the former fugitive who fled prior to filing a notice of appeal, this would be the district court.¹⁸³ Allowing the appellate court to dismiss the defendant's appeal would be, in effect, a second punishment.¹⁸⁴ Justice Stewart, in *Estelle v. Dorrough*,¹⁸⁵ stated that "punishment by appellate dismissal introduces an element of arbitrariness and irrationality into sentencing for escape."¹⁸⁶ The majority stated that this arbitrariness will result in the

177. *Id.*

178. *Id.* The district court has at its disposal many sanctions that can be used to deter felony escape. *Id.* See *Katz v. United States*, 920 F.2d 610, 613 (9th Cir. 1990) (stating that when a defendant is in front of the district court, "the disentitlement doctrine does not stand alone as a deterrence to escape").

179. *Ortega-Rodriguez*, 113 S. Ct. at 1207. As support for its position, the majority noted that if deterrence fails and the defendant flees, the district court is well equipped to impose a wide variety of sanctions which are suitable under the particular circumstances. *Id.* On the other hand, the appellate court has only the power of dismissal, which may not be the most appropriate punishment. *Id.*

180. *Id.*

181. *Id.* at 1202, 1207. The district court was able to impose such a penalty under title 18 of the Criminal Code. Section 401 provides in pertinent part: "A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority" *Id.* at 1202 n.3 (quoting 18 U.S.C. § 401(3) (1988)).

182. *Id.* at 1207.

183. *Id.*

184. *Id.* at 1207-08. Justice Stevens claimed that dismissing the defendant's appeal in this case would be imposing an additional punishment of 15 years, added to the 21 months assessed by the district court. *Id.*; cf. *United States v. Snow*, 748 F.2d 928, 930 n.3 (4th Cir. 1984) ("We refrain from punishing the defendant twice by dismissing his appeal.").

185. 420 U.S. 544, 545 (1975).

186. *Ortega-Rodriguez*, 113 S. Ct. at 1208 (quoting *Estelle*, 420 U.S. at 544-45). According to the majority:

[T]he statute imposes totally irrational punishments upon those subject to its application. If an escaped felon has been convicted in violation of law,

exact type of disparity that the Sentencing Reform Act of 1984¹⁸⁷ and the Sentencing Guidelines¹⁸⁸ proposed to eradicate.¹⁸⁹

The majority proceeded to restate their position supporting the dismissal of appeals by fugitives who fled during the appeal period and opposing the dismissal of the appeals by former fugitives who are returned to custody prior to filing a notice of appeal.¹⁹⁰ Their position focused on the different interests served in each particular instance.¹⁹¹ The majority stated that the court must base the dismissal of a defendant's pending appeal on some connection between the defendant's fugitive status and the "ongoing appellate process."¹⁹² Absent this connection, the dismissal remains unwarranted.¹⁹³ The majority conceded that in certain circumstances, events occurring within the district court give rise to a requisite connection which is sufficient to warrant dismissal by the appellate court.¹⁹⁴ Under these

his loss of his right to appeal results in his serving a sentence that under law was erroneously imposed. If, on the other hand, his trial was free of reversible error, the loss of his right to appeal results in no punishment at all. And those whose convictions would have been reversed if their appeals had not been dismissed serve totally disparate sentences, dependent not upon the circumstances of their escape, but upon whatever sentences may have been meted out under the invalid convictions.

Id. at 1208 n.20 (quoting *Estelle*, 420 U.S. at 544).

187. See 18 U.S.C. § 3551 (1984); 28 U.S.C. §§ 991-998 (1984).

188. The United States Sentencing Commission drafted the Sentencing Guidelines through the authority enumerated by the Sentencing Reform Act of 1984. See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1945-46 (1988).

189. *Ortega-Rodriguez*, 113 S. Ct. at 1208. See generally *Mistretta v. United States*, 488 U.S. 361 (1989) (addressing the purpose of the Sentencing Reform Act and Sentencing Guidelines).

190. *Ortega-Rodriguez*, 113 S. Ct. at 1208. This position is consistent with the Fugitive Dismissal Rule which has been in operation in this country for well over a century. See generally *Estelle*, 420 U.S. at 534 (stating the court may dismiss the appeal of a defendant who escapes after filing a notice of appeal); *Molinario v. New Jersey*, 396 U.S. 365 (1970) (per curiam) (holding courts may dismiss the appeal of defendants who flee during the pendency of their appeal); *Bonahan v. Nebraska*, 125 U.S. 692 (1887) (dismissing the appeal of a defendant who fled after seeking review); *Smith v. United States*, 94 U.S. 97 (1876) (holding the appeal of a fugitive who flees after filing a notice of appeal may be dismissed).

191. *Ortega-Rodriguez*, 113 S. Ct. at 1208.

192. *Id.* (quoting *Estelle*, 420 U.S. at 542). This connection is satisfied where the defendant is not within the control of the court during his appeal. *Id.*

193. *Id.*

194. *Id.*

circumstances, the appellate court may exercise its authority and dismiss an appeal based solely on fugitive status which predates the appeal.¹⁹⁵ In an attempt to clarify this statement, the majority outlined several situations which may authorize dismissal based on fugitive status.

The first situation, discussed in *Holmes*, occurs when the defendant is recaptured and resentenced prior to filing for appeal.¹⁹⁶ The majority agreed that dismissal may be warranted based on the prolonged fugitivity that may delay the appeal and therefore prejudice the government in locating witnesses and presenting evidence at retrial.¹⁹⁷ The majority, however, stated that appeals based on insufficiency of evidence, like *Ortega-Rodriguez*, lack the possibility of prejudice against the government and as such do not merit dismissal.¹⁹⁸

Additionally, the majority recognized the appellate courts' ability to dismiss the appeal of a former fugitive when the defendant's misconduct makes "meaningful appeal impossible."¹⁹⁹ Under such circumstances, the appellate courts reserve the right to manage such cases as necessary.²⁰⁰ Although the majority acknowledged certain situations

195. *Id.*

196. *Id.* In *Holmes*, the defendant was convicted for violating federal narcotics laws and possessing a firearm. *United States v. Holmes*, 680 F.2d 1372, 1372 (11th Cir. 1982), *cert. denied*, 460 U.S. 1015 (1983). The defendant failed to appear for sentencing and remained a fugitive for two years. *Id.* Following his recapture and sentencing, the defendant filed a timely appeal. *Id.*

