

Winter 1994

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Recommended Citation

Jason W. Joseph, The Fugitive Dismissal Rule Applied to Pre-Appeal Fugitivity, 84 J. Crim. L. & Criminology 1086 (Winter 1994)

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THE FUGITIVE DISMISSAL RULE APPLIED TO PRE-APPEAL FUGITIVITY

Ortega-Rodriguez v. United States, 113 S. Ct. 1199 (1993)

I. INTRODUCTION

In *Ortega-Rodriguez v. United States*,¹ the United States Supreme Court held that appellate courts may dismiss the appeal of a criminal defendant who becomes a fugitive if the fugitive status has sufficient connection to the appellate process.² However, the Court also held that when the fugitive status occurs prior to the filing of the appeal, such status generally lacks the requisite connection to dismiss the appeal.³ The Court did, however, state that in certain exceptional situations the appellate courts could apply general rules of dismissal to pre-appeal flights.⁴

This Note argues that, while the Court correctly concluded that pre-appeal flight generally lacks sufficient connection to the appellate process to warrant dismissal, the Court incorrectly reasoned that the justifications supporting dismissal in post-appeal flight cases do not apply to pre-appeal flights. In addition, this Note argues that the Court properly permitted appellate courts to exercise discretion through applying general rules of dismissal to specific, recurring situations in which pre-appeal flight is sufficiently connected to the appellate process. Finally, this Note predicts the future applicability of the fugitive dismissal rule to pre-appeal flights after *Ortega-Rodriguez*.

II. BACKGROUND

The fugitive dismissal rule provides federal appellate courts with the authority to dismiss the appeal of a criminal defendant if the defendant becomes a fugitive while the appeal is pending.⁵ A criminal defendant does not have a constitutional right to an ap-

¹ 113 S. Ct. 1199 (1993).

² *Id.* at 1208.

³ *Id.*

⁴ *Id.* at 1208-09.

⁵ See *Molinero v. New Jersey*, 396 U.S. 365 (1970).

peal.⁶ Instead, the right to an appeal is provided for by federal statute.⁷ For this reason, appellate courts have the authority to promulgate the procedural rules for perfecting an appeal.⁸ The fugitive dismissal rule has been developed based on this authority. The United States Supreme Court and various circuit courts have advanced several justifications for this rule.

The Supreme Court first adopted the fugitive dismissal rule in *Smith v. United States*.⁹ In *Smith*, the Court dismissed the defendant's writ of error because the defendant had escaped and was not under the control of the court.¹⁰ The Court in *Smith* based its decision on the concern that any judgment it issued would be unenforceable.¹¹ It stated, "[i]t is clearly within our 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."¹² The Supreme Court has continued to advance the enforceability justification in support of dismissing fugitive appeals.¹³ The Court has gone even further and stated that fugitive appeals may be dismissed even if the defendant is recaptured before any appellate action is taken.¹⁴

The Supreme Court provided another justification for the fugitive dismissal rule in *Molinaro v. New Jersey*.¹⁵ The defendant in *Molinaro*, convicted of abortion and conspiracy to commit abortion, failed to surrender himself after he had appealed.¹⁶ In dismissing the appeal, the *Molinaro* Court reasoned that the defendant, by escaping after he appealed, became disentitled to an appeal.¹⁷ The

⁶ See *Abney v. United States*, 431 U.S. 651, 656 (1977).

⁷ See 28 U.S.C. § 1291 (1989).

⁸ See FED. R. APP. P. 47.

⁹ 94 U.S. 97 (1876).

¹⁰ *Id.* The Supreme Court ordered that the cause be taken off the court's docket unless the defendant voluntarily surrendered himself to the jurisdiction of the court below on or before the first day of the Supreme Court's next term. *Id.* at 97-98.

¹¹ *Id.* at 97. The Court articulated its enforceability concerns as follows:

If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.

Id.

¹² *Id.*

¹³ See *Eisler v. United States*, 338 U.S. 189 (1949); *Bonahan v. Nebraska*, 125 U.S. 692 (1887).

¹⁴ See *Estelle V. Dorrough*, 420 U.S. 534 (1975). See *infra* note 22 and accompanying text.

¹⁵ 396 U.S. 365 (1970).

¹⁶ *Id.*

¹⁷ *Id.* at 366. The Court stated:

No persuasive reason exists why this Court should proceed to adjudicate the merits

Court has voiced other justifications for a dismissal rule as well. In *Estelle v. Dorrough*,¹⁸ the Court upheld the constitutionality of a Texas statute that provided for the automatic dismissal of an appeal by a felony defendant if he escaped while the appeal is pending.¹⁹ In so doing, the Supreme Court reasoned that the statute discouraged escape and encouraged voluntary surrender, and also that it promoted "the efficient, dignified operation of the Texas Court of Criminal Appeals."²⁰

In short, the Supreme Court has consistently approved the dismissal of a criminal defendant's appeal if the defendant becomes a fugitive while the appeal is pending.²¹ In addition, the Court has ruled that dismissal is appropriate even when a defendant is recaptured before the court of appeals has acted.²² Prior to *Ortega-Rodriguez v. United States*, however, the Supreme Court had never been confronted with the issue of whether a court may dismiss the appeal of a defendant who escapes and is recaptured before invoking appellate jurisdiction.

Several appellate courts have addressed this issue, however. The different approaches of the circuits can be classified into three categories: those that follow the Eleventh Circuit's dismissal rule, those that do not follow the Eleventh Circuit's dismissal rule, and those who have not confronted the issue.²³

of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While 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.

Id.

¹⁸ 420 U.S. 534 (1975).

¹⁹ *Id.* at 535. The Texas statute in question also provided for reinstatement of appeal if the defendant voluntarily surrenders within ten days of the escape. TEX CODE CRIM. PROC. ANN. art. 44.09 (West 1966).

²⁰ *Dorrough*, 420 U.S. at 537. In that case, a Texas district court convicted the defendant of robbery. The defendant then filed a timely appeal, escaped from jail and was recaptured two days later. As a result, the Texas Court of Criminal Appeals removed the appeal from its docket, pursuant to the dismissal statute. *Id.* at 534-37.

²¹ See *Smith v. United States*, 94 U.S. 97 (1876); *Bonahan v. State of Nebraska*, 125 U.S. 692 (1887); *Molinaro*, 396 U.S. at 365.

²² See *Dorrough*, 420 U.S. at 534.

