

IN THE SUPREME COURT OF FLORIDA

JERRY GRIFFIS,

Petitioner,

v.

CASE NO. 92,160

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

PETITIONER'S REPLY BRIEF ON THE MERITS

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**PEITIONER'S REPLY BRIEF ON THE MERITS**

I PRELIMINARY STATEMENT

This brief is submitted in reply to the Respondent's Answer Brief on the Merits. Respondent's brief will be referred to as "RB" followed by the appropriate page number in parenthesis. All other references will be as designated in Petitioner's Brief on the Merits.

## II ARGUMENT

### ISSUE PRESENTED

THIS COURT SHOULD RECONSIDER ITS HOLDING IN STATE v. GURICAN, 576 So. 2d 709 (Fla. 1991), IN LIGHT OF ORTEGA-RODRIGUEZ v. UNITED STATES, 507 U.S. 234 (1993), AND REVERSE THE DISTRICT COURT'S ORDER DISMISSING GRIFFIS' APPEAL.

In State v. Gurican, 576 So. 2d 709 (Fla. 1991), this Court imposed a blanket rule of dismissing appeals when a defendant has escaped from custody, regardless of whether the defendant's former fugitive status has had an adverse impact on, or even any connection to, the appellate process. This automatic rule is too harsh and runs contrary to the prevailing body of federal and state case law which now recognizes that there must be some connection between the escape and appellate process to justify dismissal and that the decision whether to dismiss should be left to the sound discretion of the appellate tribunal.

The United States Supreme Court has long recognized an appellate court's ability to exercise its discretion by refusing to hear the appeal of a fugitive from justice. Ortega-Rodriguez v. United States, 507 U.S. 234 (1993); Molinaro v. New Jersey, 396 U.S. 365 (1970). The Court in Ortega-Rodriguez, however, reversed the dismissal of an appeal where the defendant was sentenced in absentia but was later recaptured and resentenced prior to filing his appeal. The Court essentially held that it was not fair to

dismiss an appeal filed by a fugitive who was recaptured before the appeal was filed when the appellant's former fugitive status had no connection to the appellate process. The Court reasoned that the judgment of the appellate court would be enforceable against the appellant, and that his earlier absence, when no appeal was pending, did not threaten the dignity of the court imposing the sanction, thus there was no persuasive reason why the appeal should not be heard on the merits. 507 U.S. at 244-246. Although the Court did not rule out the possibility of appellate disentitlement where necessary to prevent actual prejudice to the Government from a fugitive's extended absence, 507 U.S. at 249, the high Court concluded that the sanction of disentitlement was unjustified as a sanction applicable to all cases where an escape had previously occurred.

The Supreme Court applied Ortega-Rodriguez in Degen v. United States, 517 U.S. \_\_\_, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996), to reverse a summary judgment entered against a claimant in a forfeiture proceeding by reason of his failure to appear in a related criminal prosecution. In Degen, the appellant fled to Switzerland to avoid criminal prosecution on drug charges, and the district court entered a summary judgment in favor of the government in the civil forfeiture action. The Supreme Court ruled that the fugitive disentitlement doctrine did not allow a court in

a civil forfeiture suit to enter judgment against a claimant because he or she is fugitive from, or otherwise is resisting related criminal prosecution.

The Court began its analysis by holding that courts have the authority to dismiss an appeal "if the party seeking relief is a fugitive while the matter is pending." 116 S.Ct. at 1781. Two rationales were advanced to support this proposition: first, so long as the party cannot be found, enforcement of any judgment on review may be impossible. Second, the party's escape "disentitles him to call upon the resources of the Court for determination of his claims." Id. The Court then examined the factual setting of the case, and determined that, as in Ortega-Rodriguez, disentitlement could not be justified. First, there was no risk of delay, or frustration in determining the merits of the forfeiture proceeding, or in enforcing the resulting judgment. Because the court's jurisdiction over the property at issue in the forfeiture proceeding was secure, there was no risk that the judgment would be unenforceable, notwithstanding Degen's absence. Second, although there was a risk that the criminal proceeding might be compromised by Degen's participation in the forfeiture proceeding, the Court concluded that the district court had other resources to deal with that problem without resort to disentitlement. Thus, the Court found that the availability of alternative means for protecting the

government's interests rendered disenfranchisement an overbroad measure in the circumstances. Furthermore, the Court reasoned that while the need to redress the indignity visited upon the trial court by Degen's absence from the criminal proceeding and the need to deter flight from criminal prosecution were both substantial interests, "disenfranchisement [was] too blunt an instrument for advancing them."

