

SUPREME COURT OF THE UNITED STATES

No. 91-7749

JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER v.
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[March 8, 1993]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE THOMAS join, dissenting.

The Court holds that, in general, a court of appeals may not dismiss an appeal based on a defendant's fugitive status if that status does not coincide with the pendency of the appeal. We disagree. The 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. This "distinction" is not strong enough to support the Court's holding, for there is as much of a chance that flight will disrupt the proper functioning of the appellate process if it occurs before the court of appeals obtains jurisdiction as there is if it occurs after the court of appeals obtains jurisdiction. As a consequence, there is no reason why the authority to dismiss an appeal should be based on the timing of a defendant's escape. Although we agree with the Court that there must be some "connection" between escape and the appellate process, we disagree with the conclusion that recapture before appeal generally breaks the connection.¹ It is beyond dispute that

¹The Court erroneously strikes the *Holmes* rule on the basis that "it reaches too many appeals," *ante*, at 16, n. 23, because there is no overbreadth doctrine applicable in this context. See *Broadrick v. Oklahoma*, 413 U. S. 601, 610-611 (1973) (overbreadth doctrine is the exception rather than the rule because "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws"). As long as the fugitive dismissal rule

the courts of appeals have supervisory power to create and enforce “procedural rules governing the management of litigation.” *Thomas v. Arn*, 474 U. S. 140, 146 (1985). The only limit on this authority is that the rules may not violate the Constitution or a statute, and must be reasonable in light of the concerns they are designed to address. See *id.*, at 146-148. There can be no argument that the fugitive dismissal rule employed by the Eleventh Circuit violates the Constitution because a convicted criminal has no constitutional right to an appeal. *Abney v. United States*, 431 U. S. 651, 656 (1977). Nor is the rule inconsistent with 28 U. S. C. §1291, which grants to criminal defendants the right of appeal, because that section does not set forth the procedural requirements for perfecting an appeal. Those requirements are set forth in the Federal Rules of Appellate Procedure and the local rules of the courts of appeals. Indeed, under Federal Rule of Appellate Procedure 47, each court of appeals has authority to make rules “governing its practice” either through rule-making or adjudication.

was applied legally to the facts of this case, the Eleventh Circuit's rule cannot be struck down. It is for this reason that we would affirm the Eleventh Circuit rather than vacating and remanding.

ORTEGA-RODRIGUEZ v. UNITED STATES

The fugitive dismissal rule is reasonable in light of the interests it is designed to protect. In *Molinero v. New Jersey*, 396 U. S. 365 (1970), we declined to adjudicate a defendant's case because he fled after appealing his state conviction. We reasoned that by absconding, the defendant forfeited his right to “call upon the resources of the Court for determination of his claims.” *Id.*, at 366. And in *Estelle v. Dorrough*, 420 U. S. 534 (1975), we upheld a Texas statute that mandated dismissal of an appeal if the defendant fled after invoking the jurisdiction of the appellate court. We recognized that Texas reasonably has an interest in discouraging felony escape, encouraging voluntary surrenders, and promoting the “efficient, dignified operation of the Texas Court of Criminal Appeals.” *Id.*, at 537. Both *Molinero* and *Estelle* are premised on the idea that a reviewing court may invoke procedural rules to protect its jurisdiction and to ensure the orderly and efficient use of its limited resources.

While we agree with the Court that there must be some connection between fugitivity and the appellate process in order to justify a rule providing for dismissal on that basis, we do not agree that flight generally does not have the required connection simply because it occurs before the defendant or his counsel files a notice of appeal.² It is fallacious to

²The very wording of Rule 47, which gives the appellate courts authority to create local procedural rules, supports the connection requirement: “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. Rule App. Proc. 47 (emphasis added).

ORTEGA-RODRIGUEZ v. UNITED STATES

suggest that a defendant's actions in fleeing likely will have no effect upon the appellate process unless those actions occur while the court of appeals has jurisdiction over the case. Indeed, flight during the pendency of an appeal may have *less* of an effect on the appellate process, especially in cases where the defendant flees and is recaptured while the appeal is pending. Because there is no delay between conviction and invocation of the appellate process, dismissal in such a case is premised on the mere *threat* to the proper operation of the appellate process. Yet the Court concedes, as it must, that courts of appeals may dismiss an appeal in this situation. *Ante*, at 7-8; see *Allen v. Georgia*, 166 U. S. 138 (1897).