197. *Ortega-Rodriguez*, 113 S. Ct. at 1208. (citing *Holmes*, 680 F.2d at 1374); see also *United States v. Persico*, 853 F.2d 134, 137 (2d Cir. 1988) ("[T]he delay occasioned by the period of a defendant's flight can prejudice the government should a new trial be ordered after a successful appeal."). This would only apply in situations where the relief sought is retrial. See Grippando, *supra* note 40, at 695. In some instances, the defendant may be seeking acquittal, which, if granted, would not create any prejudice on the government. *Id.*

198. *Ortega-Rodriguez*, 113 S. Ct. at 1208. If the court determines that there was insufficient evidence to support the defendant's conviction, the decision will be reversed and no retrial will occur. *Id.* Thus, the government will not be prejudiced by their inability to locate witnesses or present evidence. *Id.*

199. *Id.* at 1208-09 n.23 (quoting *Holmes*, 680 F.2d at 1374). It is interesting to note that in addition to situations where the defendant makes a "meaningful appeal impossible," the majority included circumstances where the defendant's conduct "otherwise disrupt[s] the appellate process so that an appellate sanction is reasonably imposed." *Id.* at 1209. The majority, however, failed to define situations which may satisfy this test.

200. *Id.* For example, in this case the defendant's escape prevented the consolidation of his appeal with that of his co-defendants. According to the majority, if the court found this to create a significant enough interference with the operation of the appellate process, dismissal would be warranted. *Id.* The majority, however, did not feel that the Eleventh Circuit reached the conclusion that the interference was sufficient. *Id.*

that would permit the appellate court to dismiss the appeal of a former fugitive, the majority refused to accept the argument that courts may only consider dismissal on a case-by-case basis.²⁰¹ The majority instead proposed that although dismissal is always discretionary,²⁰² appellate courts may develop general rules to cover specific, recurring situations that would trigger exercise of this discretion.²⁰³ The rationale behind this argument is that the *Holmes* rule is overly broad and therefore reaches too many appeals, including situations in which the defendant's fugitive status has no effect on the appellate process.²⁰⁴

The majority then applied the principles discussed above to *Ortega-Rodriguez*.²⁰⁵ In the instant case, the defendant's escape prevented the court of appeal from consolidating his appeal with that of his co-defendants, a customary practice in the appellate process.²⁰⁶ The majority acknowledged that the Eleventh Circuit Court of Appeal has jurisdiction over whether the disruption of the appellate process, caused by the defendant's flight, acted as sufficient interference to warrant the dismissal of Ortega-Rodriguez's appeal.²⁰⁷ The majority, however, did not believe that the Eleventh Circuit Court of Appeal determined that the interference was significant enough.²⁰⁸ The majority pointed out that the *Holmes* rule, applied by the Eleventh Circuit Court of Appeal in this case, focused on a lower standard than the Court now requires.²⁰⁹ Requiring more than an act of judicial defiance, the Court demanded that there be the requisite connection between the fugitive's status and the appellate process.²¹⁰ As a result, the Eleventh Circuit Court of Appeal's

201. *Id.* at 1209 n.23. (citing *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970)).

202. The appeal is discretionary in the sense that the status of the defendant, as a fugitive, does not "strip the case of its character as an adjudicable case or controversy." *Id.* (quoting *Molinaro*, 396 U.S. at 366).

203. *Id.* Examples of such recurring situations were defined by the Court as: situations where the government is prejudiced in locating witnesses or presenting evidence, and circumstances where meaningful appeal is made impossible by the defendant's escape. *Id.* at 1208-09.

204. *Id.* at 1209 n.23.

205. *Id.* at 1209.

206. *Id.*; see also *United States v. Mieres-Borges*, 919 F.2d 652, 654 n.1 (11th Cir. 1990) (recognizing Ortega-Rodriguez was absent and not a party to the appeal by Mieres-Borges), *cert. denied*, 499 U.S. 980 (1991).

207. *Ortega-Rodriguez*, 113 S. Ct. at 1209.

208. *Id.*

209. *Id.*

210. *Id.*

dismissal of this case, under *Holmes*, is insufficient to assert that the dismissal would be appropriate under these narrower standards.²¹¹

The majority continued by noting that there is no showing in the records that the defendant's former fugitive status had any significant adverse effects which would interfere with orderly appellate review.²¹² Justice Stevens stated, under the standards used today, that the disruption of the appellate process simply was inadequate to warrant the dismissal of the defendant's appeal.²¹³

The majority determined that no federal rule or case law mandates that there be uniformity among the circuits in their approach to Fugitive Dismissal Rules.²¹⁴ The only requirement is that appellate rules meet the reasonableness standard set forth in *Thomas v. Arn*.²¹⁵ Dismissal of an appeal under this rule requires that there be an adequate connection, typically defined as "some connection,"²¹⁶ between the defendant's fugitive status and the appellate process.²¹⁷ As long as the individual rules meet this requirement, their application may vary considerably.²¹⁸

The majority concluded by stating that when a defendant escapes and is recaptured prior to filing a notice of appeal, it may lack the requisite connection to the appellate process to mandate dismissal of such an appeal.²¹⁹ The majority restated its opinion that misconduct which takes place on the district court level should be sanctioned by the district court itself.²²⁰ Flight which occurs during the pendency of an appeal, however, demonstrates contempt for the appellate process and justifies the appellate court's exercise of its dismissal power²²¹ as set forth in

211. *Id.*

212. *Id.* The Court looked to both the government's motion to dismiss, as well as to the Eleventh Circuit's per curiam order. *Id.* The delay caused by the severance of the defendant's appeal from that of his co-defendants, and the duplication of resources which will be caused by this, was summarily dismissed by Justice Stevens' majority opinion. *Id.*

213. *Id.* The Court instead left the determination of the severity and effect of the delay to the court of appeals on remand. *Id.*

214. *Id.* at 1209 n.24.

215. *Id.* (citing *Thomas v. Arn*, 474 U.S. 140 (1985)).

216. This standard requiring "some connection" was developed in *Thomas*, 474 U.S. at 157 (Stevens, J., dissenting).

217. *Ortega-Rodriguez*, 113 S. Ct. at 1209 n.24.

218. *Id.* Based on this factor, the majority stated "we hesitate to decide as a general matter whether and under what circumstances preappeal flight that leads to severance of codefendants' appeals will warrant appellate dismissal, and instead leave that question to the various courts of appeals." *Id.*

219. *Id.* at 1209.