²³ It should be noted, however, that nearly all circuits agree that courts possess the authority to dismiss appeals if the defendant becomes a fugitive while the appeal is pending. See *United States v. Amado*, 754 F.2d 31 (1st Cir. 1985); *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *Virgin Islands v. James*, 621 F.2d 588 (3d Cir. 1980); *United States v. Glomb*, 877 F.2d 1 (5th Cir. 1989); *United States v. Coleman*, 834 F.2d 172 (6th Cir. 1987); *Brinlee v. United States*, 483 F.2d 925 (8th Cir. 1973); *Hussein v. INS*, 817 F.2d 63 (9th Cir. 1986); *United States v. Swigart*, 490 F.2d 914 (10th Cir. 1973); *United States v. Knight*, No. 91-334, 1992 WL 281662 (D.C. Cir. Oct. 2, 1992), *cert. denied*, 113 S. Ct. 1853 (1993). The Fourth Circuit,

The Eleventh Circuit has extended the fugitive dismissal rule to apply to defendants who flee before filing notice of appeal.²⁴ In *United States v. Holmes*,²⁵ the Eleventh Circuit held that a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless the defendant can show that his escape was due to matters completely beyond his control.²⁶

The *Holmes* court based its decision on several factors. First, the court noted that flight after conviction would postpone filing a notice of appeal, and the resulting delay would "make a meaningful appeal impossible in many cases."²⁷ Second, the court reasoned that if there were a reversal, the delay caused by pre-appeal flight would prejudice the government in locating witnesses and retrying the case.²⁸ Third, the court held that defendants who flee before appeal are equally disentitled to call upon the resources of the court of appeals as are defendants who flee after filing an appeal.²⁹

Subsequent to *Holmes*, the Eleventh Circuit has expanded its dismissal rule to include defendants who flee during trial. In *United States v. London*,³⁰ the Eleventh Circuit followed its decision in *Holmes* and dismissed the appeal of a defendant who fled while his case was on trial and remained a fugitive for three years.³¹ The *London* court noted that "the defendant disrupted a prolonged trial and flaunted his disregard for the orderly court procedures for the determination of whether he was guilty or not guilty."³² The court concluded that the justifications for dismissing the appeal of a defendant who flees before conviction are more compelling than those for a defendant

in *United States v. Snow*, 748 F.2d 928, 930 (4th Cir. 1984), decided to hear the appeal of a defendant who fled after his appeal but was recaptured less than thirty days later, but the court did state that it had the discretion to dismiss the appeal. Finally, the Seventh Circuit has not ruled on the issue of fugitive appeals.

²⁴ See *United States v. London*, 723 F.2d 1538 (11th Cir. 1984); *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982).

²⁵ 680 F.2d at 1372.

²⁶ *Id.* at 1373. The Eleventh Circuit did state, however, that a defendant who flees after conviction and before sentencing does not waive the right to appeal any post-conviction errors. *Id.*

²⁷ *Id.* at 1374.

²⁸ *Id.*

²⁹ *Id.* The court stated, "[w]ere we to hold otherwise, criminal defendants who flee prior to sentencing would be permitted upon apprehension to seek relief from the very legal system that they previously had seen fit only to defy." *Id.* This rationale directly parallels the Supreme Court's reasoning in *Molinero v. New Jersey*, 396 U.S. 365 (1970).

³⁰ 723 F.2d 1538 (11th Cir. 1984).

³¹ *Id.* at 1539. The trial court used its discretion to allow the trial to proceed in absentia. *Id.* at 1538-39.

³² *Id.* at 1539.

who flees after conviction, such as the defendant in *Holmes*.³³ Accordingly, the Eleventh Circuit's fugitive dismissal rule applies to defendants who abscond at any time either before or after filing notice of appeal.

Not all circuit courts are, however, in agreement with the Eleventh Circuit. Of the five circuit courts that have ruled on this issue, three circuits have followed the Eleventh Circuit's rule and two circuits have declined to follow the Eleventh Circuit.

The Second, Third, and Fifth Circuits have extended the fugitive dismissal rule to include cases in which defendants flee before filing notice of appeal.³⁴ The decisions by these circuits and the decision by the Eleventh Circuit differ in only one respect. The Second, Third and Fifth Circuits have all indicated that, in dismissing the appeals of defendants who fled prior to appealing, they were exercising judicial discretion.³⁵ In contrast, the Eleventh Circuit stated in *Holmes* that the defendant, by fleeing before appeal, "waive[d] his right to appeal."³⁶ Thus, it would appear that the Eleventh Circuit's dismissal rule is automatically applied in pre-appeal flight situations, while the other circuits exercise discretion in pre-appeal flight cases.

The First and Ninth Circuits have declined to follow the Eleventh Circuit's pre-appeal dismissal rule.³⁷ In *United States v. Anagnos*,³⁸ the First Circuit denied the government's motion to dismiss the appeal of a defendant who fled after conviction but before sentencing.³⁹ The *Anagnos* court refused to extend its dismissal rule beyond one which dismisses the appeal of a defendant who flees after filing notice of appeal but is recaptured and in custody at the time the appellate court takes any action.⁴⁰ As the *Anagnos* court stated, "[defendant's] misconduct was in the district court, and

³³ *Id.* As in *Holmes*, the *London* court dismissed only the appeal of the convictions, not the appeal of any sentencing errors. *Id.*

³⁴ *United States v. Persico*, 853 F.2d 134 (2d Cir. 1988); *United States v. Matista*, 932 F.2d 1055 (2d Cir. 1991); *United States v. Wright*, 902 F.2d 241 (3d Cir. 1990); *United States v. Devalle*, 894 F.2d 133 (5th Cir. 1990).

³⁵ *Persico*, 853 F.2d at 137; *Matista*, 932 F.2d at 1056; *Wright*, 902 F.2d at 242; *Devalle*, 894 F.2d at 136.

³⁶ *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982).

³⁷ *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988); *Katz v. United States*, 920 F.2d 610 (9th Cir. 1990).

³⁸ 853 F.2d 1 (1st Cir. 1988).

³⁹ *Id.* at 1. The defendant was convicted of possession of a controlled substance with intent to distribute, and conspiracy to distribute. The defendant was recaptured and sentenced for the narcotics convictions, and was also sentenced to an additional period for bail-jumping. *Id.* at 1-2.

⁴⁰ *Id.* at 2. The court referred to its decision in *United States v. Puzzanghera*, 820 F.2d 25 (1st Cir. 1987), *cert. denied*, 484 U.S. 900 (1987), which dismissed the appeal of a

should affect consequences in that court, not in ours.”⁴¹

While the First Circuit expressly declined to follow the Eleventh Circuit,⁴² the Ninth Circuit, in *Katz v. United States*,⁴³ only implicitly rejected the Eleventh Circuit’s dismissal rule. In *Katz*, the Ninth Circuit denied the government’s motion to dismiss the appeal of a defendant who fled after filing an appeal but was recaptured and in custody at the time the government’s motion was heard.⁴⁴ The *Katz* court reasoned that the disentitlement doctrine did not apply “when the person seeking judicial relief is no longer a fugitive.”⁴⁵ If the Ninth Circuit refused to dismiss the appeal of a defendant who flees after filing an appeal, it follows that the Ninth Circuit would most likely have rejected the Eleventh Circuit’s rule of dismissal of pre-appeal flight cases.

