

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOSE ANTONIO ORTEGA-RODRIGUEZ, Petitioner v.

UNITED STATES

CASE NO: 91-7749

PLACE: Washington, D.C.

DATE: Monday, December 7, 1992

PAGES: 1-56

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - X
JOSE ANTONIO ORTEGA-RODRIGUEZ, :
Petitioner :
v. : No. 91-7749
UNITED STATES :
- - - - - X

Washington, D.C.
Monday, December 7, 1992

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:12 p.m.

APPEARANCES:

JAMES ROBERT GAILEY, ESQ., Miami, Florida; on behalf of
the Petitioner.
AMY L. WAX, ESQ., Assistant Solicitor General, Department
of Justice, Washington, D.C.; on behalf of the
Respondent.

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

	PAGE
ORAL ARGUMENT OF	
JAMES ROBERT GAILEY, ESQ.	
On behalf of the Petitioner	3
AMY L. WAX, ESQ.	
On behalf of the Respondent	29

1 P R O C E E D I N G S

2 (1:12 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-7749, Jose Antonio Ortega-Rodriguez v.
5 United States.

6 Mr. Gailey, you may proceed.

7 ORAL ARGUMENT OF JAMES ROBERT GAILEY

8 ON BEHALF OF THE PETITIONER

9 MR. GAILEY: Mr. Chief Justice, and may it
10 please the Court:

11 The Government and the petitioner now agree that
12 a former, fugitive from sentencing does not, automatically
13 forfeit his right to challenge his conviction on appeal.
14 The only issue left for this Court to decide is whether
15 the Court of Appeals for the Eleventh Circuit abused its
16 discretion in denying petitioner his access to appeal.

17 We say it did, for three reasons: one, there
18 was no prejudice --

19 QUESTION: Well -- Mr. Gailey -- let me find out
20 about what you and the Government -- you say -- agree to
21 here. You -- you both agree that the right to appeal may
22 be forfeited if there is a case-by-case analysis, so to
23 speak?

24 MR. GAILEY: Yes, Your Honor, we do agree that
25 undertaking a case-by-case analysis, in the proper case,

1 may result in a dismissal of an appeal. This is through
2 the court's inherent powers to regulate its own affairs.

3 We do not believe that the -- the automatic
4 rule, as the Eleventh Circuit employs, is a proper
5 exercise of those supervisory powers, and consequently, in
6 this case it was an abuse of discretion not to have
7 allowed the appeal to go forward.

8 The three reasons why we believe --

9 QUESTION: While you are there, what if that
10 automatic rule would be bad; but a lesser automatic rule
11 would have been okay, an automatic rule involving fewer
12 situations would have been okay -- and this situation
13 comes within that lesser category? What would be the
14 situation then?

15 MR. GAILEY: I do -- I do not believe, Justice
16 Scalia, that the court, in exercising its supervisory
17 powers can have any automatic rule. Congress has
18 conferred jurisdiction upon the appellate courts to hear
19 such appeals.

20 The court, in exercising its supervisory
21 powers -- that is, powers that are necessary for the
22 courts to function -- have, from time to time -- and
23 including cases in front of this Court -- have dismissed
24 appeals. So it is the petitioner's --

25 QUESTION: Cannot have any

1 precedent -- precedential decisions, then, can't say, you
2 know, whenever fact A, B, and C is present, you lose. You
3 can't do that? That's just ordinary precedent. I thought
4 everything we do is governed by precedent.

5 MR. GAILEY: Your Honor, that is ordinary
6 precedent. The problem that petitioner has with that
7 approach to the problem, though, is that Congress has
8 conferred the jurisdiction -- not the courts. The courts
9 cannot limit their own jurisdiction but for an exercise of
10 these inherent powers that the courts have.

11 QUESTION: They have to reinvent the wheel every
12 time a case comes -- I mean, the judge can't say, gee, we
13 had a case just like this 2 weeks ago, and there we held
14 factors A, B, and C being present, you're out. But we
15 have to rethink it again this time.

16 They really have to do that?

17 MR. GAILEY: Yes, and the reason why is that
18 Congress conferred the jurisdiction. Congress can limit
19 it -- as this Court, faced with a Texas legislative
20 decision in *Estelle v. Dorough*, where the Texas
21 legislature limited the legislatively granted right to
22 appeal.

23 We do believe that the discretionary analysis in
24 this case was abused for three reasons. And these three
25 reasons are ones that historically courts have looked at

1 in order to determine whether or not, in its discretion,
2 and in the exercises of its supervisory powers, a court
3 ought to decline to hear an appeal.

4 Those three grounds are: no
5 prejudice -- prejudice in the appellate court; prejudiced
6 into potential post-appellate proceedings; and the
7 vindication of the court's authority.

8 In this case, under the analysis of all three of
9 those factors, it would have been an abuse of discretion
10 not to have gone forward with the appeal.

11 So on factor number one -- prejudice to the
12 appellate court -- there was none. This issue on
13 appeal --

14 QUESTION: Is it a flat rule that someone who
15 absconds while his appeal is pending has -- deserves to
16 have his appeal dismissed?

17 MR. GAILEY: If someone absconds while his
18 appeal is pending, as this Court reasoned in a line of
19 cases beginning with Smith --

20 QUESTION: Well, that's a pretty flat rule,
21 isn't it?

22 MR. GAILEY: Yes, Your Honor, but the --

23 QUESTION: Well, that isn't -- that is nothing
24 case to case about that.

25 MR. GAILEY: Well, except that the court

1 always -- when they made the determination, they did not
2 exercise it in an automatic fashion. This Court, while it
3 looked at fugitives during an appeal pending, and
4 expressed concerns about -- ah --

5 QUESTION: We thought there was -- apparently we
6 thought there was a class of cases where the -- where you
7 could dispense with case-by-case analysis, because you
8 would always come out the same way.