220. *Id.*

221. *Ortega-Rodriguez*, 113 S. Ct. at 1210. This decision affirmed the rule established in the late 19th century and its use since its inception. *See Estelle v.*

Molinaro.²²² The majority concluded the opinion by vacating the judgment of the court of appeal and remanding the case for further review consistent with the opinion.²²³

B. *Dissenting Opinion*

Chief Justice Rehnquist wrote the dissenting opinion, which attacked the majority's position on the lack of connection between the former fugitive and the appellate process.²²⁴ The dissent began by making two strong assertions. First, Chief Justice Rehnquist pointed out that "[t]he only difference between a defendant who absconds preappeal and one who absconds postappeal is that the former has filed a notice of appeal while the latter has not."²²⁵ This distinction, according to the dissent, is insufficient to support the majority's claim that the connection between the appellate process and the fugitive is inadequate.²²⁶ If the defendant flees pre-filing, the chance that the appellate process will be disrupted is just as great as if he waits until the appellate court obtains jurisdiction and then flees.²²⁷ Chief Justice Rehnquist emphasized that the dissent agreed with the majority that there must be a sufficient connection between fugitive flight and the appellate process in order to dismiss the fugitive's appeal, but disagreed with the majority's theory that recapture prior to filing for appeal breaks that connection.²²⁸

Dorrough, 420 U.S. 534 (1975) (stating that the court may dismiss the appeal of a defendant who escapes after filing a notice of appeal); *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (per curiam) (holding that courts may immediately dismiss the appeal of defendants who flee during the pendency of their appeal); *Bonahan v. Nebraska*, 125 U.S. 692 (1887) (dismissing the appeal of a defendant who fled after seeking review); *Smith v. United States*, 94 U.S. 97 (1876) (holding that the appeal of a fugitive who flees after filing a notice of appeal may be dismissed).

222. *Ortega-Rodriguez*, 113 S. Ct. at 1210.

223. *Id.*

224. *Id.* Joining in the dissenting opinion were Justices White, O'Connor, and Thomas.

225. *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting).

226. *Id.* For a discussion on the majority's assertion regarding the requisite connection to the appellate process, see *supra* notes 190-204 and accompanying text.

227. *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting). Under either circumstance the appellate court will be delayed in hearing the case for the period the defendant can elude law enforcement officials. *Id.* Thus, the dissent failed to see why the authority to dismiss the appeal of a fugitive should be dependent on the timing of the defendant's escape. *Id.*

228. *Id.* In footnote 1, the dissent stated that the Court incorrectly struck down the *Holmes* rule based on the fact that "it reached too many appeals." *Id.* at 1210 n.1

The dissent supported its assertion by examining the appellate court's "supervisory power to create and enforce 'procedural rules governing the management of litigation.'"²²⁹ There are only two limitations on the court's authority to create these rules.²³⁰ First, the rules may not violate the Constitution or any statute.²³¹ Second, the rules must be reasonable in light of the interests they seek to address.²³² The dissent addressed these two requirements individually. First, the dissent stated that the Eleventh Circuit Court of Appeal's decision, based on the Fugitive Dismissal Rule as employed in that case, did not violate the Constitution because the defendant had no constitutional right to an appeal.²³³ For that matter, no criminal defendant has the constitutional right to appeal.²³⁴ In addition, the Fugitive Dismissal Rule implemented by the Court of Appeal did not violate federal statute²³⁵ 28 U.S.C. § 1291, which grants criminal defendants the right to appeal. The dissent pointed out, however, that this statute does not provide the grounds for exacting an appeal.²³⁶ Instead, those requirements are found in Rule 47 of the Federal Rules of Appellate Procedure, which states that all courts of appeals have the authority to create rules regulating their practices through adjudicative or rule-making processes.²³⁷ The dissent then addressed the second limitation on the court's authori-

(Rehnquist, C.J., dissenting).

229. *Id.* at 1210 (Rehnquist, C.J., dissenting); *see also* *Thomas v. Arn*, 474 U.S. 140, 146 (1985) (acknowledging "the power of the courts to mandate procedures deemed desirable from the viewpoint of sound judicial practice").

230. *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting).

231. *Id.* This rule does not violate either.

232. *Id.*; *see also* *Thomas*, 474 U.S. at 146-48 (stating procedural rules must be reasonable in relation to the interests they seek to promote). For a discussion of the reasonableness of the rule, *see supra* notes 28-30 and accompanying text.

233. *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting); *see also* *Abney v. United States*, 431 U.S. 651, 656 (1977) (asserting a criminal defendant has no constitutional right to appeal).

234. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *see also* *Abney*, 431 U.S. at 656 (stating criminal defendants have no constitutional right to appeal); *McKane v. Durston*, 153 U.S. 684, 687-88 (1894) (declaring the Constitution does not provide the right to appeal a criminal conviction).

235. *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting).

236. *Id.*

237. *Id.* Federal Rule of Appellate Procedure 47 states in pertinent part:

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by the rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.

FED. R. APP. P. 47.

ty. According to Chief Justice Rehnquist, the Fugitive Dismissal Rule is reasonable in light of the concerns it is aimed at protecting.²³⁸

The dissent then examined several of these interests in an attempt to validate the Fugitive Dismissal Rule.²³⁹ Chief Justice Rehnquist noted the Court's decision in two earlier cases.²⁴⁰ In *Molinaro v. New Jersey*,²⁴¹ the Court held that a defendant who flees during his appeal forfeits his right to "call upon the resources of the Court for determination of his claims."²⁴² The dissent determined that with few exceptions this principle should apply to former fugitives as well as to fugitives who abscond during the appellate process.²⁴³ In *Estelle v. Dorrough*,²⁴⁴ the Court upheld a decision relying on a state statute permitting the court to dismiss the appeal of a fugitive who fled after invoking the appellate court's jurisdiction.²⁴⁵ The Court reasoned that the statute discouraged felony escape, encouraged voluntary surrenders, and promoted "the efficient, dignified operation of the Texas Court of Criminal Appeals."²⁴⁶ Relying on the decisions of the Court in these two cases, the dissent emphasized that a reviewing court may "implore procedural rules to protect its jurisdiction and to ensure the orderly and efficient" use of scarce judicial resources.²⁴⁷ The Fugitive Dismiss-

238. *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting). For a discussion on the reasonableness of the Fugitive Dismissal Rule, see *supra* notes 39-97 and accompanying text.

239. *Ortega-Rodriguez*, 113 S. Ct. at 1210-12 (Rehnquist, C.J., dissenting).

240. *Id.* at 1210-11 (Rehnquist, C.J., dissenting).