At the time the Supreme Court decided *Ortega-Rodriguez*, the remaining courts of appeals—the Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits—had not been confronted with the issue of fugitive dismissal for pre-appeal flights, and had not indicated in any way whether they would follow the Eleventh Circuit’s fugitive dismissal rule. The Supreme Court therefore attempted to guide the appellate courts with respect to this issue in *Ortega-Rodriguez*.

III. FACTS AND PROCEDURAL HISTORY

On November 7, 1988, a customs service pilot observed a low flying airplane dropping bales to a boat circling in the waters near Cay Sal Bank, located approximately midway between the Florida Keys and Cuba.⁴⁶ The customs plane was flying too high to identify the boat, but the pilot described the boat as a forty to fifty-foot white vessel.⁴⁷ The next morning, a different customs pilot spotted a boat resembling the one seen the day before, thirty miles from where the

defendant who fled after filing an appeal but was recaptured before any appellate court action.

⁴¹ *Anagnos*, 853 F.2d at 2.

⁴² *Id.*

⁴³ 920 F.2d 610 (9th Cir. 1990).

⁴⁴ *Id.* at 611. The defendant was convicted and sentenced, and then filed a timely appeal in 1971. That appeal was dismissed because it was not perfected. Released on bond, the defendant fled the jurisdiction of the court. Thirteen years later, in 1984, the defendant was arrested in Norway and extradited to the United States. In 1989, the defendant filed a motion to correct, vacate or set aside the 1971 sentence. It is this 1989 motion that the government had moved to dismiss pursuant to a fugitive dismissal rule. *Id.*

⁴⁵ *Id.* at 613.

⁴⁶ *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1201 (1993).

⁴⁷ *Id.*

bales were dropped, headed toward Cuba.⁴⁸ The pilot observed numerous bales stacked on the nearby beach.⁴⁹ At this point the pilot contacted a coast guard cutter, whose crew intercepted, boarded, and searched the boat but found no narcotics or other incriminating evidence.⁵⁰

Jose Antonio Ortega-Rodriguez was one of three individuals on the boat.⁵¹ These three individuals were arrested, tried, and convicted of both possession with the intent to distribute and conspiring to possess with the intent to distribute over five kilograms of cocaine.⁵²

On June 15, 1989, the date set for sentencing, Ortega-Rodriguez did not appear before the district court and was sentenced in absentia to a prison term of nineteen years and seven months, to be followed by a five year period of supervised release.⁵³ While Ortega-Rodriguez's two co-defendants filed timely appeals of their convictions and sentences, no appeal was filed on behalf of Ortega-Rodriguez.⁵⁴

Eleven months later, on May 24, 1990, Ortega-Rodriguez was apprehended.⁵⁵ He was indicted and found guilty of contempt of court and failure to appear.⁵⁶ The district court imposed a prison sentence of twenty-one months followed by a three year period of supervised release, to be served after completion of the sentences on the narcotics offenses.⁵⁷ Counsel for Ortega-Rodriguez then filed a motion to vacate the sentence and for resentencing, which the district court granted.⁵⁸ Subsequently, the district court resentedenced Ortega-Rodriguez to a prison term of fifteen years and eight months, followed by a five year period of supervised release, to which Ortega-Rodriguez filed a timely appeal.⁵⁹

⁴⁸ *Id.* This boat was a thirty to forty foot long white sport fishing vessel. *Id.*

⁴⁹ *Id.* at 1201-02.

⁵⁰ *Id.* at 1202.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* The district court subsequently issued a warrant for the arrest of Ortega-Rodriguez. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* After Ortega-Rodriguez's arrest, the court of appeals disposed of the co-defendants' appeals, affirming one conviction, but reversing the other due to insufficiency of evidence to establish guilt beyond a reasonable doubt. *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1203. The district court denied Ortega-Rodriguez's motion for judgment of acquittal. *Id.*

⁵⁹ *Id.* Because Ortega-Rodriguez would have been barred by time limits from appealing his initial sentence, the only reason he was able to file an appeal was because the district court granted his motion to resentence. *Id.* at n.9.

On appeal, the Eleventh Circuit dismissed the appeal without an explanation.⁶⁰ The government argued that the fugitive dismissal rule, as developed by the Eleventh Circuit in *Holmes*, precluded the appeal of a defendant who escaped prior to appealing.⁶¹ Therefore, it can only be inferred that the court of appeals based the dismissal on the *Holmes* rule, which provides dismissal for defendants who flee prior to filing an appeal.⁶²

Subsequently, the Supreme Court granted certiorari to decide whether a defendant who flees and is recaptured while his case is in the district court waives his right to appeal.⁶³

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

In *Ortega-Rodriguez v. United States*, the Supreme Court, in an opinion delivered by Justice Stevens,⁶⁴ held that in order to apply the fugitive dismissal rule there must be a connection between the defendant's flight and the appellate process, and that the requisite connection is generally lacking when a defendant's flight occurs before the appeal stage.⁶⁵ Accordingly, the Court vacated the Eleventh Circuit's judgment and remanded the case.⁶⁶

The Court began by stating the longstanding rule, adopted by the Court in *Smith*, that an appellate court may dismiss a criminal defendant's appeal if the defendant is a fugitive from justice while the appeal is pending.⁶⁷ The Court then discussed the various reasons supporting the fugitive dismissal rule.

Justice Stevens observed that the fugitive dismissal rule originally developed because the Court was concerned that any judgment it issued would prove to be unenforceable against fugitive defendants.⁶⁸ Another reason the Court gave for upholding dismissal of a fugitive's appeal, given in *Molinaro*, was the notion that fleeing during the pendency of appeal disintitled the defendant to an appeal.⁶⁹ Justice Stevens considered the disintitlement theory to be

⁶⁰ *United States v. Ortega-Rodriguez*, No. 91-5083, 1993 WL 60980 (11th Cir. Jan. 22, 1993).

⁶¹ *Ortega-Rodriguez*, 113 S. Ct. at 1201 n.1.

⁶² *Id.*

⁶³ *Ortega-Rodriguez v. United States*, 112 S. Ct. 2964 (1992).

⁶⁴ Justice Stevens was joined by Justices Blackmun, Scalia, Kennedy and Souter.

⁶⁵ *Ortega-Rodriguez*, 113 S. Ct. at 1209.

⁶⁶ *Id.* at 1210.

⁶⁷ *Id.* at 1203 (citing *Smith v. United States*, 94 U.S. 97 (1876)).

⁶⁸ *Id.* at 1203.