9 MR. GAILEY: This Court never -- well -- this
10 Court, nevertheless, undertook such analysis. And, as a
11 matter of fact, Your Honor --

12 QUESTION: Well, for a class of cases.

13 MR. GAILEY: I'm sorry?

14 QUESTION: For a class of cases, I suppose.

15 MR. GAILEY: The class being fugitive --

16 QUESTION: Or was that just for the -- was that
17 just for the case that we had before us?

18 MR. GAILEY: The class that Your Honor is
19 referring to is the case where the fugitives are pending
20 appeal -- out, pending appeal.

21 The Court has ruled on cases where fugitives
22 have been fugitives at the time appeal was pending.
23 However, in those cases, the Court was reversing a
24 favorable result at the court of appeals level.

25 Nevertheless, the Court did not take the

1 position that automatically, because the fugitive had left
2 during the appeal pending, that the court was divested of
3 jurisdiction in some fashion.

4 Rather, the Court looked at the individual case,
5 and made a determination whether or not in this Court's
6 powers, it ought to decline to hear the appeal.

7 QUESTION: I don't think you should lump
8 together, Mr. Gailey, the cases we've had from State
9 courts involving this, and the cases from Federal courts.
10 Because our only authority over State courts is the
11 Constitution. Whereas, here you're relying -- at least in
12 part -- on the congressional grant of the right of appeal.

13 MR. GAILEY: That's correct, Your Honor. And I
14 did not mean to lump those two things together.

15 What I was merely trying to
16 illustrate -- inarticulately though it may have
17 been -- was that this Court even when the court declined
18 to hear an appeal, it did not set down an automatic rule.
19 Rather, it -- it made reference to the fact that it had
20 the authority not to hear the appeal, but did not say that
21 it was divested somehow of jurisdiction because the
22 appeal -- because the petitioner was a fugitive.

23 In addition, in this particular case --

24 QUESTION: Well, suppose that in this case, your
25 client had absconded and was absent for 3 years during

1 which time an appeal had been pending and was dismissed.

2 Could you argue that the dismissal was invalid
3 at that point?

4 MR. GAILEY: Possibly, although obviously, as
5 Your Honor points out, the longer and more protracted the
6 period of fugitivity, the more likely it will be that the
7 very nature of the fugitivity during the appellate process
8 has some way compromised the appellate court's ability to
9 deal with the appeal.

10 However, it is still in the court's -- it is
11 still a discretionary, rather than a mandatory, reflexive
12 application of a rule. Because in this particular case, I
13 would suggest to the Court, that because the issue is
14 strictly and solely sufficiency of the evidence, and
15 because the record has already been prepared and the
16 briefs are already filed, that even a period of fugitivity
17 for 3 years might not necessarily result in an automatic
18 dismissal.

19 At that point, Your Honor, I believe that the
20 third issue that courts look at -- vindication of the
21 court's authority -- would largely come into play. And
22 this Court has consistently -- or at least consistently
23 when the petitioner was the -- the criminal
24 defendant -- has consistently denied that kind of relief.

25 In this case, the appeal -- the record has been

1 prepared, the brief has been filed. The only issue in the
2 case is sufficiency of the evidence. And, moreover, the
3 merits of the appeal are not just abstract. Rather, a
4 similarly situated codefendant has had his conviction
5 reversed because of the insufficiency of the evidence.

6 The defendant in this case received a 15-year
7 sentence on the same case for which the court of appeals
8 for the similarly situated codefendant reversed the
9 conviction.

10 QUESTION: Are you suggesting that one factor
11 that must be considered is the likelihood of success on
12 appeal?

13 MR. GAILEY: That is one of the factors, Your
14 Honor, that has been considered in the past in evaluating
15 whether or not a court ought to dismiss an appeal. That
16 is one of the factors.

17 QUESTION: Ah -- That really doesn't make a lot
18 of sense, does it? I mean if you're going to dismiss an
19 appeal, you're saying you're not entitled to the judgment
20 of the court on the merits of your case because you have,
21 in some way, defaulted or waived.

22 And so to take into account whether or not you
23 would have had much of a go at it, had you not defaulted,
24 it seems inconsistent.

25 MR. GAILEY: Well, it very well may be in many

1 cases. However, there are some cases, for example, where
2 there may be plain error. Or, there may be misconduct on
3 the part of the Government in final argument. Or, the
4 court may not have given an instruction that the appellate
5 court believes ought to have been given. And because of
6 the significance of the particular instruction, may choose
7 to go forward with the appeal.

8 So the essence of what the petitioner has been
9 saying all along is that it is a discretionary call on the
10 part of the court, and not a woodenly applied,
11 automatic --

12 QUESTION: So, an appellate court can say
13 we'd -- under our other factors we'd hold you had
14 defaulted. But this is a kind of a case we've been
15 looking for for a long time to decide on the merits. So
16 we're going to do it.

17 That would be permissible?

18 MR. GAILEY: Some appellate courts have, in
19 fact, done that.

20 QUESTION: So --

21 MR. GAILEY: The second factor --

22 QUESTION: -- so you really want a -- a kind of
23 a three-prong test, plus anything else the court wants to
24 bring in. Because this doesn't fit in your three prongs.

25 MR. GAILEY: It's a discretionary analysis, Your

1 Honor. And the court is -- is -- in --

2 QUESTION: But all I'm saying is -- I thought
3 your argument began by saying there's a -- essentially a
4 three-part inquiry. And you're going beyond that.