241. 396 U.S. 365 (1970).

242. *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting) (citing *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970)). In *Molinaro*, the defendant was tried and convicted for abortion and conspiracy to commit abortion. *Molinaro*, 396 U.S. at 365. The defendant was free on bail but failed to surrender himself to authorities. Therefore, the court revoked defendant's bail and dismissed his appeal. *Id.*

243. *Ortega-Rodriguez*, 113 S. Ct. at 1210-13 (Rehnquist, C.J., dissenting); see *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982) (holding that courts may dismiss the appeal of a former fugitive who files for appeal after being recaptured), *cert. denied*, 460 U.S. 1015 (1983).

244. 420 U.S. 534 (1975).

245. *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting) (citing *Estelle v. Dorrough*, 420 U.S. 534, 537 (1975)). In *Estelle*, the defendant was convicted of robbery and sentenced to 25 years in prison. *Estelle*, 420 U.S. at 534. After filing a notice of appeal, the defendant escaped from the Dallas County Jail in a stolen mail truck. *Id.* He was recaptured two days later. *Id.* at 534-35.

246. *Ortega-Rodriguez*, 113 S. Ct. at 1210-11 (Rehnquist, C.J., dissenting) (citing *Estelle*, 420 U.S. at 537).

247. *Id.* at 1211 (Rehnquist, C.J., dissenting).

al Rule, which would allow for the dismissal of a former fugitive's appeal, promotes these same interests and, is therefore, reasonable.²⁴⁸

The dissent then repeated its earlier assertion that the majority's finding of an insufficient connection between the defendant's flight and the appellate process is unfounded.²⁴⁹ According to the dissent, it is implausible to suggest that a defendant who escapes prior to filing an appeal will not have an effect on the appellate process for the mere reason that he has not yet filed a petition for appeal.²⁵⁰ Indeed, the dissent observes that while flight prior to appeal may have less of an effect than flight that occurs during the appeal, there is a substantial effect nonetheless.²⁵¹ The dissent points out that if, as here, the defendant flees prior to appeal and is later recaptured, he will delay the appellate process for at least as long as he evades law enforcement officials.²⁵² Additionally, the defendant will gain a second opportunity to file a timely appeal if he is resentenced following recapture.²⁵³

The dissent voiced its opposition to the majority's assertion that "any concomitant delay . . . likely will exhaust itself well before the appellate tribunal enters the picture."²⁵⁴ This is not always true. Such a delay, according to the dissent, will result, at the least, in an increase in the size of the court's docket and its organization.²⁵⁵ Furthermore, the dissent emphasized that the delay caused by defendants who flee prior to

248. *Id.* Although the dissent did not expressly assert this, it is reasonably inferred from the dissent's argument that the Eleventh Circuit's power to dismiss the defendant's appeal did not violate the Constitution or any federal statute. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* Here, Ortega-Rodriguez eluded the authorities for 11 months. *Id.* at 1202 (Rehnquist, C.J., dissenting); see also *United States v. Sudthisa-Ard*, 17 F.3d 1205 (9th Cir.) (addressing the appeal of a defendant who evaded law enforcement officials for 15 years), *cert. denied*, 114 S. Ct. 1386 (1994); *United States v. Bravo*, 10 F.3d 79 (2d Cir. 1993) (dismissing the appeal of a defendant who remained a fugitive for 15 years); *United States v. Parrish*, 887 F.2d 1107 (D.C. Cir. 1989) (dismissing the appeal of a defendant who remained at large for over 14 years).

253. *Ortega-Rodriguez*, 113 S. Ct. at 1211 (Rehnquist, C.J., dissenting). This is only true if the court resentenced the defendant. If the district court denied his motion for resentencing, applicable time limits would have barred the defendant from filing a timely appeal on his initial sentence and judgment. *Id.* at 1203 n.9 (Rehnquist, C.J., dissenting). According to the Federal Rules of Appellate Procedure, a notice of appeal must be filed within 10 days of a criminal conviction. FED. R. APP. P. 4(b). Ortega-Rodriguez was only able to file a timely appeal because the district court decided to resentence him. *Ortega-Rodriguez*, 113 S. Ct. at 1203 n.9 (Rehnquist, C.J., dissenting).

254. *Ortega-Rodriguez*, 113 S. Ct. at 1204-05 (Rehnquist, C.J., dissenting).

255. *Id.* at 1211. The nonexistence of a Fugitive Dismissal Rule would force the appellate court to entertain the appeal of a former fugitive, provided with a second opportunity to file for a timely appeal. *Id.*

filing, but are recaptured and then file a timely appeal, increases "exponentially" with each individual who does so.²⁵⁶

Chief Justice Rehnquist then addressed the effect that this delay has on other areas of the appellate process. Such effects include forcing a severance, requiring duplication of appellate procedures, and increasing the number of inconsistent judgments.²⁵⁷ In the case at hand, the defendant's flight delayed the appellate process for roughly nineteen months.²⁵⁸

The dissent asserted that the defendant's flight in this case adversely affected the appellate process, and thus, the appellate court should have the authority to dismiss the defendant's appeal.²⁵⁹

In addition, the dissent emphasized the other interests supported by the Eleventh Circuit's expanded version of the Fugitive Dismissal Rule. First, it deters flight by convicted defendants.²⁶⁰ Conversely, the majority's holding not only does not deter flight, but it encourages defendants who know that they are going to attempt to escape do so prior to filing an appeal.²⁶¹ The majority failed to recognize that if the fugitive is later recaptured and resentenced, he may still file a timely appeal.²⁶² Under the majority's rule, if the judge refuses the opportunity

256. *Id.* The majority failed to explain how this delay is eliminated by the fact that the defendant is recaptured prior to filing the appeal. *Id.*

257. *Id.*

258. *Id.* This period includes the period the defendant was a fugitive and the time that it took the district court to resentence him. During this 19 month delay, the court of appeals heard and decided the appeals of the co-defendants in this case. *Id.*; see *United States v. Mieres-Borges*, 919 F.2d 652, 663 (1990) (affirming the conviction of Mieres-Borges and overturning the conviction of Beccera-Flores), *cert. denied*, 499 U.S. 980 (1991). Had Ortega-Rodriguez not been a fugitive during this period, his appeal would have been combined with that of his co-defendants. *Ortega-Rodriguez*, 113 S. Ct. at 1211-12 (Rehnquist, C.J., dissenting). Instead, the defendant's flight forced the appellate court to hear two appeals arising from one case. *Id.* The court was also concerned that the defendant's escape increased the possibility of inconsistent judgments. *Id.* at 1212.