⁶⁹ *Id.* at 1204. The Court quoted *Molinaro* at length:

No persuasive reason exists why this Court should proceed to adjudicate the merits

the same as a theory of abandonment of the right to appeal.⁷⁰ Finally, Justice Stevens concluded this portion of the opinion by reiterating that the Court has consistently approved dismissal of appeal when the defendant is a fugitive during the appellate process, and that in addition to the enforceability justification, the fugitive dismissal rule "serves an important deterrent function and advances an interest in efficient dignified appellate practice."⁷¹

Next, the Court asserted that the Eleventh Circuit's rule in *Holmes*, which provided dismissal of an appeal by a former fugitive who was returned to custody prior to sentencing, was based on the disentitlement rationale formulated by the *Molinaro* Court and the concern that the government might be prejudiced by delays in the proceedings caused by the escape.⁷² The Court then distinguished the rule in *Holmes* from the rule in *Molinaro* on the grounds that the *Holmes* rule applies to defendants who escape while their cases are before the district courts, allows dismissal of appeals of convictions but not appeals of sentences,⁷³ and requires automatic dismissal instead of allowing for judicial discretion.⁷⁴

The Court noted that the justifications supporting dismissal in cases where a defendant flees while his appeal is pending demand "some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response."⁷⁵ Accordingly, the Court concluded that those justifications are necessarily attenuated in a case where flight and recapture occur while the case is pending before the district court.⁷⁶

To support its conclusion, the Court explained that a defendant who is recaptured before the appellate process begins presents no risk of unenforceability because the defendant is under the control of the court of appeals throughout the entire course of the appeal.⁷⁷

of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While 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.

Id. (quoting *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970)).

⁷⁰ *Id.*

⁷¹ *Id.* at 1204-05.

⁷² *Id.* at 1205.

⁷³ In analyzing the Eleventh Circuit's reasoning in *Holmes*, the Court stated that "because flight cannot fairly be construed as a waiver of appeal from errors occurring after recapture, defendants who flee pre-sentencing retain their right to appeal sentencing errors, though they lose the right to appeal their convictions." *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 1205-06.

⁷⁶ *Id.* at 1206.

⁷⁷ *Id.*

Furthermore, the Court noted that when a defendant's escape and recapture occur before the appeal stage, the resulting delay affects only the district court hearing the case.⁷⁸

Similarly, dismissal of these appeals does not operate to protect the dignity of the appellate court because "the contemptuous disrespect manifested by his flight was directed at the district court."⁷⁹ For these reasons, the Court determined that district courts are in a better position, in most cases, to sanction pre-appeal fugitivity.⁸⁰ The Court also reasoned that the deterrence rationale does not support a rule allowing appellate courts to dismiss former fugitives' appeals.⁸¹ The Court relied on the fact that the district court should sanction behavior that occurs under its jurisdiction: flight during a pending case, the Court noted, is treated as the separate offense of contempt of court.⁸²

The Court held that the interests served by the fugitive dismissal rule do not support a rule of dismissal for all appeals filed by former fugitives who have been recaptured before the appellate process begins.⁸³ The Court did proceed to limit this holding, however.

The Court admitted that, in some instances, the actions of defendants before appeal might impact the appellate process enough to warrant an appellate sanction.⁸⁴ As the Court noted, "we do not hold that a court is entirely without authority to dismiss an appeal because of fugitive status predating the appeal."⁸⁵ A long escape, even if ended before the appeal, could prejudice the government in locating witnesses and presenting evidence.⁸⁶ Accordingly, the Court bestowed upon appellate courts the authority to sanction with dismissal those cases in which the appellate process is adversely affected.⁸⁷ The Court warned that appellate courts should not use their discretion to consider dismissals on a case by case basis, but rather should develop "generally applicable rules to cover specific,

⁷⁸ *Id.* The Court claimed that Ortega-Rodriguez's 11-month period of fugitivity caused a 19-month delay in the district court proceedings, but that the appellate court was unaffected by the defendant's escape. *Id.* at n.16.

⁷⁹ *Id.* at 1207.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 1208.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* The Court also noted that in cases like Ortega-Rodriguez's, where the appeal is premised on insufficiency of evidence, the Government would not be prejudiced by a long delay because those appeals do not permit retrial. *Id.*

⁸⁷ *Id.* at 1209.

recurring situations.”⁸⁸

In the present case, Ortega-Rodriguez’s flight prevented the court of appeals from consolidating his appeal with the appeals of his codefendants.⁸⁹ The Court concluded that the dismissal rule can only be applied when pre-appeal flight interferes with the operation of the appellate process.⁹⁰ Accordingly, the Court vacated the judgment of the Eleventh Circuit and remanded the case to decide whether a flight that causes severance of appeals affects the appellate process enough to warrant the sanction of dismissal.⁹¹

B. THE DISSENTING OPINION

The dissent, written by Chief Justice Rehnquist,⁹² agreed with the Court that dismissal requires a connection between the escape and the appellate process, but disagreed with the Court’s conclusion that recapture before appeal generally breaks the connection.⁹³ For this reason, the dissent would have affirmed the Eleventh Circuit’s judgment.⁹⁴

The dissent argued that the only distinction between a defendant who flees pre-appeal and one who flees post-appeal is that the latter has filed a notice of appeal.⁹⁵ Accordingly, the dissent noted, “there is no reason why the authority to dismiss an appeal should be based on the timing of a defendant’s escape.”⁹⁶

According to the dissent, appellate courts have the authority to create and enforce procedural rules governing litigation.⁹⁷ The dissent argued that the only limits on the appellate court’s authority are that the rules created may not violate the Constitution or a statute, and that the rules must be reasonable in light of the interests they are designed to protect.⁹⁸ First, the dissent argued, the Eleventh Circuit’s dismissal rule does not violate the Constitution because a criminal defendant has no constitutional right to an

⁸⁸ *Id.* at 1209 n.23.

⁸⁹ *Id.* at 1209.

⁹⁰ *Id.*

⁹¹ *Id.* at 1210. The Court declined to apply a general rule of dismissal when pre-appeal flight causes severance of appeals, and instead left it up to the appellate courts to decide independently. *Id.* at 1209 n.24.

⁹² Justices White, O’Connor and Thomas joined in the dissent.

⁹³ *Id.* at 1210 (Rehnquist, C.J., dissenting).

⁹⁴ *Id.* at 1210 n.1 (Rehnquist, C.J., dissenting).

⁹⁵ *Id.* at 1210 (Rehnquist, C.J., dissenting).

⁹⁶ *Id.* (Rehnquist, C.J., dissenting).

⁹⁷ *Id.* (Rehnquist, C.J., dissenting) (citing *Thomas v. Arn*, 474 U.S. 140, 146 (1985)).

