IN THE SUPREME COURT OF FLORIDA

JERRY GRIFFIS,

Petitioner,

v. CASE NO. 96-2480

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, JERRY GRIFFIS, was the defendant in the Circuit Court and the appellant in the District Court of Appeal. He will be referred to in this brief as petitioner or by his proper name. Respondent, the State of Florida, was the prosecuting authority and appellee in the courts below.

The record on appeal consists of nine volumes, one volume of pleadings and eight volumes of transcript. The transcript of proceedings is not assembled or numbered in chronological manner.[1] The transcript of the jury trial on February 15, 1990, is contained

[1]The preparation of the record on appeal was complicated by the fact that petitioner was tried in February, 1990, but not sentenced until June, 1996. In the interim, petitioner's trial counsel, Dennis Gunnison, died, and one of the court reporters moved out of the circuit (T 671-678).

in two consecutively paginated volumes marked Volume I (on page 3 of the transcript) and Volume II (on the front cover of the transcript). The remaining volumes are consecutively numbered, beginning with page 289 following the last page of Volume II of the trial transcript. None of these volumes are designated by volume number. Consequently, they will be referred to as “T” followed by the appropriate page number in parenthesis. The one volume record of pleadings will be designated as “R” followed by the appropriate page number in parenthesis.

The order of the District Court is not published and is attached hereto as an appendix. The appendix will be designated as “A.”

I STATEMENT OF THE CASE AND FACTS

Jerry Griffis was charged in a six count information filed February 2, 1989, with four counts of sexual battery on a child under the age of 12 and two counts of lewd and lascivious assault on a child under 16.

Griffis was tried on Counts V - X of the information on February 15, 1990. Jury selection for that trial was conducted on February 12, 1990 (T417-545). Griffis was present for jury

At the conclusion of the trial, the jury found Griffis guilty as charged on all six counts (R129-131; T283-284).

Griffis surrendered to Alachua County authorities on May 10, 1996 (R158-159), and appeared for sentencing on June 5, 1996. The trial court sentenced him to concurrent terms of life in prison with a minimum mandatory term of 25 years on Counts V, VI, VII and VIII, and to concurrent terms of four and a half years in prison on Counts IX and X, which sentences were imposed pursuant to the guidelines recommended range. The court awarded Griffis 444 days jail credit on all counts and imposed costs in the amount of $258 (R142-155; T412-415).

Griffis timely appealed to the First District Court of Appeal on June 20, 1996 (R157). He filed an initial brief, and the state responded with a motion to dismiss the appeal, relying on this Court's decision in State v. Gurican, 576 So. 2d 709 (Fla. 1991). The District Court issued an order to show cause why the state's motion should not be granted. Petitioner filed a response, urging the court to adopt the holding in Ortega-Rodriguez v. United States, 507 U.S. 234 (1993), or certify the issue to this Court. By order dated December 30, 1997, the District Court dismissed the appeal but certified the following question:

> SHOULD THE HOLDING IN STATE V. GURICAN, 576 So. 2d (Fla. 1991), BE RE-EVALUATED IN LIGHT OF ORTEGA-RODRIGUEZ v. UNITED STATES, 507 U.S. 234 (1993)?

(A 1-3).

This appeal follows.

III SUMMARY OF ARGUMENT

In Ortgega-Rodriguez v. United States, the Supreme Court held that when a defendant's flight and recapture occur before the appeal commences, the defendant's former fugitive status does not justify dismissal of the appeal. The Court reasoned that a defendant's former fugitive status does affect the enforceability of the appellate court's decision; it does not demonstrate disrespect for the appellate process, and it lacks the kind of connection to the appellate process that would justify the appellate sanction of dismissal. The Court found that when the contemptuous disrespect manifested by flight is directed to the trial court, that court and not the appellate court should impose the appropriate sanctions. The Supreme Court expressly limited the disentitlement theory, which was the premise of this Court's decision in State v. Gurican, to situations where a defendant is a fugitive during the pendency of the appeal.

Griffis absconded after jury selection and before trial, but he returned to the jurisdiction of the trial court for sentencing and before the commencement of his appeal and timely filed his notice of appeal. His former fugitive status did not demonstrate disrespect for the appellate process, nor did it hinder the appellate process in any way. Therefore, it should not be grounds for dismissal of his appeal.

Because this Court's decision in State v. Gurican was based on policy reasons advanced by the federal courts, which reasons have subsequently been repudiated by the United States Supreme Court, petitioner requests that this Court reconsider its decision in Gurican, adopt the rationale of Ortega-Rodriguez, and remand the cause to the District Court with directions to reinstate his appeal.