5 MR. GAILEY: I am going beyond that, only
6 because of the nature of -- of the -- the merits on appeal
7 is one of the factors that has been looked at. Although,
8 quite practically speaking, I have lumped that into factor
9 number two, which focuses on the potential --

10 QUESTION: On prejudice to the appellate
11 process?

12 MR. GAILEY: That's correct.

13 QUESTION: How does it fit there?

14 MR. GAILEY: Well, in a case where the case has
15 merit, but the period of fugitivity has been protract -- a
16 protracted period of time, it may be impossible or
17 impractical for the Government to re prosecute.

18 So in that case, rather than militating in favor
19 of hearing the appeal, the court -- within its supervisory
20 powers -- might choose not to hear the appeal, in applying
21 its discretion.

22 QUESTION: So the greater the chances of
23 success, the less likelihood of being given relief?

24 MR. GAILEY: The greater the chances of success
25 on the appeal --

1 QUESTION: On appeal.

2 MR. GAILEY: -- the greater the likelihood.

3 I -- it's difficult for me to quantify exactly
4 how those factors will play out. Because the court's
5 question seemingly would involve almost any analysis in
6 almost any case. And obviously, it's going to depend upon
7 the facts and circumstances in an individual case, as to
8 whether or not the court wants to use its discretion in
9 refusing to hear an appeal.

10 In this -- I'm sorry, Justice Scalia, did you
11 have --

12 QUESTION: Well, finish that, if you were
13 answering that.

14 MR. GAILEY: I was moving on to another point.

15 QUESTION: Oh good. Well, don't move on just
16 for a minute.

17 MR. GAILEY: Okay.

18 QUESTION: I assume that -- that -- that the
19 consequence of your proposition that each case has to be
20 decided on its own facts is that there is no such thing as
21 an abuse of discretion, right? I -- I guess -- I guess a
22 court could never be reversed for either -- either
23 dismissing or not dismissing because of the fugitiveness.

24 What basis would you have to reverse? I mean
25 you reverse because some general has been violated. And

1 you're telling us there are no general principles.

2 MR. GAILEY: I believe that in a case where the
3 court exercises its discretion not to hear an appeal, that
4 that is always subject to an abuse-of-discretion analysis.

5 QUESTION: Well, how could you possibly abuse
6 discretion that is not subject to any general rules? You
7 say that no general rules exist.

8 MR. GAILEY: The general rules that exist are
9 that the right to appeal is fundamental, especially in a
10 criminal case.

11 The other proposition is that in spite of the
12 right to appeal, which is a congressionally conferred
13 right, that the court, in an exercise of its inherent
14 powers, can limit the right to appeal in certain classes
15 of cases where there has been some fugitivity.

16 It is impossible to set down a brightline rule
17 to say that if a defendant is gone more than X-number of
18 days or months, that there is going to be some sort of
19 prejudice presumed. Because in some cases, a period of
20 fugitivity of less than that might well militate against
21 going forward with the appeal.

22 If, for example, witnesses have died, or their
23 memories have dimmed -- or things of that sort -- and the
24 relief being sought would require a retrial -- in those
25 cases, the court, within its supervisory powers, might

1 well determine not to go forward with the appeal.

2 Nevertheless, there's a whole other class of
3 cases where a period of fugitivity might be even longer,
4 where there is no good reason for the court to exercise
5 its discretion and limit its jurisdiction in that way.

6 QUESTION: You mean there's no -- there's
7 no -- there's no good reason for it deciding not to hear
8 the appeal. Not it isn't limiting its jurisdiction.

9 MR. GAILEY: That's -- well, that's correct, not
10 to hear the appeal.

11 In this case, with reference to the second prong
12 about appellate post -- potential postappellate
13 proceedings, the only issue is sufficiency of the
14 evidence. There will be no retrial. There will not be
15 any prejudice to the Government which might be attendant
16 to a reprosecution after a period of time.

17 The third prong is the vindication of the
18 court's authority.

19 QUESTION: When you say the only issue is
20 sufficiency of the evidence, you mean that no -- no
21 question is being raised on appeal about improper evidence
22 admitted, or that sort of thing?

23 MR. GAILEY: No, Your Honor.

24 QUESTION: It's just strictly one question: was
25 there sufficient evidence to support a finding of guilt?

1 MR. GAILEY: That's correct.

2 QUESTION: Which you say has already been
3 decided.

4 MR. GAILEY: Well, it has been decided --

5 QUESTION: In another party's case.

6 MR. GAILEY: -- as to a codefendant that is
7 similarly situated. That's correct.

8 The third prong is -- is -- that other courts
9 have looked at, is the vindication of the court's
10 authority.

11 In this case, the petitioner has been prosecuted
12 by the Government, convicted, and sentenced by the
13 district court for violations of contempt of court, as
14 well as Bond Reform Act violations. He has been sentenced
15 to a period of 21 years -- or 21 months' incarceration for
16 committing that violation.

17 Consequently, the authority of the district
18 court has been vindicated by the petitioner's period of
19 fugitivity.

20 QUESTION: Well, you could always say that. You
21 know -- if someone coming back after 20 years -- if they
22 get a sentence for absconding as well.

23 That's correct. But again, that is only one
24 of the factors that courts have looked at, and only one of
25 the factors that we believe are appropriate for inquiry.

1 QUESTION: But you say that factor is satisfied
2 by the appealing defendant in every case where he is
3 sentenced for his offense of bail jumping -- or whatever
4 it was.

5 MR. GAILEY: Not necessarily in every case, but
6 certainly in a case where the period of fugitivity begins
7 before the appellate process starts off, and he has not
8 been a fugitive, and has been available to accept the
9 consequences of an adverse ruling at the court of appeals.