⁹⁸ *Id.* (Rehnquist, C.J., dissenting).

appeal.⁹⁹ Second, the dismissal rule does not violate the statute granting criminal defendants the right to appeal,¹⁰⁰ because that statute does not provide the procedural requirements for perfecting an appeal.¹⁰¹ In fact, the dissent noted, the procedural requirements for perfecting appeals are contained in the Federal Rules of Appellate Procedure, which give each court of appeals the authority to make rules governing appellate practice.¹⁰² Finally, the dissent argued that the fugitive dismissal rule is reasonable because it is designed to protect the appellate court's jurisdiction and to ensure the efficient use of the court's limited resources.¹⁰³

The dissent then opposed the majority's assertion that a defendant's flight before appeal generally has no connection to the appellate process.¹⁰⁴ For example, the dissent observed that the appellate process is delayed for, at a minimum, the amount of time the defendant is at large.¹⁰⁵ The dissent argued that, because a fugitive's case could turn up unexpectedly on an appellate court's docket, the delay could result in damage to docket organization and predictability.¹⁰⁶

Another possibly damaging result of the delay caused by a defendant's pre-appeal flight is the severance of appeals.¹⁰⁷ The dissent noted that in the present case, the Eleventh Circuit heard the appeals of the two codefendants during the period of Ortega-Rodriguez's fugitivity, as opposed to hearing all three appeals concurrently. Ortega-Rodriguez's flight, therefore, placed an increased burden on the appellate court to hear his appeal separately.¹⁰⁸ The dissent also argued that the Eleventh Circuit's fugitive dismissal rule serves an interest in deterring flight and encouraging voluntary surrender.¹⁰⁹ The dissent stated that the majority's holding, in contrast, encourages flight and discourages voluntary surrender

⁹⁹ *Id.* (Rehnquist, C.J., dissenting) (citing *Abney v. United States*, 431 U.S. 651, 656 (1977)).

¹⁰⁰ 28 U.S.C. § 1291 (1948).

¹⁰¹ *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting).

¹⁰² *Id.* (Rehnquist, C.J., dissenting) (citing FED. R. APP. P. 47). Rule 47 states:

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 rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.

FED. R. APP. P. 47.

¹⁰³ *Ortega-Rodriguez*, 113 S. Ct. at 1211 (Rehnquist, C.J., dissenting).

¹⁰⁴ *Id.* (Rehnquist, C.J., dissenting).

¹⁰⁵ *Id.* (Rehnquist, C.J., dissenting).

¹⁰⁶ *Id.* (Rehnquist, C.J., dissenting).

¹⁰⁷ *Id.* (Rehnquist, C.J., dissenting).

¹⁰⁸ *Id.* (Rehnquist, C.J., dissenting).

¹⁰⁹ *Id.* at 1212 (Rehnquist, C.J., dissenting).

because a defendant who escapes before appeal is in a no-lose position since he would still be able to appeal when, and if, he is returned to custody.¹¹⁰

The dissent also disagreed with the Court's argument that a defendant's flight shows disrespect for the district court only and that therefore the district court is the proper authority to sanction the defendant.¹¹¹ The dissent contended that a defendant who flees before appeal flouts the authority of the entire judicial process, not only the district court.¹¹² The appellate court, according to the dissent, ought to be able to respond to such conduct, as it equally insults the appellate court's integrity.¹¹³

Finally, the dissent acknowledged the fact that the Court's holding made an exception for cases that significantly interfere with the operation of the appellate process,¹¹⁴ but argued that this rule is too narrow.¹¹⁵ While the Court's exception would apply to cases in which retrial is negatively affected, cases in which meaningful appeal is impossible and cases that involve multiple defendants, it fails to include cases "where sheer delay caused by the fugitivity of the lone defendant has an adverse affect on the appellate process."¹¹⁶

For these reasons, the dissent concluded that in cases in which fugitivity obstructs the workings of the appellate process in any way, the fugitive dismissal rule should be applied.¹¹⁷ Accordingly, because Ortega-Rodriguez's flight delayed the appellate process by at least nineteen months and forced the severance of his appeal from that of his codefendants, the dissent would have held that the Eleventh Circuit correctly applied the fugitive dismissal rule.¹¹⁸

V. ANALYSIS

This Note argues that the Supreme Court improperly determined that the justifications supporting a fugitive dismissal rule in cases in which the defendant flees after filing an appeal do not generally apply to cases in which the defendant flees prior to filing an appeal. However, this Note also asserts that the Supreme Court correctly concluded that pre-appeal flight generally lacks a sufficient

¹¹⁰ *Id.* (Rehnquist, C.J., dissenting).

¹¹¹ *Id.* (Rehnquist, C.J., dissenting).

¹¹² *Id.* (Rehnquist, C.J., dissenting).

¹¹³ *Id.* (Rehnquist, C.J., dissenting).

¹¹⁴ *Id.* (Rehnquist, C.J., dissenting) (citing *Ortega-Rodriguez*, 113 S. Ct. at 1208-10).

¹¹⁵ *Id.* at 1212 (Rehnquist, C.J., dissenting).

¹¹⁶ *Id.* (Rehnquist, C.J., dissenting).

¹¹⁷ *Id.* (Rehnquist, C.J., dissenting).

¹¹⁸ *Id.* at 1212-13 (Rehnquist, C.J., dissenting).

connection to the appellate process to warrant the sanction of dismissal. Finally, this Note argues that the Court properly granted appellate courts the authority to exercise discretion in formulating general rules of dismissal for specific and recurring situations in which pre-appeal flight does adversely affect the appellate process.

The arguments on each side are clear. The defendant, *Ortega-Rodriguez*, argued that courts of appeals should consider the dismissal of former fugitives' appeals on a discretionary, case by case basis, and in particular that the Eleventh Circuit should have exercised that discretion to hear the appeal on its merits.¹¹⁹ In contrast, the government argued that the rule of the Eleventh Circuit dismissing appeals of defendants who escape prior to filing an appeal is a reasonable exercise of the appellate court's supervisory authority and should be affirmed.¹²⁰ The Supreme Court struck a balance between these two arguments by holding that pre-appeal flight generally lacks a sufficient connection to the appellate process to warrant the sanction of dismissal, but that appellate courts may exercise discretion to apply general rules of dismissal for specific, recurring situations in which pre-appeal flight adversely affects the appellate process.¹²¹

A. THE JUSTIFICATIONS FOR THE FUGITIVE DISMISSAL RULE APPLY TO PRE-APPEAL FLIGHTS

Courts have advanced five justifications for applying a dismissal rule to defendants who escape after filing an appeal. These five justifications include unenforceability concerns, protecting the dignity of the courts, deterring flight, promoting the efficient operation of appellate courts, and avoiding the prejudicial impact of a delay in the appellate proceedings.¹²² The Supreme Court incorrectly concluded that these justifications do not apply to pre-appeal flights.

The first justification, the unenforceability concern, was the original justification advanced in support of the fugitive dismissal rule.¹²³ Courts have viewed this concern two different ways. First,

¹¹⁹ Brief for Petitioner at 9, 11, *Ortega-Rodriguez* (91-7749).

¹²⁰ Brief for United States at 18-19, *Ortega-Rodriguez* (91-7749).

¹²¹ *Ortega-Rodriguez*, 113 S. Ct. at 1208. The Court's holding on the one hand supported defendant's contention that pre-appeal flight does not automatically warrant dismissal, but on the other hand left some discretion in the hands of the appellate courts to determine individually which pre-appeal flights have a sufficient connection to the appellate process. In addition, the Court noted that appellate court discretion should not be on a case by case basis, but rather through general rules applying to specific, recurring situations. See *supra* note 88.