259. *Ortega-Rodriguez*, 113 S. Ct. at 1212 (Rehnquist, C.J., dissenting). The dissent supported this assertion by quoting from the brief filed by the government in this case, stating, "[p]etitioner's flight 'imposed exactly the same burden of duplication on the court of appeals that it would have if he had filed his notice of appeal before absconding.'" *Id.* (quoting Brief for United States at 21, *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993) (No. 91-7749)).

260. *Id.* at 1212. *Estelle* recognized deterrence of felony escape as a justification for the Fugitive Dismissal Rule. See *supra* notes 71-74 and accompanying text.

261. *Ortega-Rodriguez*, 113 S. Ct. at 1212 (Rehnquist, C.J., dissenting).

262. *Id.* According to the Federal Rules of Appellate Procedure, a criminal defen-

to file an appeal, the fugitive is in no worse situation than if he escaped post filing.²⁶³ Second, the majority's holding fails to encourage voluntary surrenders.²⁶⁴ Encouraging voluntary surrenders, the dissent points out, is an "obvious interest" supporting the Eleventh Circuit's Fugitive Dismissal Rule.²⁶⁵

The dissent also asserted that a rule authorizing the dismissal of a former fugitive's appeal secures the dignified operation of the judicial system.²⁶⁶ Any time a defendant elects to abscond, the authority of the entire legal process is flouted.²⁶⁷ The dissent stated that no fugitive plans on voluntarily returning to the system and therefore is displaying disrespect for all levels of the judicial process including the trial and appellate level.²⁶⁸

Chief Justice Rehnquist concluded the dissenting opinion by pointing out that the majority's rule is not entirely unsatisfactory, but merely too narrow.²⁶⁹ The majority's holding limits the use of the Fugitive Dismissal Rule to situations where the flight of a convicted defendant causes a "significant interference with the operation of the appellate process,"²⁷⁰ or where "a meaningful appeal is impossible," or where the severance of appeals is forced due to the flight.²⁷¹ The dissent declared that this excludes situations where the defendant's flight causes such delay in the appellate process as to create adverse effects.²⁷² The

dant has 10 days following the entry of final judgment to file his appeal in the district court. FED. R. APP. P. 4.

263. *Ortega-Rodriguez*, 113 S. Ct. at 1212 (Rehnquist, C.J., dissenting). If the defendant fled after filing a notice of appeal, the court of appeals could have dismissed his appeal with prejudice. *Id.*; see *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam) (stating courts may dismiss, with prejudice, the appeal of a defendant who flees after filing a notice of appeal).

264. *Ortega-Rodriguez*, 113 S. Ct. at 1212 (Rehnquist, C.J., dissenting). In *Estelle* the court acknowledged encouragement of voluntary surrenders as a justification for the Fugitive Dismissal Rule. See *supra* notes 71-74 and accompanying text.

265. *Ortega-Rodriguez*, 113 S. Ct. at 1212 (Rehnquist, C.J., dissenting).

266. *Id.* This was the second major justification for the Fugitive Dismissal Rule set forth in *Estelle*, 420 U.S. at 537.

267. *Ortega-Rodriguez*, 113 S. Ct. at 1212 (Rehnquist, C.J., dissenting). As support for this assertion, the dissent professed that the majority could not possibly be suggesting that when a defendant absconds prior to invoking the appellate process, he means only to disrespect the district court and not the appellate court. *Id.*

268. *Id.*

269. *Id.* The dissent agreed with the portion of the majority's opinion that required a connection between the appellate process and the defendant's fugitive status. *Id.*

270. *Id.* at 1209 (Rehnquist, C.J., dissenting). This differs from the dissent's perspective in that the majority requires a "significant" interference. *Id.* The dissent's version of the rule is far less restrictive in its use. *Id.*

271. *Id.* at 1208-10; see *supra* notes 190-98 and accompanying text for a more detailed discussion of the Fugitive Dismissal Rule in these circumstances.

272. *Ortega-Rodriguez*, 113 S. Ct. at 1212 (Rehnquist, C.J., dissenting).

dissent stated that a connection between the fugitive's status and the appellate process is indeed necessary, but that status as a former fugitive has that requisite connection.²⁷³ The defendant's flight in this case delayed the appellate process for approximately nineteen months, causing adverse effects on the system.²⁷⁴ Therefore, the dissent maintained that the Eleventh Circuit Court of Appeal had the authority to dismiss the defendant's appeal.²⁷⁵

V. IMPACT

A. General Impact

The Fugitive Dismissal Rule, which began to evolve as early as the nineteenth century in *Smith v. United States*,²⁷⁶ has continued to develop, and was extended in *United States v. Holmes* to include pre-appellate fugitives.²⁷⁷ Following *Holmes*, the cases leading up to *Ortega-Rodriguez* have expanded the scope of the rule even further. The Court in *Ortega-Rodriguez*, however, put a stop to this development, taking a step backwards by limiting the rule to those defendants who flee during the pendency of their appeal.²⁷⁸ This narrow holding will have a substantial impact in many different areas.

1. Economic Impact

First, the decision in *Ortega-Rodriguez* will have an impact economically. This rule tends to promote pre-appeal escapes. The greater the number of defendants who flee, the greater the costs to the courts, the taxpayers, and the government. The delay in the judicial process alone will cost an unconscionable amount of money.²⁷⁹ Also, severance of

273. *Id.*

274. *Id.* at 1212-13 (Rehnquist, C.J., dissenting). In the instant case, Ortega-Rodriguez's escape not only caused a delay in the proceedings, but it also forced the severance of his appeal from that of his co-defendants. See *United States v. Mieres-Borges*, 919 F.2d 652, 663 (11th Cir. 1990) (affirming the conviction of Mieres-Borges and overturning the conviction of Beccera-Flores), *cert. denied*, 499 U.S. 980 (1991).

275. *Ortega-Rodriguez*, 113 S. Ct. at 1212-13 (Rehnquist, C.J., dissenting).

276. 94 U.S. 97 (1876).

277. 680 F.2d 1372 (11th Cir. 1982), *cert. denied*, 460 U.S. 1015 (1983), *overruled by Ortega-Rodriguez*, 113 S. Ct. 1199 (1993).

278. *Ortega-Rodriguez*, 113 S. Ct. at 1209-10 (Rehnquist, C.J., dissenting).