10 In those cases --

11 QUESTION: Well, of course, the only
12 real -- that really is fortuitous in this case. It's not
13 as if your client returned voluntarily. He was caught.

14 MR. GAILEY: He was -- he was arrested.

15 QUESTION: Yeah.

16 MR. GAILEY: That's correct.

17 QUESTION: Well, so he gets credit for that?

18 MR. GAILEY: He doesn't get credit for that. He
19 gets punished for that, as he has been, by prosecution and
20 conviction for those two statutes.

21 QUESTION: But he, nonetheless, gets favorable
22 treatment because he was back -- albeit not of his own
23 will.

24 MR. GAILEY: It's not a matter of favorable
25 treatment, Your Honor. What it is a matter of is

1 participating in his rights to appeal when there is no
2 reason not to have the appeal go forward.

3 Again, the decisions regarding the parameters of
4 the appellate process are defined by Congress. If
5 Congress had chosen -- as they did in the -- in enacting
6 the Bond Reform Act -- they mentioned contempt of court,
7 as well as violation of 3146 directly.

8 QUESTION: What about dismissing an appeal for
9 failure to file a timely notice? Congress hasn't provided
10 the -- the Rules provide the notice, don't they?

11 MR. GAILEY: That's correct.

12 QUESTION: Is that a violation of Congress'
13 conferring of a right to appeal?

14 MR. GAILEY: Not at all. Because within the
15 rulemaking authority of the courts, timetables and time
16 limits can be established in order to regulate the appeals
17 in the litigation before the court.

18 That is not present in this case.

19 QUESTION: No, but that is an example of a rule
20 that certainly impinges on an unlimited right to take
21 advantage of the congressional right. And what the
22 Government is saying is that the courts of appeals have
23 rulemaking authority in this area, too.

24 MR. GAILEY: Exactly right, Your Honor.
25 However, the rulemaking authority cannot be in conflict

1 with the Constitution or with statutory rights, and can
2 neither enlarge or abridge any rights that are thus
3 conferred.

4 QUESTION: I didn't understand you to make any
5 constitutional claim in this case.

6 MR. GAILEY: We did not make a constitutional
7 claim.

8 I'm trying to draw the distinction between the
9 rulemaking authority of the court in a matter of
10 regulating the appellate practice before it, and deciding
11 to have a blanket rule which exercises nonjurisdiction in
12 cases where there has been a period of fugitivity.

13 QUESTION: Has --

14 QUESTION: Would you say that it was an abuse of
15 the court's discretion in a case in which there had not
16 been a prosecution for escape, for the court to say look,
17 I don't want to encourage the United States Attorney to
18 waste more court time on -- on -- on escape prosecutions.
19 And I will simply cut off the right to appeal. I will
20 simply find the right to appeal waived, and that will
21 teach him a lesson.

22 In that case, there would have been no
23 independent vindication. So would that be a proper use of
24 the court's power to vindicate its position?

25 MR. GAILEY: No, I do not believe that it would

1 be.

2 QUESTION: Well, if it wouldn't be, then isn't
3 the answer -- isn't it going to be the case that in every
4 case -- whether a person has been prosecuted for escape or
5 not -- he could be; and whether bail has been revoked or
6 not, it could be. So that in every case, your third
7 prong, in fact, is going to result in a finding favorable
8 to the party who now wants to -- to the fugitive who now
9 wants to appeal?

10 MR. GAILEY: I do believe, Your Honor, that that
11 third prong is one of lesser significance than the first
12 two -- primarily because Congress has spoken in the
13 contempt statute, as well as the Bond Reform Act statute,
14 in this whole area of vindication of the court's
15 authority.

16 QUESTION: Well, given the fact that Congress
17 has so spoken, what kind of a case might result in an act
18 of discretion favorable to -- to a waiver conclusion, as
19 opposed to a nonwaiver conclusion? When would you ever
20 come out against you?

21 MR. GAILEY: Focusing just on the third prong?

22 QUESTION: Yeah.

23 MR. GAILEY: I suppose that if the period of
24 fugitivity directly occurred while the appeal was
25 pending -- as this Court has been faced with on several

1 occasions -- there, I believe that as a response to that
2 the court would be within its rights to dismiss the
3 appeal.

4 QUESTION: Why? I mean they can still go after
5 him for escape. They can still revoke the bail. Why does
6 the court need it in that case, rather than in the case in
7 which he appeals -- in which he escapes before the appeal
8 has begun?

9 MR. GAILEY: Because the court has the right to
10 regulate the matters that are before it. And in the
11 hypothec that Your Honor poses --

12 QUESTION: You're saying it's like direct
13 contempt, as opposed to indirect contempt?

14 MR. GAILEY: It would directly affect this Court
15 or the appellate court's function. The Court of Appeals
16 for the Eleventh --

17 QUESTION: Why? They can go ahead and decide
18 the appeal. The defendant is never in the courtroom for
19 an appeal.

20 MR. GAILEY: The reasons why were set forth in
21 the whole line of cases beginning with Smith, over 100
22 years ago -- or nearly 100 years ago.

23 QUESTION: Yeah, but I think you're undercutting
24 that. I mean you're -- you're -- I don't see why your
25 rationale for prosecution and bail revocation doesn't

1 undercut the rationale for the so-called kind of direct-
2 contempt analysis.

3 MR. GAILEY: It's not a direct-contempt
4 analysis. Rather, it is an inherent-power analysis, where
5 this court has the right to regulate the matters that are
6 before it.