¹²² See *United States v. Persico*, 853 F.2d 134, 137 (2d Cir. 1988).

¹²³ *Smith v. United States*, 94 U.S. 97 (1876).

from the appellate courts' perspective, if a defendant is at large when the appeal is being heard, it would be a waste of time for an appellate court to render a decision that it had no way to enforce.¹²⁴ From the standpoint of the fugitive, not being in custody when the appeal is heard provides the fugitive with the tactical advantage of waiting to see the outcome before deciding to return to custody.¹²⁵ In this respect, the fugitive dismissal rule serves to prevent an appellate court from making a decision it cannot enforce and also to prevent defendants from gaining a tactical advantage by fleeing from custody.

It is true that this enforceability justification will not apply to pre-appeal flight and recapture, because if the defendant was returned to custody, the appellate court's decision would be enforceable. However, the fact that this justification does not apply to pre-appeal flight does not significantly affect this analysis since the enforceability justification has been eroded through decisions of the Supreme Court. For instance, in *Dorrough*, the Court upheld the dismissal of the appeal of a defendant who fled after filing an appeal, but who was recaptured and in custody at the time of the appeal.¹²⁶ Therefore, through its decision in *Dorrough*, the Supreme Court has indicated that enforceability of an appellate court's decision is not determinative of whether the fugitive dismissal rule should be applied. For this reason, this analysis will place more weight on the remaining four justifications supporting the fugitive dismissal rule.

The second justification for a fugitive dismissal rule stems from the disentitlement rationale given by the Court in *Molinaro*.¹²⁷ This justification provides that a defendant who flees from custody while the appeal is pending shows such disrespect for the court's authority that the fugitive becomes disentitled to an appeal.¹²⁸ Therefore, the fugitive dismissal rule serves to protect the dignity of the appellate court. This Note disagrees with the Court's assertion that such disrespect disappears if the defendant flees before filing an appeal.

The Court argued that a defendant who escapes prior to filing an appeal disrespects the district court but not the appellate court.¹²⁹ However, a defendant who attempts to escape from custody almost certainly does so to free himself from any kind of judicial restraint, whether it be because she is innocent and does not

¹²⁴ *Id.*

¹²⁵ See *Katz v. United States*, 920 F.2d 610, 612 (9th Cir. 1990).

¹²⁶ *Estelle v. Dorrough*, 420 U.S. 534 (1975).

¹²⁷ *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970).

¹²⁸ See *United States v. London*, 723 F.2d 1538, 1539 (11th Cir. 1984).

¹²⁹ *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1207 (1993).

want to be falsely imprisoned, or because she is guilty and simply does not want to serve time in prison.

Such reasons for flight appear to show disrespect for the judicial process as a whole, rather than solely for the district court.¹³⁰ The purpose of the entire judiciary in a criminal context is to interpret the law and apply it to a given situation. If the defendant escapes from custody after the court has ruled against him, the defendant is showing disrespect for the judicial system's ability to perform its function. While trial courts and appellate courts have different roles in the judicial system, their overall purpose is the same. Therefore, a defendant who flees before the appeal stage arguably shows the same degree of disrespect for the judicial process as a defendant who flees during the appeal stage.¹³¹ Accordingly, the justification that flight shows such a level of disrespect for the courts that it disentitles the defendant to an appeal seems to apply to pre-appeal flight.

The third justification for the fugitive dismissal rule is that the rule deters escape. It seems clear that a rule providing appellate courts with the authority to impose the sanction of dismissal on defendants who escape while their appeals are pending will deter, to some extent, similarly situated defendants from taking such action.¹³² Similarly, the threat of having an appeal dismissed will also deter defendants who ponder escaping before filing an appeal.¹³³ In fact, as the dissent suggested, if appellate courts did not have the authority to dismiss appeals of defendants who flee prior to appealing, then defendants would have the incentive to escape prior to appeal, rather than take the chance of having their appeal dismissed if they flee during the appeal.¹³⁴ Therefore, it seems obvious that the deterrence justification applies to pre-appeal flight.

The fourth justification for the fugitive dismissal rule is that it promotes the efficient operation of the appellate courts.¹³⁵ Post-appeal flight disrupts the operation of the appellate court:¹³⁶ the appellate process is delayed by at least the amount of time the

¹³⁰ *Id.* at 1212 (Rehnquist, C.J., dissenting). The Court might counter by suggesting that a defendant might flee because of a particular hatred for the trial judge or certain district court proceedings, in which case the defendant would be aiming disrespect at the district court only. However, such a specifically directed motivation for flight seems surely to be a rare exception rather than the rule.

¹³¹ *Id.* (Rehnquist, C.J., dissenting).

¹³² See *Estelle v. Dorrough*, 420 U.S. 534, 537 (1975).

¹³³ See *United States v. Matista*, 932 F.2d 1055, 1057 (2d Cir. 1991).

¹³⁴ *Ortega-Rodriguez*, 113 S. Ct. at 1212 (Rehnquist, C.J., dissenting).

¹³⁵ See *Matista*, 932 F.2d at 1057.

¹³⁶ See *United States v. Persico*, 853 F.2d 134, 137 (2d Cir. 1988).

defendant is at large. Further, because there is no way to determine when a defendant will be returned to custody, there is no method the appellate court can use to adjust its schedule accordingly.¹³⁷

These justifications also apply to pre-appeal flight, because pre-appeal flight causes the same delays in appellate court proceedings as post-appeal flight.¹³⁸ In fact, pre-appeal flight may disrupt the organization and planning of the appellate court more than post-appeal flight. In post-appeal flight, the appellate court is aware that an appeal is pending and can arrange its docket to accommodate the case, whereas pre-appeal flight cases could spring up on the appellate court docket with no notice to the appellate court at all, since the time of appeal depends on when the defendant is returned to custody.¹³⁹ For these reasons, the justification that a fugitive dismissal rule promotes the efficient operation of the appellate courts applies to pre-appeal flights.

The final justification for the fugitive dismissal rule is that the delay caused by the defendant's flight can prejudice the government in the event that a retrial was ordered.¹⁴⁰ A long delay in appellate proceedings could prejudice the government in the event of a reversal or remand, because locating witnesses and retrying the case long after the original trial would, at the very least, place a heavy burden on the government, and, if witnesses were no longer available or if their memories had faded with time, such a delay could doom the government's case.¹⁴¹ As discussed previously, the delay in appellate proceedings caused by pre-appeal flight is the same as the delay caused by post-appeal flight.¹⁴² Therefore, the government is just as likely to be prejudiced by pre-appeal flight. Accordingly, the justification that a fugitive dismissal rule would prevent any prejudice resulting from a delay in proceedings applies to pre-appeal flight.