IV ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD RECONSIDER ITS HOLDING IN STATE v. GURICAN, 576 So. 2d (Fla. 1991), IN LIGHT OF ORTEGA-RODRIGUEZ v. UNITED STATES, 507 U.S. 234 (1993), AND REVERSE THE DISTRICT COURT'S ORDER DISMISSING HIS APPEAL.

Griffis was present for jury selection on February 12, 1990, but failed to appear for trial on February 15, 1990. He was tried *in absentia* and found guilty on all six counts. The trial court postponed adjudication and sentencing until June 5, 1996, after Griffis returned to the jurisdiction the preceding month (T 412-414). After sentencing, the trial court advised Griffis that he had a right to appeal the judgment and sentence within 30 days (T415), and he timely filed his notice of appeal on June 20, 1996 (R157). The District Court subsequently dismissed the appeal, finding that Griffis' flight from justice constituted a waiver of his right to appellate review under the authority of State v. Gurican, 576 So. 2d 709 (Fla. 1991)(A 1-3).

In dismissing the appeal, the Court held that it was bound to follow this Court's decision in Gurican, but noted that the policy considerations underlying that decision were subsequently rejected in Ortega-Rodriquez v. United States, 507 U.S. 234 (1993). The District Court certified that question noted above, reasoning that this Court was the appropriate forum for resolving the question of whether that policy should be reconsidered. Petitioner submits

that the rationale of Ortega-Rodriguez is persuasive and should be adopted by this Court.

In Gurican, this Court answered with "a qualified affirmative" the following question:

> Should Florida's appellate courts apply the federal escape rule in which the court, upon proper motion, will dismiss an appeal of an accused who has fled the jurisdiction before sentencing, and hence before filing a notice of appeal, even though the accused is back within the court's jurisdiction when the motion to dismiss is filed?

576 So. 2d at 710. Relying on the United States Supreme Court's opinions in Estelle v. Dorrough, 420 U.S. 534 (1975); Molinaro v. New Jersey, 396 U.S. 365 (1970), and Allen v. Georgia, 166 U.S. 138 (1897), the Court held that district courts may dismiss the appeal of a convicted defendant not yet sentenced who flees the jurisdiction of the trial court before filing a notice of appeal. The Court found that Gurican had unilaterally extended the time for filing an appeal of her conviction by fleeing before she was adjudicated guilty and sentenced and reasoned that her flight demonstrated a disrespect of the judicial system and thwarted the orderly, effective administration of justice and, as such, "disentitled her of the right to call upon its protections." Id., at 712. The Court concluded that

> as a matter of policy, appellate courts of this state shall dismiss the appeal of a convicted defendant not yet

> sentenced who flees the jurisdiction before filing a notice of appeal and who fails to return and timely file that appeal unless the defendant can establish that the absence was legally justified.

Id. The Court also advised that in future cases where a convicted defendant escapes and fails to appear for sentencing, trial courts should proceed *in absentia* and render their final judgments adjudicating the defendant guilty, thus triggering the 30 day period for filing an appeal.

In finding that an escape "disentitles the defendant to call upon the resources of the Court for determination of his claims," Id., at 711, the Gurican Court primarily relied upon the United States Supreme Court's decision in Molinaro v. New Jersey, 396 U.S. 365, 366 (1970), wherein the Court said:

> No 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. 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., at 711. Molinaro, however, applied the disentitlement theory to defendants who were fugitives during the pendency of their appeals, not to defendants who were returned to custody before invoking the jurisdiction of the appellate courts.

Two years after Gurican was decided, the United States Supreme Court expressly limited the holding of Molinaro to defendants who

were fugitives during the pendency of their appeals and repudiated every justification for dismissal relied upon by the Gurican Court when applied to defendants whose fugitive status did not coincide with the appellate process. Ortega-Rodriguez. In Ortega-Rodriguez, the Court dealt with the precise question whether a defendant may be deemed to forfeit his right to appeal by fleeing while his case is pending in the district [trial] court, though he is recaptured before sentencing and before the commencement of the appellate process. Recognizing that dismissal is an appropriate sanction when a convicted defendant is a fugitive during the ongoing appellate process, the Court held that when a defendant's flight and recapture occur before the appeal commences, the defendant's former fugitive status lacks the kind of connection to the appellate process that would justify an appellate sanction of dismissal. The Court found that when a defendant is a fugitive during the appellate process, dismissal is justified for a number of reasons, including concerns about the enforceability of the appellate court’s judgment against the fugitive, see Smith v. United States, 94 U.S. 97 (1876); the belief advanced in Molinaro that flight disentitles the fugitive to relief; the desire to promote the efficient operation of the appellate process and maintain the dignity of the appellate court, see Estelle v.