7 And in the case where an appeal is pending
8 before it, and this court recognizes that because the
9 defendant is gone, he or she is not available to accept
10 the consequences of an adverse judgment, this court -- in
11 a vindication of its authority -- can dismiss the appeal.

12 However, I do not believe that there is any case
13 which holds, by either the court of appeals or this Court,
14 that automatically if there is a period of fugitivity at
15 the district court level that the Supreme Court or the
16 court of appeals can just dismiss the appeal.

17 QUESTION: Mr. Gailey, can you explain to me why
18 you are willing to concede -- as I think you have -- that
19 courts without special statutory authorization can
20 establish time limits for filing of notice of appeal and
21 say if you don't meet those limits, you are out; without
22 going case by case and saying well, you know, this fellow
23 came within 2 weeks, but there's a lot of trouble at home.

24 It isn't a case-by-case evaluation. You have a
25 time limit, and that's it.

1 MR. GAILEY: Not at all.

2 QUESTION: Now, why is it okay there, but it's
3 not okay here?

4 MR. GAILEY: First of all, those rules that the
5 Court suggest are ones that are the product of -- of
6 thoughtful analysis and discretion and are the end result
7 of -- at least according to the Rules of Appellate
8 Procedure in an appellate court context -- a majority vote
9 by the court of appeals judges.

10 With reference to the Appellate Rules,
11 themselves, or the Criminal Rules of Procedure, this Court
12 and the Congress -- Congress then adopts, in statutory
13 form, those rules. They are there as expressions of the
14 court's power to regulate the matters before it.

15 This case, there is nothing before the court of
16 appeals.

17 QUESTION: I don't understand -- you mean those
18 rules would not -- a court would not be able to have such
19 rules unless they were submitted to Congress and made
20 statutory? Is that it?

21 MR. GAILEY: Not at all.

22 QUESTION: You can have those rules.

23 MR. GAILEY: Of course. But --

24 QUESTION: In the exercise of its own
25 supervisory authority.

1 MR. GAILEY: Precisely. Except when that power
2 is exercised, it's got to be -- it cannot be in
3 noncompliance with either statutory right or congressional
4 right.

5 And in this Court -- this Court looked at a
6 similar rule in the Thomas v. Arn case where you had an
7 expression by Congress of a limitation of the right to
8 appeal from magistrates' orders.

9 The Court went to great lengths to ascertain and
10 to conclude that it was not an arbitrary rule; that it was
11 not a jurisdiction rule. And one of the things they
12 looked at was the fact that in a recent case, the court
13 had declined to treat it as a waiver.

14 QUESTION: But it didn't -- but we didn't
15 ascertain that it was not a rule, which is what you want
16 us to ascertain here. You want us to say since it is a
17 rule, it's bad.

18 MR. GAILEY: No -- I'm sorry if I've -- I've
19 misled the Court if that's the conclusion that you have.

20 It's not that if it's a rule that it's bad. But
21 rather, when an appellate court attempts to use its
22 discretion not to hear an appeal for which jurisdiction is
23 conferred by Congress, that there -- it needs to be done
24 in conformity with its supervisory powers. And in this
25 particular case, there is no reason for the Court of

1 Appeals for the Eleventh Circuit to have denied the
2 petitioner the right to have his case on appeal.

3 QUESTION: Well, I wonder if --

4 QUESTION: Go ahead.

5 QUESTION: Yes, I wonder if that's true.

6 Because his flight kept this case alive much longer than
7 it otherwise would have been kept alive. He was gone
8 what, 3 years?

9 MR. GAILEY: He was gone for 11 months, Your
10 Honor.

11 QUESTION: 11 months -- well, for 11 months,
12 because he wasn't present at his sentencing, he had a
13 right to resentencing, because he had to be present.
14 Isn't that what -- and therefore, they resentenced.

15 But that was all because of his flight, that it
16 postponed for 11 months. Therefore the whole appellate
17 process is 11 months behind schedule.

18 MR. GAILEY: That's correct.

19 QUESTION: So there was at least a reason why
20 one could conclude that his flight had an adverse impact
21 on the appellate process.

22 MR. GAILEY: Except the court didn't so
23 conclude.

24 Rather, the argument made below was that just by
25 virtue of the fugitive status, he was precluded from an

1 appeal. So there was not any sort of analysis at all done
2 about whether or not the court of appeals, in its
3 discretion, ought not to go forward with the appeal.

4 QUESTION: Well, they didn't write -- they
5 didn't really write an opinion explaining what they did,
6 did they? I can't remember.

7 MR. GAILEY: They merely -- they granted the
8 Government's motion to dismiss. And the argument on that
9 motion was based on preclusion, not based on any
10 discretionary analysis.

11 QUESTION: Did the defendant have a right to be
12 resentenced, or could the trial court have said, no. We
13 sentenced you in absentia, and that's it.

14 MR. GAILEY: The trial court was convinced
15 that --

16 QUESTION: Well, did the trial court have to
17 resentence him?

18 MR. GAILEY: The trial court did not have to
19 resentence him.

20 QUESTION: And had it not, then the appeal time
21 would have run, and he'd be out.

22 MR. GAILEY: If not, then the appeal time would
23 have been run -- had run, and he would have been out.
24 That's correct.

25 QUESTION: What was the authority of the

1 district court to reopen the sentence, anyway?

2 MR. GAILEY: Based upon the fact that the
3 defendant was not present and could not allocute on his
4 own behalf, the district court was satisfied that the
5 sentencing ought to be vacated and resentenced.