In brief, the Supreme Court's conclusion that the justifications supporting a fugitive dismissal rule generally do not apply when the defendant flees prior to filing an appeal is misplaced. Other than enforceability, the justifications apply to pre-appeal flight. This does not necessarily mean, however, that pre-appeal flight is sufficiently connected to the appellate process to warrant the sanction of dismissal in every case.

¹³⁷ *Ortega-Rodriguez*, 113 S. Ct. at 1211 (Rehnquist, C.J., dissenting).

¹³⁸ *Id.* (Rehnquist, C.J., dissenting).

¹³⁹ *Id.* (Rehnquist, C.J., dissenting).

¹⁴⁰ *See Persico*, 853 F.2d at 137.

¹⁴¹ *Id.*

¹⁴² *See supra* notes 136-37 and accompanying text.

B. PRE-APPEAL FLIGHT OFTEN LACKS A SUFFICIENT CONNECTION TO THE APPELLATE PROCESS

While the Supreme Court improperly asserted that the justifications for the fugitive dismissal rule do not apply to pre-appeal flight, the Court correctly concluded that pre-appeal flight generally lacks a sufficient connection to the appellate process to warrant the sanction of dismissal. The key word here is "sufficient." All escapes affect the appellate process to a degree by delaying the proceedings while the defendant remains a fugitive. The Court's argument is not that pre-appeal flight has no connection to the appellate process, but rather that it does not have a sufficient connection to deny the defendant the right to appeal.¹⁴³

There are several reasons why appellate courts generally should not dismiss appeals of defendants who flee before the appellate process has begun. These reasons are based on the underlying fact that the pre-appeal fugitives are under the jurisdiction of the district court, not the appellate court.

Perhaps the most compelling reason for disallowing the application of the dismissal rule to pre-appeal flight is that a dismissal would act as a second punishment. If defendants flee while they are under the jurisdiction of the district court, they are then subject to district court sanctions. In the instant case, the district court sanctioned Ortega-Rodriguez's escape by convicting him of a separate offense, contempt of court, and by sentencing him to an additional twenty-one months in prison.¹⁴⁴ By granting the government's motion to dismiss, the Eleventh Circuit essentially punished the same action as the district court. Such double punishment is prohibited by the Double Jeopardy Clause of the Fifth Amendment.¹⁴⁵

The Supreme Court correctly argued that the district court is the proper authority to sanction pre-appeal flight.¹⁴⁶ The main reason that pre-appeal flight is most appropriately sanctioned by the district court is that appellate courts lack the authority to sanction pre-appeal flight. Those favoring the dismissal of pre-appeal flight cases, in addition to criminal contempt sanctions, might argue that these punishments are not separate, but rather constitute a single combined consequence of escape. This argument is flawed, however, because the district court does not have the authority to dis-

¹⁴³ *Ortega-Rodriguez*, 113 S. Ct. at 1207.

¹⁴⁴ *Id.* at 1202.

¹⁴⁵ See *United States v. Halper*, 490 U.S. 435, 440 (1989); *Abney v. United States*, 431 U.S. 651, 660-61 (1977).

¹⁴⁶ *Ortega-Rodriguez*, 113 S. Ct. at 1207.

miss appeals.¹⁴⁷ To impose contempt sanctions at the district court level and to dismiss the appeal requires action by two separate entities. Therefore, such action should be considered double punishment. The issue then becomes which court ought to sanction pre-appeal flight.

Appellate courts have supervisory power to promulgate procedural rules governing the management of litigation.¹⁴⁸ The Supreme Court has maintained a reasonableness standard in determining the validity of appellate court rules.¹⁴⁹ However, there are several factors that suggest that a dismissal rule for pre-appeal flight is an unreasonable exercise of the appellate court's authority.

Again, the fact that the defendant is under the jurisdiction of the district court implies that an appellate court rule governing such a defendant would be unreasonable because it would lead to double punishment. More significantly, a pre-appeal dismissal rule is unreasonable because it is too broad and drastic a measure: broad because it would allow appellate courts to dismiss appeals of any defendant who, at any point, obtained fugitive status;¹⁵⁰ drastic because it would allow the extreme sanction of dismissal, even if a defendant was not a fugitive long enough to seriously affect the operation of the judicial process.¹⁵¹ Accordingly, a rule permitting appellate courts to dismiss appeals of defendants who flee prior to filing an appeal is not a reasonable exercise of the courts' supervi-

¹⁴⁷ FED. R. APP. P. 47 gives appellate courts the authority to make procedural rules for perfecting appeals. See *supra* note 102.

¹⁴⁸ *Cuyler v. Sullivan*, 446 U.S. 335, 346 n.10 (1980).

¹⁴⁹ *Thomas v. Arn*, 414 U.S. 140, 155 (1985). The Supreme Court also noted that appellate court rules must not violate the Constitution or any statutes. *Id.* at 148. This is not a concern here, though, as the Government pointed out that there is no constitutional right to an appeal, and the statute granting the right of appeal to criminal defendants does not set forth the procedural requirements for perfecting an appeal. Brief for United States at 9-10, *Ortega-Rodriguez* (91-7749). The procedural requirements for an appeal are contained in FED. R. APP. P. 47, which allows appellate courts to make rules governing their practice. This Note argues that, contrary to the dissent's opinion, a rule authorizing an appellate court to dismiss appeals of defendants who are under the jurisdiction of a district court is not a rule governing the appellate court's practice.

¹⁵⁰ Such a rule would extend the power of the appellate court to the beginning stages of the judicial process if, for example, a defendant jumps bail immediately after indictment and is gone for a year before being captured and tried.

¹⁵¹ If a fugitive is recaptured after only several days, the main justifications for the dismissal rule would not apply. Enforceability is not a concern after capture, and such a short escape does not delay the wheels of justice or prejudice the government. While any escape disrespects the entire judicial system, see *supra* notes 129-31 and accompanying text, flight at such an early stage arguably directs more disrespect to the arresting officers than to any court. Finally, while trial court sanctions can deter escape, the dismissal of any appeal in this situation only serves to discourage voluntary surrender and prolong fugitive status.

sory rulemaking power.¹⁵²

In short, the Supreme Court correctly concluded that pre-appeal flight generally lacks a sufficient connection to the appellate process to warrant the sanction of dismissal. Defendants who flee prior to sentencing remain under the jurisdiction of the district court, which appropriately sanctions such action with prosecution for contempt. To also allow the appellate court to sanction these defendants would be to allow double punishment. Moreover, a pre-appeal flight dismissal rule is not a reasonable exercise of an appellate court's authority.

C. EXCEPTIONS WHERE PRE-APPEAL FLIGHT IS SUFFICIENTLY
CONNECTED TO THE APPELLATE PROCESS WARRANT
DISMISSAL

The Supreme Court properly determined that appellate courts should have discretion to apply general rules of dismissal to specific, recurring situations in which pre-appeal flight is sufficiently connected to the appellate process. This determination acknowledged the fact that in some limited instances dismissal of appeal is a reasonable exercise of appellate authority.