279. Inflation has caused the costs and delays incident to appellate proceedings to grow monumentally. See Alvin B. Rubin & Gilbert Ganucheau, *Appellate Delay and*

appeals may occur under the proposed rule,²⁸⁰ adding the enormous costs of having separate appellate hearings for co-defendants convicted in the same trial. In addition, under the *Ortega-Rodriguez* holding, many retrials that never would have occurred under a different rule, will have to be scheduled. The cost of these retrials must be borne by the taxpayers.²⁸¹

2. Judicial Impact

The judicial system is the second area that will be substantially impacted by the decision in *Ortega-Rodriguez*. The Court's holding will sacrifice the efficient operation of all levels of the judicial system.²⁸² This loss of efficiency will be experienced most prominently at the appellate level. Under this rule, fugitives who are recaptured and resentenced have the opportunity to file a timely appeal.²⁸³ This will force the appellate court to calendar cases that did not originally appear on the docket.²⁸⁴ Adding these cases to the docket will serve to further clog and hinder an already overburdened system.²⁸⁵

Cost—An Ancient and Common Disease: Is It Intractable?, 42 MD. L. REV. 752, 752 (1983).

280. See, e.g., *Ortega-Rodriguez*, 113 S. Ct. at 1209 (Rehnquist, C.J., dissenting). (stating that "petitioner's flight prevented the Court of Appeals from consolidating his appeal with those of his codefendants, which we assume would be its normal practice").

281. It costs approximately \$2186 to run a court room for a single day. Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1255 (1985) (citing JUDICIAL COUNCIL OF CALIFORNIA, 1984 ANNUAL REPORT, at 53 (1984)). One example of the enormous cost of appeals is the appeal of a death penalty conviction. In California, for example, each appeal costs roughly \$48,000-\$60,000. *Id.* at 1263.

282. As a result of the strain on this nation's courts, the justice system and the American public have suffered palpable harm. See RICHARDSON LYNN, DELAY ON APPEAL 1 (1993).

283. See *Ortega-Rodriguez*, 113 S. Ct. at 1209-10 (Rehnquist, C.J., dissenting) (holding that recaptured fugitives retain the right to file a timely appeal).

284. *Id.* at 1211 (Rehnquist, C.J., dissenting) (noting that "[t]his disruption to the management of the court's docketing procedures is qualitatively different from delay caused by other factors like settlement by the parties").

285. The number of appeals filed in the 12 regional appellate courts rose in 1989, to an astounding 40,266. L. Ralph Mecham *Annual Report of the Administrative Office of the United States Courts*, REP. OF THE JUD. CONF. OF THE U.S., Mar. 13, 1990 and Sept. 12, 1990, at 4. This 3% increase in the number of filings represented a record high for appellate filings. *Id.* The number of appeals filed in United States appellate courts continued to rise and totaled 44,465 in 1991. *United States Courts for the Ninth Circuit*, ANN. REP. 70 (1992). Only a year later the number reached an astronomical 47,756. *Id.* This signified a jump of 7.4% over the course of one year. It has been estimated that every decade the enormous caseload of the appellate courts in America doubles. See LYNN, *supra* note 282, at 6 n.3 (citing Marvell & Moody, *The*

Another area of the judicial system adversely affected by the holding in *Ortega-Rodriguez* is the dignity of the courts. Promoting the dignified operation of the judicial system is a major concern of the Court.²⁸⁶ This holding not only fails to advance such an interest, it actually damages it. Logic foretells that as more defendants recognize that a pre-appeal escape will not harm their chance to appeal, the greater the number of pre-appeal escape attempts that will occur. The dignified reputation of the judicial system, that society demands, will no longer exist; in fact, the system will foster more disrespect than it had prior to *Ortega-Rodriguez*.²⁸⁷

3. Impact on Number of Escapes

The holding in *Ortega-Rodriguez* will also have a significant impact on the number of attempted escapes. Under this holding, defendants are put on notice that they will be able to obtain a second opportunity to engage the appellate process if they escape prior to filing for appeal. If recaptured, the defendants must simply convince the judge to resentence them and they will have the opportunity to file a timely appeal.²⁸⁸ Even if the judge refuses to resentence the fugitive, the fugitive is in no worse a position than he would have been had he escaped after filing for an appeal.²⁸⁹ This is because fugitives who flee after fil-

Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output, 21 U. MICH. J.L. REF. 415 n.1 (1988). The average length of time between the filing in the lower court and the final disposition in United States appellate court is 24 months. *United States Courts for the Ninth Circuit*, ANN. REP. 73 (1992). The average length of time between filing the notice of appeal and final disposition is 10.6 months. *Id.* Considering that every trial takes approximately 2 years to complete, and every appeal nearly 11 months, allowing former fugitives to file for appeal following recapture will result in an enormous loss of efficiency in the appellate courts. *Id.*

286. See *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982) (per curiam) (promoting the dignified operation of appellate courts), *cert. denied*, 460 U.S. 1015 (1983).

287. *Ortega-Rodriguez*, 113 S. Ct. at 1199 (holding that recaptured fugitives retain the right to a timely appeal). The felony escapes which occurred in the cases leading up to this decision illustrate the disrespect experienced by the courts prior to the Court's decision. See *supra* notes 23-97 and accompanying text.

288. See *supra* notes 251-52 and accompanying text. The court is likely to resentence the fugitive after recapture in order to include the sanction for his escape. See, e.g., *Ortega-Rodriguez*, 113 S. Ct. at 1203.

289. If the judge refuses to resentence the former fugitive, and the fugitive has been at large for more than 10 days, his appeal would be barred by applicable time limits. The Federal Rules of Appellate Procedure provide the relevant time constraints

ing for an appeal would automatically have their appeal dismissed under the pre-existing dismissal rule.²⁹⁰ The Court's holding fails to deter escapes, as intended by the Fugitive Dismissal Rule, and serves to promote pre-appeal escapes, a policy the Court could never have intended to promote.

4. Social Impact

The decision in *Ortega-Rodriguez* will have a significant effect on society. Individuals in modern society are already disenchanted with the legal system²⁹¹ and many Americans believe that the judicial system offers the criminal defendant too many benefits.²⁹² The decision in *Ortega-Rodriguez* places fewer restrictions on defendants who escape prior to filing an appeal and then seek to petition their conviction following recapture. Hence, the former fugitive is given a second bite at the proverbial appellate apple. Many in society already believe that criminal defendants receive too many bites and are beginning to believe that the apple, our judicial system, is rotten to the core.²⁹³

Clearly, the holding in *Ortega-Rodriguez*, which prohibits appellate courts from dismissing appeals of fugitives who escape prior to filing for appeal, has far-reaching negative impacts. Perhaps the Court in *Ortega-Rodriguez* could have offered a better rule to serve the interests of the Court. The following section recommends such a rule.