Dorrough, 420 U.S. 534 (1975), and the deterrent effect of dismissal:

> Enforceability is not, however, the only explanation we have offered for the fugitive dismissal rule. In *Molinaro v. New Jersey*, 396 U.S. 365, 366, 90 S.Ct. 498, 498-499, 24 L.Ed.2d 586 (1970), we identified an additional justification for dismissal of an escaped prisoner's pending appeal:
>
> > No 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 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.
>
> As applied by this Court, then, the rule allowing dismissal of fugitives' appeals has rested in part on enforceability concerns, and in part of a 'disentitlement' theory that construes a defendant's flight during the pendency of his appeal as tantamount to waiver or abandonment.

507 U.S. at 240.

The Court then reasoned that each of the justifications for dismissal assumes some connection between the defendant's fugitive status and the appellate process, but the same rationales do not support a rule mandating dismissal when the defendant flees the jurisdiction of the trial court and is recaptured before invoking the jurisdiction of the appellate court. The Court said:

> [T]he justifications we have advanced for allowing appellate courts to dismiss pending fugitive appeals all

> assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response. These justifications are necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the district court, so that a defendant's fugitive status at no time coincides with his appeal.
>
> There is, for instance, no question but that dismissal of a former fugitive's appeal cannot be justified by reference to the enforceability concerns that animated *Smith v. United States*, 94 U.S. 97, 24 L.Ed. 32 (1876), and the cases that followed. A defendant returned to custody before he invokes the appellate process presents no risk of unenforceability; he is within control of the appellate court throughout the period of appeal and issuance of judgment. . . .
>
> Similarly, in many cases, the 'efficient . . . operation' of the appellate process, identified as an independent concern in *Estelle*, 420 U.S., at 537, 95 S.Ct., at 1175, will not be advanced by dismissal of appeals filed after former fugitives are recaptured. It is true that an escape may give rise to a 'flurry of extraneous matters,' requiring that a court divert its attention from the merits of the case before it. . . . The court put to this 'additional trouble,' . . ., however, at least in the usual course of events, will be the court before which the case is pending at the time of escape. When an appeal is filed after recapture, the 'flurry,' along with any concomitant delay, likely will exhaust itself well before the appellate tribunal enters the picture.
>
> Nor does dismissal of appeals filed after recapture operate to protect the 'digni[ty] of an appellate court. . . .

507 U.S. at 244-245 [Citations and footnotes omitted]. The Court noted that the premise of Molinaro's disentitlement theory was that the fugitive had demonstrated a disrespect for the legal process and that dismissal was an appropriate sanction for this act of

disrespect. When a defendant's flight operates as an affront to the dignity of the appellate process, the Court reasoned, appellate courts may still employ dismissal as a sanction. The Court continued:

> The problem in this case, of course, is that petitioner, who fled before sentencing and was recaptured before appeal, flouted the authority of the District Court, not the Court of Appeals. The contemptuous disrespect manifested by his flight was directed at the District Court, before which his case was pending during the entirety of his fugitive period. Therefore, under the reasoning of the cases cited above, it is the District Court that has the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain.

507 U.S. at 246.

The disentitlement theory in Molinaro, which was adopted by this Court in Gurican, was extended by the Eleventh Circuit in United States v. Holmes, 680 F. 2d 1372 (11th Cir. 1982), to dismiss appeals by former fugitives who were returned to custody prior to sentencing and seeking appeal. In Ortega-Rodriguez, the United States Supreme Court expressly rejected the notion that the disentitlement rationale applied equally to defendants who fled before sentencing and those who fled after filing a notice of appeal, stating:

> We cannot accept an expansion of this reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings. . . . Such a rule would sweep far too broadly, permitting, for

> instance, this Court to dismiss a petition solely because the petitioner absconded for a day during district court proceedings, or even because the petitioner once violated a condition parole or probation. None of our cases calls for such a result, and we decline today to adopt such an approach. Accordingly, **to the extent that the *Holmes* rule rests on the premise that *Molinaro's* disentitlement theory by itself justifies dismissal of an appeal filed after a former fugitive is returned to custody, . . ., it cannot be sustained.**

Id., at 246-247 [Emphasis added].