One exception identified by the Court applies when the delay caused by the fugitive status would prejudice the government in re-trying the case.¹⁵³ The controversial issue will then be to determine the point at which a delay caused by pre-appeal flight prejudices the government sufficiently to warrant the sanction of dismissal. Nonetheless, the Court correctly left that determination to the appellate courts. As long as an appellate court recognizes a sufficient connection to the appellate process, dismissal will be appropriate.¹⁵⁴

Pre-appeal flight that forces the severance of appeals is another exception identified by the Court that could warrant a general rule

¹⁵² The government argued that such a rule is reasonable in light of the interests it is designed to protect, such as protecting the dignity of the courts and promoting the efficient operation of the courts. Brief for United States at 16-17, *Ortega-Rodriguez* (91-7749). This Note argues, however, that a pre-appeal flight dismissal rule is reasonable in light of those interests only in those exceptional situations in which pre-appeal flight adversely affects the appellate process.

¹⁵³ *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1208 (1993). As the Court correctly noted, the flight in the present matter would not fall under this exception because Ortega-Rodriguez's appeal claimed insufficiency of evidence, which if reversed would not require a retrial. Therefore, there would be no possibility of prejudice. *Id.*

¹⁵⁴ Again, the Court noted that appellate courts should not consider such issues on a case by case basis, but rather in the form of general rules. *Id.* at 1209. The prohibition of case by case analysis lessens the possibility that appellate courts could use their discretion to dismiss every pre-appeal flight situation.

of dismissal.¹⁵⁵ Because the severance of appeals causes the appellate courts to duplicate their costs unnecessarily, there is little doubt that pre-appeal flight that prevents the consolidation of appeals adversely affects the appellate process.

The Supreme Court properly concluded that appellate courts should carve out their own exceptions to the general rule that pre-appeal flight lacks a sufficient connection to the appellate process to warrant dismissal. Exceptions should be made in certain instances because the connection to the appellate process is so strong that dismissing the appeal would be reasonable, in light of the interests that the fugitive dismissal rule is designed to protect. For example, when pre-appeal flight causes the severance of an appeal, that appeal may be reasonably dismissed, due to the court's interest in promoting an efficient use of its resources. For this reason, the Supreme Court correctly afforded the appellate courts discretion to formulate general rules of dismissal for certain pre-appeal flights that are sufficiently connected to the appellate process.

D. THE FUTURE OF THE FUGITIVE DISMISSAL RULE

While the Supreme Court identified two exceptions that allow appellate courts to find sufficient connection to the appellate process to warrant dismissal, it is clear that the Court did not intend to limit the appellate courts' discretion to those two situations. For this reason, the future application of the fugitive dismissal rule to pre-appeal flights is likely to be varied and unpredictable.

One court, however, has already applied the Supreme Court's holding in *Ortega-Rodriguez v. United States*.¹⁵⁶ In *United States v. Reese*,¹⁵⁷ the Circuit Court for the District of Columbia dismissed the appeal of a defendant who fled after being convicted but before being sentenced.¹⁵⁸ The court in *Reese*, following the Supreme Court's decision in *Ortega-Rodriguez*, dismissed the appeal because "by becoming a fugitive he [the defendant] disrupted the appellate process, precluding the court from consolidating his appeal with that of his codefendant."¹⁵⁹

In its analysis, the *Reese* court acknowledged the Supreme Court standard that there must be a connection between the flight and the appellate process, and that pre-appeal flight may lack the connec-

¹⁵⁵ *Id.*

¹⁵⁶ *United States v. Reese*, 993 F.2d 254 (D.C. Cir. 1993).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 255. The defendant in *Reese* remained a fugitive for five years until he was recaptured and sentenced. *Id.*

¹⁵⁹ *Id.*

tion to justify the sanction of dismissal.¹⁶⁰ The *Reese* court then identified the two exceptions laid out by the Supreme Court, including the severed appeals exception.¹⁶¹ Accordingly, the court in *Reese* held that "a defendant whose flight prevents consolidation of his appeal with that of a codefendant is not entitled to a belated appeal to this court."¹⁶²

In *Ortega-Rodriguez*, it is likely that the Eleventh Circuit, on remand, will dismiss *Ortega-Rodriguez's* appeal again, fashioning the same rule as did the *Reese* court. Likewise, the appellate courts that followed the Eleventh Circuit are likely to formulate similar rules.¹⁶³ In contrast, it is more difficult to predict what rules regarding pre-appeal fugitives will be formulated by those circuits that either have declined to follow the Eleventh Circuit or have yet to address the issue.¹⁶⁴

VI. CONCLUSION

In *Ortega-Rodriguez v. United States*, the Supreme Court properly limited the application of the fugitive dismissal rule to those situations in which the defendant's fugitive status is sufficiently connected to the appellate process to make the dismissal a reasonable exercise of appellate authority. The Court also correctly indicated that not all pre-appeal flights lacked the requisite connection to the appellate process, and stated that appellate courts could formulate general rules to apply in specific, recurring situations in which pre-appeal flight is sufficiently connected to the appellate process. The Court's holding comports with common sense. It seems reasonable to allow appellate courts to sanction behavior that affects the appellate process. At the same time, it seems unreasonable to allow ap-

¹⁶⁰ *Id.* at 256.

¹⁶¹ *Id.*

¹⁶² *Id.* The court added that "[b]y thwarting consolidation, such fugitivity inherently disrupts the appellate process. To reward the fugitive by granting his claim to a second helping of the court's limited resources would be perverse indeed." *Id.*

¹⁶³ The Second, Third, and Fifth Circuits are likely to develop similar rules as the court in *Reese*, because those appellate courts have already indicated that dismissing appeals of defendants who flee prior to appeal is a reasonable exercise of appellate authority. See *supra* notes 34-35 and accompanying text. Therefore, those courts are likely to be in favor of dismissing appeals in cases where the pre-appeal flight significantly affects the appellate process.

¹⁶⁴ Because the Supreme Court in *Ortega-Rodriguez* left some discretion with the appellate courts concerning the development of exceptions to the rule of no dismissal for pre-appeal flight cases, the courts that have previously declined to extend the dismissal rule to pre-appeal flight may interpret these exceptions more narrowly. Those courts which have not dealt with the pre-appeal flight issue will be much less predictable because they have exhibited no inclination either way.

pellate courts to sanction conduct that takes place before district courts, unless the appellate court in question is significantly affected by that conduct.

In any event, after *Ortega-Rodriguez*, appellate courts probably will be most inclined to apply the fugitive dismissal rule to defendants who escape prior to appealing when the defendant remains a fugitive for an extended period of time or if the flight caused a severance of appeals. In other situations, pre-appeal flight probably is less likely to be sanctioned with dismissal.

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