6 QUESTION: Well, what's the authority of the
7 district court to do that?

8 MR. GAILEY: The authority -- there is a -- a
9 case in the Eleventh Circuit which allows the court, in
10 its supervisory powers, to do that. So the district court
11 judge did do that --

12 QUESTION: You can vacate the sentence at any
13 time if the defendant had been sentenced in absentia?

14 MR. GAILEY: That's not the rule. Rather, the
15 court made the determination -- the district court judge
16 made the determination.

17 QUESTION: I'm asking what the Eleventh
18 Circuit's authority said. In what circumstances can a
19 district judge reopen a sentencing after the period for
20 modification has run, under the Federal Rules --

21 MR. GAILEY: When --

22 QUESTION: -- of Criminal Procedure?

23 MR. GAILEY: I'm sorry.

24 When the court is satisfied that in the
25 particular case, the sentencing ought to be reopened. And

1 in this particular case, the district court judge did
2 express that --

3 QUESTION: So the Eleventh Circuit says that any
4 time a district court judge is satisfied sentencing has
5 to -- may be reopened, and it can do it, despite the
6 provisions of the Federal Rules of Criminal Procedure?

7 MR. GAILEY: The district court judge had the
8 discretion, and still had jurisdiction over the case.

9 The argument made below was -- dealt with his
10 presence at the sentencing, as well as whether or not the
11 court ought to have sentenced him in absentia, since there
12 was a question about whether notice had been given.

13 QUESTION: Oh --

14 MR. GAILEY: I'm sorry.

15 QUESTION: I wouldn't think there would be many
16 cases like this, where you can be gone for 11 months and
17 still have a right to appeal.

18 I suppose if -- if you take off -- if the
19 defendant takes off and stays away longer than his appeal
20 time, why normally he just can't take an appeal. And you
21 don't object to that.

22 You say that courts of appeals can set times at
23 which appeals have to be taken.

24 MR. GAILEY: That's correct.

25 QUESTION: And certainly Congress can do that by

1 statute.

2 So --

3 MR. GAILEY: That's correct.

4 QUESTION: -- if you're gone longer -- if you
5 run off and stay longer than your appeal time allows,
6 you're out, normally.

7 MR. GAILEY: Normally that's true, Your Honor.

8 QUESTION: Unless you can convince some district
9 judge to do what happened here.

10 MR. GAILEY: Normally that would be true.

11 Thank you, Your Honor.

12 QUESTION: Thank you, Mr. Gailey.

13 Ms. Wax, we'll hear from you.

14 ORAL ARGUMENT OF AMY L. WAX

15 ON BEHALF OF THE RESPONDENT

16 MS. WAX: Mr. Chief Justice, and may it please
17 the Court:

18 Petitioner starts out his argument by saying
19 that the Government concedes that fugitivity does not
20 automatically lead to forfeiture of an appeal. That is a
21 highly misleading statement.

22 It's true. We agree that the mere fact that
23 someone is fugitive does not require any court of appeals
24 to dismiss his court of appeals to dismiss his appeal
25 because there is no requirement that any court of appeals

1 adopt the disentanglement doctrine, or extend the rule of
2 dismissal for fugitivity to preappeal flight.

3 In --

4 QUESTION: Ms. Wax, do you mind starting at the
5 beginning? Is this case just a fluke? I mean this man
6 was resentenced when he didn't have to be? Is that right?

7 MS. WAX: Well --

8 QUESTION: What's the authority for
9 resentencing?

10 MS. WAX: It's a bit mysterious, Justice
11 O'Connor. But as we understand it -- we understand the
12 district court to have, in effect, granted a 2255 motion.
13 Or, that's how we think --

14 QUESTION: What's that?

15 MS. WAX: -- the petitioner's motion was
16 styled.

17 A motion for a correction of sentence, because
18 the sentence was illegally imposed.

19 QUESTION: Did he get a longer or a shorter
20 sentence?

21 MS. WAX: He got a shorter sentence, Your Honor.

22 When he filed his motion, after
23 returning -- after being recaptured, he filed a motion
24 with the district court, citing Rule 43 and Rule 32: Rule
25 43, which has to do with proceedings in absentia; and Rule

1 32 which governs sentencing, you know, procedures at
2 sentencing -- the right of allocution, the right to be
3 informed of your right to appeal, et cetera.

4 And as we understand it --

5 QUESTION: Did the district court have
6 authority, then, to reopen the sentence?

7 MS. WAX: Well, let's put it -- I'm not sure, is
8 the answer. The Government did not --

9 QUESTION: Did the Government challenge the
10 authority?

11 MS. WAX: -- object. No, it did not.

12 The Government did not challenge the authority
13 of the court to reopen the sentence. We did object to the
14 reduction of sentence.

15 It can be argued -- we don't think that the
16 defect is jurisdictional. It can be argued that the
17 district court shouldn't have resentenced him, because
18 number one, he never took a direct appeal on the
19 sentencing in absentia. But then you can argue that you
20 shouldn't hold the defendant to the obligation to take a
21 direct appeal if he's not there.

22 On the other hand, you could argue that this
23 isn't the kind of error that can be entertained on a
24 2255 -- there are lots of possible objections that you
25 could make.