Ortega-Rodriguez thus instructs that while dismissal may be an appropriate sanction for someone who absconds during the pendency of his appeal, it is not appropriate for one who submits to the jurisdiction of the trial court and thereafter seeks a timely appeal and whose fugitive status has no connection to the appellate process. Clearly, when a defendant flees before or during his trial, the trial court may impose appropriate sanctions, either by sentencing the defendant for escape or holding the defendant in contempt. Dismissing the appeal is not appropriate punishment when the defendant returns to custody before commencement of the appeal and has not thwarted or exhibited disrespect for the appellate process. In light of Ortega-Rodriguez, it is clear that the policy reason underlying this Court's opinion in Gurican is wholly inapplicable to persons like Griffis whose fugitive status has no connection to the appellate process. Petitioner submits this Court should adopt the rationale of Ortega-Rodriguez and reinstate his appeal.

Although this Court has not revisited this issue since Ortega-Rodriguez was decided, at least one district court of appeal has followed the holding of United States Supreme Court, despite the contrary holding in Gurican, where the defendant's flight occurred before his appeal was commenced. See Kivett v. State, 629 So. 2d 249 (Fla. 3d DCA 1993)("Because the defendant's flight occurred before this appeal, his flight does not justify dismissal of this appeal," citing Ortega-Rodriguez). In Jarrett v. State, 654 So. 2d 973 (Fla. 1st DCA 1995), the First District distinguished Gurican and refused to dismiss an appeal where the defendant failed to appear for a pre-trial conference and was tried *in absentia* but was apprehended while his motion for new trial was pending and was present for his adjudication and sentencing. The court reasoned that because Jarrett was back in custody before his motion for new trial was decided, his "absence did not delay the judgment, sentence, or time for appeal in the way Gurican's absence did." 654 So. 2d at 974. The holding of Jarrett renders the disentitlement theory suspect when applied to defendants, like Griffis, who return to custody before the appellate process is commenced. If the act of flight demonstrates such disrespect of the judicial system that it disentitles a criminal defendant of the right to appellate review, it should not matter when the defendant is apprehended. Griffis, like Jarrett, was tried *in absentia*. He

was in custody for sentencing and timely filed his notice of appeal, and he, too, should be afforded the right to appellate review.

The disentitlement theory in Gurican should not be applied under these circumstances to deprive Griffis of his right to appeal. Gurican was based on the federal escape rule, which rule has been limited by the United States Supreme Court to situations where the defendant is a fugitive during the pendency of his appeal. Moreover, Gurican was based solely on policy reasons (which reasons have subsequently been deemed unsound by the United States Supreme Court under the circumstances present here), and not on lack of jurisdiction. It is noteworthy that at the time Gurican was decided, there was no recognized right to appeal under the state constitution. See Gurican, 576 So. 2d at 713 n. 2. This Court has since held that there is a constitutional right to appeal under the Florida Constitution. See Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773 (Fla. 1996); Art. V, §4(b), Fla. Const. This constitutional right cannot be abridged by untenable policy considerations.

While it is undisputed that Griffis absconded during his trial and remained at large for six years, the trial court deferred adjudication and sentencing until he was returned to the jurisdiction. Under Gurican, the decision whether or not to

adjudicate and sentence a defendant *in absentia* is within the discretion of the trial court. Gurican, 576 So. 2d at 712 ("we *advise* trial courts to proceed *in absentia* and render their final judgment adjudicating the defendant guilty. Thus, the thirty-day period for filing an appeal will commence running . . ."). The court below did not adjudicate and sentence Griffis *in absentia,* although it had the authority to do so, and the time for filing the notice of appeal did not commence until the final judgment and sentence was rendered. See Fla. R. App. P. 9.020(h)[formerly Rule 3.020(g)]; Fla. R. App. P. 9.110(b). Consequently, Griffis did not *unilaterally* extend the time for filing the appeal, which was also a concern in Gurican.

Since petitioner's flight occurred before his appeal, and he was advised by the trial court of his right to appeal, and he timely filed his notice of appeal after the judgment and sentence was rendered, his flight cannot justify dismissal of his appeal. Ortega-Rodriguez; Kivett; Jarrett.

For all these reasons, petitioner requests that this Court vacate the order dismissing his appeal and remand the cause to the District Court with directions that the appeal be reinstated.

V CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, petitioner requests that this Court reconsider its decision in State v. Gurican, adopt the reasoning of Ortega-Rodriguez, and remand the cause to the District Court with directions to reinstate his appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Trina Kramer, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and to petitioner, on this ____ day of February, 1998.

PAULA S. SAUNDERS
Assistant Public Defender