If, as in the present case, the defendant eventually is recaptured and resentenced, he obtains a second chance to challenge his conviction and sentence, and consequently delays the appellate process by at least the amount of time he managed to elude law enforcement authorities. We are startled by the Court's assertion that "any concomitant delay . . . likely will exhaust itself well before the appellate tribunal enters the picture." *Ante*, at 11. If the defendant obtains an additional opportunity to file a timely notice of appeal, the court of appeals, in the absence of a fugitive dismissal rule or any jurisdictional defect, *must* entertain the appeal. At the very least, the result is an increase in the court's docket and a blow to docket organization and predictability. This disruption to the management of the court's docketing procedures is qualitatively different from delay caused by other factors like settlement by the parties. Unlike the fugitive's case, the settled case will not turn up as an additional and unexpected case on the court's docket some time down the road. And of course, the burden of delay increases exponentially with the number of defendants who abscond preappeal, but are recaptured and

ORTEGA-RODRIGUEZ v. UNITED STATES

invoke the appellate court's jurisdiction in a timely manner. The Court fails to explain how this obvious delay somehow disappears when the defendant is recaptured before invoking the appellate court's jurisdiction.

As is demonstrated by the instant case, the delay caused by preappeal flight can thwart the administration of justice by forcing a severance, requiring duplication of precious appellate resources, and raising the spectre of inconsistent judgments. Here, the appellate process was delayed by approximately 19 months (counting both the period of fugitivity and the time used by the District Court to resentence petitioner). During this delay, the Eleventh Circuit heard and decided the appeals filed by petitioner's codefendants. *United States v. Mieres-Borges*, 919 F. 2d 652 (1990), cert. denied, 499 U. S. ___ (1991). Because petitioner fled, the Eleventh Circuit was unable to consolidate petitioner's appeal with those filed by his codefendants and conserve judicial resources. In addition to forcing a severance, petitioner's flight created a real possibility of inconsistent judgments. Petitioner'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." Brief for United States 21. Had petitioner's counsel filed a notice of appeal on petitioner's behalf while he remained at large, the Court of Appeals could have dismissed the appeal with prejudice. See *Molinaro*, 396 U. S., at 366. Since petitioner's flight had an adverse effect on the proper functioning of the Eleventh Circuit's process, there is no principled reason why that court should not be able to dismiss petitioner's appeal.

In addition to administration, the Eleventh Circuit's fugitive dismissal rule is supported by an interest in deterring flight and encouraging voluntary surrender. Due to the adverse effects that flight, whenever it

ORTEGA-RODRIGUEZ v. UNITED STATES

occurs, can have on the proper functioning of the appellate process, courts of appeals have an obvious interest in deterring escape and encouraging voluntary surrender. Unfortunately, today's opinion only encourages flight and discourages surrender. To a defendant deciding whether to flee before or after filing a notice of appeal, today's decision makes the choice simple. If the defendant flees preappeal and happens to get caught after the time for filing a notice of appeal has expired, he still has the opportunity for appellate review if he can persuade a district judge to resentence him. If the district judge refuses, the defendant is at no more of a disadvantage than he would have been had he escaped after filing an appeal since flight after appeal can automatically extinguish the right to appellate review. See *Molinaro, supra*.

A rule permitting dismissal when a defendant's flight interrupts the appellate process protects respect for the judicial system. When a defendant escapes, whether before or after lodging an appeal, he flouts the authority of the *judicial process*, of which the court of appeals is an integral part. Surely the Court does not mean to argue that a defendant who escapes during district court proceedings intends only disrespect for that tribunal. Quite obviously, a fleeing defendant has no intention of returning, at least voluntarily. His flight therefore demonstrates an equal amount of disrespect for the authority of the court of appeals as it does for the district court. Viewed in this light, the "finely calibrated response" available to the district court, *ante*, at 14, does nothing to vindicate the affront to the appellate process. The Court's argument is not enhanced by the use of far-fetched hypotheticals, see *ante*, at 13, because the dignity rationale does not exist in a vacuum. As outlined above, a reviewing court may not dismiss an appeal in the absence of some effect on its orderly functioning.

ORTEGA-RODRIGUEZ v. UNITED STATES

While the Court recognizes that the reasoning underlying the opinion requires an exception for cases in which flight throws a wrench into the proper workings of the appellate process, *ante*, at 15-18, its rule is too narrow. The Court limits the exception to cases in which flight creates a "significant interference with the operation of [the] appellate process." *Ante*, at 16. Translated, the rule applies preappeal only when retrial is hampered, a "meaningful appeal [is] impossible", or the case involves multiple defendants, thereby causing a forced severance. *Ante*, at 16-18. This grudging concession is insufficient because it fails to include those cases where sheer delay caused by the fugitivity of the lone defendant has an adverse effect on the appellate process.

In sum, courts of appeals have supervisory authority, both inherent and under Rule 47, to create and enforce procedural rules designed to promote the management of their docket. Fugitivity dismissal rules are no exception. In cases where fugitivity obstructs the orderly workings of the appellate process, this authority is properly exercised. Because petitioner's flight delayed the appellate process by approximately 19 months, and involved the burden of duplication and the risk of inconsistent judgments, we would hold that the Eleventh Circuit properly applied its fugitive dismissal rule in this case.