1 But the fact is that the judge did resentence
2 him. We didn't object to it. And as we understood it,
3 the court of appeals took that as a final judgment -- as
4 the sentence that triggered his appeal and his appeal of
5 his --

6 QUESTION: The second sentence.

7 MS. WAX: -- underlying claim, yeah.

8 QUESTION: Took the second sentence.

9 MS. WAX: Took the second sentence as the
10 final --

11 QUESTION: Who was the district judge in this
12 case?

13 MS. WAX: -- sentence.

14 I don't -- Judge King.

15 QUESTION: Thank you.

16 QUESTION: Is it your -- does the Government
17 have a position as to whether or not an appeal could be
18 dismissed if the appeal is from a 2255 -- an order
19 pursuant to 2255 and the escape, or fugitivity was before
20 the district court made that order --

21 MS. WAX: Yeah.

22 QUESTION: -- i.e., suppose this were a 2255
23 proceeding?

24 MS. WAX: I understand what you're saying.

25 If we were to consider this -- and once again,

1 we're not sure what it really is, what animal it is. But
2 if it was a 2255 in the sense -- I think that we would
3 take the position that yes -- because this was treated as
4 the sentence in this case, the final judgment --

5 QUESTION: Suppose it were a 2255 proceeding.
6 You'd take the position that yes, it could be dismissed on
7 the ground of fugitivity that occurred before the 2255
8 action was commenced in the district court?

9 MS. WAX: Okay, if you're asking what our
10 position is about dismissal of appeals from collateral
11 attack -- that's what you're asking?

12 QUESTION: Yes.

13 MS. WAX: From collateral attacks -- the
14 Government's position would be -- well, first of all, the
15 question is whether the court of appeals has a rule in
16 this case that we're willing to defend, of dismissal of
17 appeals in these -- in those situations.

18 And I think our position would be that if it's a
19 true collateral attack, that the fugitivity and the
20 failure to take an appeal should be treated as an ordinary
21 default, procedural default, and that the procedural
22 default rules should apply in those cases.

23 But once again, it's not really our choice to
24 make these rules. The question is, you know, what are the
25 rules that the courts can make that are reasonable; that

1 are within their supervisory powers?

2 I mean we're not standing here commending to the
3 Court one particular rule, as opposed to another. Because
4 that's not the posture of this case.

5 The posture of this case is --

6 QUESTION: Ms. Wax, if I could just throw this
7 in -- I probably shouldn't interrupt you -- if you say
8 normal, procedural default principles should be applied,
9 this is a very unusual case. Because he can make a pretty
10 powerful showing of actual innocence.

11 MS. WAX: Your Honor, we disagree with that. He
12 can't make a showing of actual innocence.

13 QUESTION: Oh, you don't agree the facts are the
14 same as to his codefendant.

15 MS. WAX: There is an enormous difference
16 between actual innocence -- the type that excuses
17 procedural default -- and falling short of proving
18 something beyond a --

19 QUESTION: The presumption of --

20 MS. WAX: -- reasonable doubt.

21 QUESTION: He's not entitled to a reapplication
22 of the presumption of innocence when there's not proof
23 beyond a reasonable doubt that he's guilty?

24 MS. WAX: Well, we understand the actual
25 innocence exception, you know, for collateral attack, to

1 mean there has to be affirmative proof that you didn't do
2 it. And it has to be tied to a violation of a
3 constitutional right. That's the Government's position on
4 the actual innocence exception.

5 QUESTION: Could I ask this? If this sport, as
6 Justice O'Connor points out because of the long
7 delay -- would it have been proper for the Eleventh
8 Circuit to have dismissed the appeal if, after he was
9 found guilty, say they sent the case to a probation
10 officer for a presentencing report, and set the sentencing
11 date 6 weeks later, after which the normal appeal process
12 had run; and if he had fled during that 6-week period and
13 been recaptured before sentencing -- on those facts, could
14 they dismiss the appeal then?

15 MS. WAX: Well, I think the court -- a court
16 could have a rule which would allow it to dismiss an
17 appeal under those circumstances.

18 QUESTION: Even though the flight had absolutely
19 no impact on the appellate process, at all?

20 MS. WAX: Yes.

21 QUESTION: Or even the sentencing process?

22 MS. WAX: Yes, the Government's position is that
23 courts of appeals may proceed to make -- using their
24 supervisory authority, to make blanket, across-the-board-
25 type rules which do not have to proceed case by case, and

1 would encompass that type of --

2 QUESTION: And what if, instead --

3 MS. WAX: -- situation --

4 QUESTION: of a flight during the 6-weeks
5 period, he committed another offense? Say he got drunk,
6 or something like that, in violation of his probation.
7 Could they dismiss his appeal for that?

8 MS. WAX: Well, I mean that --

9 QUESTION: And why not? What's the difference
10 between the two? I know --

11 I understand flight during an appeal, or
12 something that affects the proceedings. But if you make a
13 hypothesis that has no impact whatsoever on either the
14 district court or the court of appeals proceeding, is
15 there still justification for dismissing the appeal?

16 MS. WAX: If it is pursuant to a general rule
17 that has a rational justification that is reasonable in
18 terms of the problem it's designed to address.

19 There are three criteria for a --

20 QUESTION: Don't we have a general rule --

21 MS. WAX: -- valid, supervisory --

22 QUESTION: -- that committing probation
23 violations is bad, and we don't want that to happen, so
24 we'll just use dismissal of appeals as a remedy for it.
25 That's certainly rational.

1 MS. WAX: Well, I think in terms of committing
2 probation violations, there -- you know, it would
3 depend -- and, you know, I'm not a master of probation
4 violation law -- but I think it would depend on
5 whether -- ah -- you know, that exercise of supervisory
6 authority conflicted with a rule of this Court, or a
7 statute, or some body of law that this Court has developed
8 to govern the particular area. And if the --

9 QUESTION: Well, I'm assuming it doesn't --

10 MS. WAX: -- answer was no --

11 QUESTION: -- just as this case it doesn't.

12 MS. WAX: Well, if the answer was no, then, then
13 it would be permissible.

14 QUESTION: So if -- appeal dismissal --

15 MS. WAX: But let me make a point about that --

16 QUESTION: -- is sort of an all-purpose weapon
17 to deter improper conduct.

18 MS. WAX: Well, the answer is yes. But let me
19 make a point about that.

20 Any time this Court decides that it doesn't like
21 the way the court of appeals are exercising their
22 supervisory authority under Rule 47, it doesn't have to
23 make a finding of unreasonableness, of conflict with a
24 statute or a rule, or of a constitution before it can act
25 to impose a uniform, national rule on the courts of

1 appeals.