116 S. Ct. at 1783. Finally, the Court said:

It remains the case, however, that the sanction of disenfranchisement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.

Id.

Respondent urges this Court to reject the rationale of Ortega-Rodriguez v. United States [and presumably that of Degen] and adopt the reasoning of the Missouri Supreme Court in State v. Troupe, 891 S.W. 2d 808 (Mo. 1995), where the court dismissed the appeal of a defendant who had fled prior to sentencing and was recaptured eight months later. Troupe escaped while the jury was deliberating, and he was sentenced in absentia. When he was recaptured, he filed a motion for post-conviction relief, which was dismissed as untimely. However, the motion court ordered a resentencing because Troupe was not present at his original sentencing hearing. After a second resentencing, ordered because of an error in Troupe's offender



classification, Troupe appealed his conviction, sentence and the denial of his post-conviction motion. The appeal was dismissed under Missouri's escape rule. The Missouri Supreme Court found that Troupe's escape under these circumstances adversely impacted the criminal justice system and dismissal was, therefore, justified. Significantly, however, the Troupe court did not hold that dismissal was automatically required but rather concluded that the decision whether to dismiss an appeal is left to the sound discretion of the appellate court. 891 S.W. 2d at 811. Subsequent cases applying the rule in Troupe have held that in order to justify dismissal, there must be a relationship between the escape and prejudice to the criminal justice system. See e.g., State v. Thornton, 930 S.W. 2d 54, 56 (Mo. App. 1996).

Other states which have considered the issue since the Supreme Court's 1993 decision in Ortega-Rodriguez have held that while dismissal is appropriate when a defendant becomes a fugitive during the pendency of the appeal, it is discretionary whether to dismiss an appeal based on the defendant's former fugitive status. Clearly, dismissal of a pending appeal while a defendant is a fugitive involves considerations which are not present when a defendant has been recaptured or surrenders prior to the initiation of the appellate process. As recognized by the Idaho Court of

Appeals in State v. Schneider, 126 Idaho 624, 888 P. 2d 798, 800-801 (1995), quoting, Ortega-Rodriguez v. United States:

[A]lthough dismissal of a pending appeal while the defendant is a fugitive may serve substantial interests,

The same interests do not support a rule of dismissal for all appeals filed by former fugitives, returned to custody before invocation of the appellate system. Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during 'the ongoing appellate process,' . . . the justification advanced for dismissal of fugitives' pending appeals generally will not apply.

In State v. Schneider, the court refused to dismiss an appeal where the appellant became a fugitive while his appeal was pending but was recaptured within a few days. Noting that Ortega-Rodriguez required some connection between the fugitive status and appellate process in order to justify dismissal, the Idaho court found that Schneider's brief hiatus from custody did not disrupt the appellate process and did not warrant dismissal.

Pennsylvania has also applied a discretionary rule to determine whether sanctions should be imposed in view of the particular circumstances and the effect of the flight on the court's ability to dispose of the case. See In the Interest of J.J., 656 A. 2d 1355 (Pa. 1995)(appellate courts have inherent authority to entertain appeals of fugitives who have returned to custody during pendency of appeal, or reinstate appeals previously dismissed upon a fugitive's return to custody), and In the Interest

of J.J., 668 A. 2d 1176, 1178 (Pa. Super Ct. 1995)(on remand). The courts have held, for example, that it is not proper to dismiss an appeal where the trial court chooses to ignore the disrespect manifested by the defendant's flight. Commonwealth v. Huff, 540 Pa. 535, 658 A. 2d 1340 (Pa. 1995); Commonwealth v. Rhodes, 538 Pa. 73, 645 A. 2d 1294 (Pa. 1994). The most relevant factor in determining whether to dismiss an appeal is the connection between the flight and the court's ability to conduct its appellate review. Consequently, in In the Interest of J.J., 668 A. 2d 1176 (Pa. Super. Ct. 1995), the Superior Court refused to dismiss an appeal where the juvenile escaped from a commitment facility after sentencing and after filing his notice of appeal and was apprehended in a stolen car one month later. The court noted that while the juvenile's behavior evinced a rejection of the rehabilitative opportunities provided by the court and an utter contempt for the judicial system, he was returned to custody, albeit involuntarily, in one month and his escape did not in any way disrupt the appellate process.