B. Recommended Approach

A more preferable rule would be the "Discretionary Dismissal Rule for Fugitives."²⁹⁴ The Court should weigh the following three factors in making its determination of whether the former fugitive's appeal should

for filing a timely appeal. Rule 4 provides in pertinent part: "In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry of either the judgment or order appealed from, or of a notice of appeal by the Government." FED. R. APP. P. 4(b).

290. For the pre-existing Dismissal Rule, see *supra* note 6 and accompanying text.

291. See Richard Lacayo, *Lock 'em up!*, TIME, Feb. 7, 1994, at 50. As of January 1994, crime was the number one concern of citizens of the United States. *Id.* at 52. Anxiety concerning the high level of crime in the country ranks ahead of such problems as the economy, unemployment, and the budget deficit. *Id.*

292. See *id.*

293. Our society is preoccupied with crime. *Id.* at 51. One example of the frustration being felt by citizens throughout the nation is found in a letter written to a judge in Dade County, Florida. *Id.* Concerning the chances afforded criminals, one individual wrote, "[l]ine them up against the wall and get a firing squad and pull, pull, pull. I am volunteering to pull, pull, pull." *Id.*

294. This three-factor rule is proposed by the author and is not yet widely accepted.

be dismissed: (1) length and effect of the delay; (2) voluntary versus involuntary return; and (3) nature of the claim asserted.²⁹⁵ This rule would grant appellate courts the unconditional authority to dismiss the appeal of any fugitive or former fugitive. Moreover, there is a sufficient connection to the appellate process to warrant the "Discretionary Dismissal Rule for Fugitives."²⁹⁶ Although this rule would grant a court the authority to dismiss the appeal, it is recommended that a court do so only after conducting a case-by-case analysis based upon the three enumerated factors.²⁹⁷ These three factors make up the "Discretionary Dismissal Rule for Fugitives."

1. Length and Effect of Fugitivity

The length and effect of fugitivity has two prongs:

a. Length of fugitivity

The first prong the court should consider in deciding whether or not to dismiss an appeal is the length of fugitivity. The longer the period of fugitivity, the greater the chance that the defendant's appeal would be dismissed.²⁹⁸ Discouraging prolonged periods of fugitivity best serves public policy. Every minute, hour, or day a fugitive is on the run means a minute, hour, or day the authorities expend society's tax dollars to

295. See *infra* notes 296-310 and accompanying text for a detailed discussion and analysis of the "Discretionary Dismissal Rule for Fugitives."

296. See *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1210-12 (1993) (Rehnquist, C.J., dissenting) (stating there is a sufficient connection to the appellate process to warrant the dismissal of former fugitives' appeals).

297. See *Perko v. Bowers*, 945 F.2d 1038, 1040 (8th Cir. 1991) (stating the "court should exercise its discretion in determining whether to dismiss a criminal defendant's civil case based upon the circumstances of each individual case"), *cert. denied*, 112 S. Ct. 1482 (1992); see, e.g., *United States v. Snow*, 748 F.2d 928, 930 (4th Cir. 1984) (illustrating the court "decided to exercise its discretion in favor of permitting the appeal to proceed").

298. In *Ortega-Rodriguez*, the defendant eluded the authorities for 11 months. 113 S. Ct. at 1202; see also *United States v. Sudthisa-Ard*, 17 F.3d 1205, 1206 (9th Cir. 1994) (dismissing the appeal of a defendant who evaded law enforcement officials for 13 years); *United States v. Bravo*, 10 F.3d 79, 84-85 (2d Cir. 1993) (dismissing the appeal of a defendant who remained a fugitive for 15 years) *cert. denied*, 114 S.Ct. 1386 (1994); *United States v. Parrish*, 887 F.2d 1107, 1107 (D.C. Cir. 1989) (dismissing the appeal of a defendant who remained at large for 14 years). *But see Perko v. Bowers*, 945 F.2d 1038, 1040 (8th Cir. 1991) (holding an inmate's escape for less than three days did not warrant dismissal of his appeal), *cert. denied*, 112 S. Ct. 1482 (1992).

find him. Thus, the longer the period of fugitivity, the more apt the court should be to dismiss the fugitive's appeal. This component of the first factor is easily determined, and, as such, should be treated objectively.²⁹⁹ It is important to recognize that the length of fugitivity should be viewed in light of its adverse effects on the judicial system, and most importantly, on the appellate process. Furthermore, the court should consider the fact that the adverse effects on the judicial system will not always be proportionate to the length of the delay.

b. Effect of delay

The effect of delay caused by the defendant's flight is the second prong of this first factor and also merits examination. This has been proposed as the greatest justification for the Fugitive Dismissal Rule.³⁰⁰ As such, the court should weigh this factor heavily in its decision as to whether to dismiss the appeal of a former fugitive. The effect of the delay is intimately related to the length of fugitivity. The court should focus on the ramifications to the appellate process that directly result from the defendant's choice to flee.

For example, in a multi-defendant trial, the delay may force the severance of the defendant's appeal from that of his co-defendants.³⁰¹ This severance will result in the appellate court duplicating appeals, which is both costly and inefficient.³⁰² Again, public policy dictates that such inefficient use of judicial resources be avoided. An additional effect caused by the length of the delay is the possibility of prejudicing the government in locating witnesses and presenting evidence.³⁰³ During the defendant's absence, witnesses become unavailable due to death, ill-

299. For example, in *Ortega-Rodriguez*, the defendant remained a fugitive for 11 months. 113 S. Ct. at 1202.

300. Gripando, *supra* note 40, at 694-95.

301. See, e.g., *Ortega-Rodriguez*, 113 S. Ct. at 1203 (illustrating that a defendant's escape may force the severance of his appeal from that of his codefendants'); *United States v. London*, 723 F.2d 1538, 1539 (11th Cir.) (severing the defendant's appeal from that of his six co-defendants), *cert. denied*, 467 U.S. 1228 (1984).