Under the Texas rules of procedure, an appeal will not be dismissed if the defendant is back in custody when the record reaches the appellate court or if the defendant voluntarily returns to custody within 10 days after escaping. Former fugitives who return to custody before the commencement of the appellate process

do not lose their appellate rights. Implicitly, this rule recognizes that there must be a significant connection between the escape and the appellate process before disentitling the defendant of his right to appeal. See Ortiz v. State, 862 S.W. 2d 170 (Tex. Ct. Of App. 1993).

Respondent cites Bellows v. State, 871 P. 2d 340 (Nev. 1994), in support of the notion that following the dictates of Ortega-Rodriguez would encourage defendants to flee. Interesting, the Nevada Supreme Court in Bellows agreed with the holding in Ortega-Rodriguez that not every case involving a defendant who escapes prior to sentencing requires dismissal. The court found that dismissal was appropriate in those cases in which the escaped defendant's conduct significantly interfered with the operation of the appellate process. Rather than imposing a blanket rule of dismissal, the Nevada court, like the courts in Missouri, Idaho and Pennsylvania, adopted a case-by-case approach. The Nevada court ultimately dismissed Bellows' appeal, not under an automatic rule of dismissal, but because Bellows' trial transcript had been destroyed during his eight years as a fugitive. The court reasoned that when an escape results in the loss of the trial transcript, the escape has substantially interfered with the appellate process.

Rather than imposing a blanket rule of dismissal, the United States Supreme Court and the highest courts of many states have

determined that the decision whether to dismiss an appeal because of a defendant's past fugitive status should be made by the appellate court through the exercise of sound discretion and that there must be some nexus between the escape and appellate process. The lesson of Degen and Ortega-Rodriguez is that disenfranchisement should be judiciously applied only when a fugitive's absence severely prejudices the appellate process. The Court in Degen was particularly concerned that a fugitive not suffer disenfranchisement absent some great prejudice to others. The primary concerns of the Supreme Court in Degen and Ortega-Rodriguez -- that the appellate judgment be enforceable and that sanctions be imposed by the court suffering the indignity caused by the defendant's flight -- are simply not present here. Griffis is in custody and subject to the court's jurisdiction, thus enforceability is not a legitimate concern. Respondent suggests that since the trial court did not penalize Griffis for his escape, this Court should dismiss his appeal (RB 10), but Griffis' flight did not threaten the dignity of this or the District Courts. While the trial court could have punished Griffis for his failure to appear, it did not do so [presumably because Griffis was sentenced to four mandatory life terms]. It would be now an extreme and unjust measure to deny him the right to appeal because the trial court chose to ignore the disrespect shown to it. The only potential concern here is whether

the state will be prejudiced in locating witnesses and presenting evidence at a retrial should petitioner's appeal be successful. While this concern is legitimate, any prejudice to the state at this juncture is wholly speculative and should not be the sole basis for denying petitioner his constitutional right to appeal. Respondent further notes that prejudice would result if the victim is forced to recount the molestation that occurred when he was five years old (RB 12), but that is always the case when a conviction is reversed on appeal and a new trial is ordered, regardless of whether there has been an intervening escape.

Where a defendant's fugitive status adversely impacts the appellate process, it is reasonable for an appellate court to dismiss the appeal. It is not reasonable to dismiss an appeal where a defendant has fled during trial but is no longer a fugitive when the appeal is commenced. Griffis was not a fugitive at any time during the appellate process, and while his actions may have constituted an affront and inconvenience to the trial court, they did not impact the appellate court and should not foreclose consideration of his appeal on the merits. His appeal, therefore, should not be dismissed.

The decision in Ortega-Rodriguez is not binding on this Court, but it is highly persuasive. Petitioner urges this Court to recede from the blanket rule in Gurican and hold that the appeal of a

fugitive who has escaped before sentencing but is in custody prior to the commencement of the appeal may not be dismissed absent an express finding that the defendant's former fugitive status has prejudiced the appellate process.

### III CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, as well as that in petitioner's Brief on the Merits, petitioner requests that this Court reconsider its decision in State v. Gurican, adopt the sound 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, on this \_\_\_\_ day of March, 1998.

\_\_\_\_\_  
PAULA S. SAUNDERS