302. See *supra* notes 279-81 and accompanying text.

303. See *United States v. Persico*, 853 F.2d 134, 137 (2d Cir. 1988) ("[T]he delay occasioned by the period of a defendant's flight can prejudice the prosecution should a new trial be ordered after a successful appeal."); *United States v. Baccollo*, 725 F.2d 170, 172 (2d Cir. 1983) ("[T]he two year deliberate flight and absence of defendant . . . would gravely prejudice the government were the defendant successful on his appeal During the lost two years witnesses, through death or other cause, and other evidence may have become unavailable to the government.") (emphasis deleted); *United States v. Holmes*, 680 F.2d 1372, 1374 (11th Cir. 1982) (per curiam), *overruled by, Ortega-Rodriguez*, 113 S.Ct. 1199, 1207 (1993). ("In the case of reversal, the government would obviously be prejudiced in locating witnesses and retrying the case.").

ness, relocation or refusal to retestify.³⁰⁴ Similarly, evidence that would be used at the defendant's retrial becomes stale, lost, or otherwise unavailable to the government. Public policy, therefore cries out that such judicial inefficiencies be assessed against the former fugitive.

2. Voluntary Versus Involuntary Return

Another factor that should be considered in this balancing approach is whether the defendant returned voluntarily or was recaptured involuntarily. Although the conditions under which the defendant returns have no effect on the delay caused by flight, adding this factor to the test is a matter of public policy.³⁰⁵ One of the goals of the Fugitive Dismissal Rule is to deter future escape attempts by convicted defendants. Similarly, the rule should encourage, or at least not discourage, the voluntary surrender of fugitives.³⁰⁶ Based on this public policy argument, the defendant's voluntary return should act in the defendant's favor in determining whether to grant an appeal.³⁰⁷

3. Nature of the Claim

The final factor that should be considered in this balancing test is the nature of the claim asserted. If, for example, the claim is based on a constitutional issue, the court should favor entertaining the appeal of the former fugitive.³⁰⁸ Additionally, the court should hear the defen-

304. See *Baccollo*, 725 F.2d at 172; *Holmes*, 680 F.2d at 1374 (elaborating on the potential costs to the parties arising from delay).

305. See *Gonzales v. Stover*, 575 F.2d 827, 827-28 (10th Cir. 1978) (per curiam) ("For over one hundred years the Supreme Court has consistently refused to grant post-conviction review for escaped prisoners. These decisions make it clear that the Court's informal policy is grounded on considerations which favor voluntary surrender and discourage escape.").

306. See *Estelle v. Dorrough*, 420 U.S. 534, 541 (1975) (per curiam) (stating that the goal of discouraging felony escapes and encouraging voluntary surrender is a valid justification for dismissing a defendant's appeal); see also *Bonahan v. Nebraska*, 125 U.S. 692, 692 (1887) (indicating that the defendant's surrender would prevent the dismissal of his appeal). But see *United States v. Snow*, 748 F.2d 928, 930 (4th Cir. 1984) (stating the fact that the defendant "did not voluntarily surrender" and was "recaptured against his will . . . militates against granting [appellant] a judicial forum where he can contest the terms and conditions of his sentence").

307. See *Grippando*, *supra* note 40 at 692.

308. See *United States v. Veliotis*, 586 F. Supp. 1512, 1514 (S.D.N.Y. 1984) ("[W]here a fugitive defendant seeks to vindicate a right vouchsafed by the United States Constitution, the Court should give weight to this factor in determining how to exercise

dant's appeal when the defendant seeks acquittal rather than retrial.³⁰⁰ In contrast, if the claim asserted results in a re-trial, following a long delay, the government may be unable to reproduce evidence or relocate witnesses.³¹⁰ In such cases, the court should endorse dismissal of the defendant's appeal.

Based on the length and effect of fugitivity, voluntary versus involuntary return, and nature of the claim, which together comprise the "Discretionary Dismissal Rule for Fugitives," courts will be able to determine whether the appeal of a former fugitive warrants dismissal.

VI. CONCLUSION

The federal courts' authority to dismiss the appeal of a fugitive who escapes after filing for a timely appeal is well established.³¹¹ Recently, lower courts have extended this power to include the ability to dismiss the appeal of a defendant who flees prior to filing for appeal, but is later recaptured and files a timely appeal.³¹² The Court's most recent holding on this issue in *Ortega-Rodriguez* retreated from this development and limited the appellate courts' authority to dismiss the appeal of a former fugitive.³¹³ This holding is inconsistent with the evolution of the law in this area.³¹⁴

its discretion."); *see also* *United States v. Tunnell*, 650 F.2d 1124, 1126 (9th Cir. 1981) (stating the fact that the defendant remained at large for 12 years before being recaptured did not justify dismissal of their appeal where convictions may have been based on an unconstitutional presumption); *United States v. Tapia-Lopez*, 521 F.2d 582, 583-84 (9th Cir. 1975) (*per curiam*) (reversing the conviction of the defendant where an unconstitutional jury instruction was given, despite the fact that the defendant escaped after conviction and was not sentenced until after she reappeared 5 years later).

309. If the court determines that there was insufficient evidence to support the defendant's conviction, the decision will be reversed and no retrial will occur. *See, e.g., Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1208 (1993). Thus, the government will not be prejudiced by its inability to locate witnesses or present evidence. *Id.*

310. *See supra* notes 196-97 and accompanying text.

311. *See supra* note 6 and accompanying text.

312. *See London v. United States*, 723 F.2d 1538, 1539 (11th Cir.) (holding that the appeal of defendants who flee and are recaptured prior to filing an appeal may be dismissed), *cert. denied*, 467 U.S. 1228 (1984); *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982) (*per curiam*) (stating that appellate courts may dismiss the appeal of a former fugitive who subsequently files an appeal of his conviction), *cert. denied*, 460 U.S. 1015 (1983).

313. *See Ortega-Rodriguez*, 113 S. Ct. at 1209 (1993) (holding that a defendant's escape and recapture prior to filing a notice of appeal lacks the requisite connection to the appellate process to warrant dismissal).

314. *See London*, 723 F.2d at 1538 (extending the Fugitive Dismissal Rule to include former fugitives); *Holmes*, 680 F.2d at 1372 (expanding the existing law to grant ap-

A better approach to this issue would be to grant the appellate court the unconditional right to dismiss the appeal of a former fugitive under the authority of the "Discretionary Dismissal Rule for Fugitives," or other similar rule.³¹⁵ This decision, however, should be based on a case-by-case analysis consisting of a delicate three-part balancing test weighing the following factors: the length and effect of fugitivity, voluntary versus involuntary return, and the nature of the claim asserted on appeal. This approach would allow the courts to ensure the dignified, efficient operation of the court system while at the same time deterring future escapes.

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pellate courts the authority to dismiss the appeal of former fugitives).

315. See discussion *supra* part V(B).