2 And the fact is, if the Court validates, or
3 permits the Eleventh Circuit dismissal rule to stand, it's
4 not really committing itself to any -- to the next
5 extension of that rule in the next case. Because --

6 QUESTION: Ms. Wax, certainly -- I mean do I
7 really have to buy into the -- into the one if I buy into
8 the other? I mean isn't it a perfectly reasonable
9 distinction between parole violations that fugitivity
10 during the course of the trial, or before the appeal has
11 been perfected demonstrates a -- a contempt for the
12 judicial process that's in front of the court? And the
13 court is not punishing evil-doing at large, but punishing
14 evil-doing that has to do with this very proceeding before
15 this very court system.

16 MS. WAX: Well, to the extent that dismissal --

17 QUESTION: So it is tied into the particular
18 case, isn't it?

19 MS. WAX: Well, no, it's tied into the sorts of
20 interests that this Court has recognized as valid, that
21 the courts can vindicate through supervisory rules with
22 regard to -- you know -- fugitivity.

23 I mean -- we -- you can't dismiss for a parole
24 violation -- if you can't dismiss, it's because there's
25 really no good reason -- there's nothing that the court is

1 accomplishing by doing that this Court is willing to
2 accept.

3 QUESTION: Well, if Justice --

4 MS. WAX: But in fugitivity --

5 QUESTION: -- Stevens gives you a situation
6 where nothing good is accomplished by -- in a practical
7 sense -- by dismissing for the fugitivity, either.

8 MS. WAX: But that's --

9 QUESTION: No time's been lost or anything else.

10 MS. WAX: But that's to assume that courts have
11 to proceed case by case, that they have to look at the
12 circumstances of each case.

13 But there's nothing that this Court has ever
14 said about supervisory rules that would require a court to
15 do that. Courts --

16 QUESTION: Well, doesn't -- Ms. Wax, doesn't
17 there have to be some connection with the appellate
18 process? I mean take Justice Stevens' hypothesis a step
19 further.

20 Supposing the guy creates trouble before he's
21 tried in jail -- he wants more food, and they won't give
22 it to him, so he starts a riot. Would that be a reason
23 for -- if he's ultimately convicted -- for dismissing his
24 appeal?

25 MS. WAX: Of course not. It has to be -- it has

1 to have, as a general matter, some effect on the appellate
2 process.

3 QUESTION: Well --

4 MS. WAX: It has to involve a flouting of the
5 appellate process.

6 QUESTION: But what -- what effect does the
7 probation hypothesis given to you by Justice Stevens have
8 on the appellate process?

9 MS. WAX: Well, I mean I think the answer is it
10 doesn't have a similar effect to fleeing the court. And
11 in that sense, it's possible that it wouldn't be a valid
12 exercise of supervisory authority.

13 But my point is, that whether or not it were
14 valid, and there were a good reason to dismiss because of
15 this, you could have a blanket rule.

16 QUESTION: So it's a rationality standard.

17 MS. WAX: Yes.

18 QUESTION: The rule the court of appeals adopts
19 has to be rationally related to the integrity of the court
20 process. Is that what it is?

21 MS. WAX: Right, to the --

22 QUESTION: Or to the orderly functioning of the
23 appellate court process?

24 MS. WAX: Right, to the orderly functioning of
25 the court process. The way --

1 QUESTION: What would you do --

2 MS. WAX: -- this Court has put it --

3 QUESTION: -- if there was -- there were a
4 rule or a line of decisions which required dismissal of
5 the appeal if there was an attempt, abortive attempt, to
6 escape?

7 MS. WAX: Well, it depends on how much weight
8 one puts on this Court's statement in its line of cases
9 that flouting the authority of the court is an independent
10 reason to dismiss.

11 I think prob -- you know, one could argue that
12 that wouldn't rise to the level of a sufficient flouting
13 of the court's authority.

14 I think that -- I think that you could make a
15 distinction between that case and true fugitivity.
16 Because in true fugitivity, someone just removes
17 themselves from the court's authority -- succeeds in
18 removing themselves, and thereby, in effect, displays
19 their unwillingness to submit to the court's jurisdiction
20 or control.

21 QUESTION: Well, does the rule have to relate at
22 all to flouting of the appellate court's authority? It's
23 the appellate court that's adopting the rule. Or, do you
24 take the position that the rule can encompass some
25 flouting of the district court's authority -- even though

1 the district court didn't see fit to enforce any such
2 discipline?

3 MS. WAX: We do think that it can take into
4 account possible -- the possibility of prejudice both to
5 the appellate court and the trial court.

6 Our submission is this: --

7 QUESTION: Must there be prejudice found?

8 MS. WAX: Not in every case, Your Honor. We
9 think that there --

10 QUESTION: You think the rule can apply as a
11 blanket rule in the absence of any prejudice in the
12 particular case --

13 MS. WAX: Well, yes --

14 QUESTION: -- to the appellate process?

15 MS. WAX: -- we think that it's just a garden
16 variety principle of rulemaking. And this Court has said
17 it, in cases like Weinberger v. Salfi, and Arizona v.
18 Maricopa County, that it's not necessary to minutely
19 examine the facts of each and every instance to which a
20 rule applies to see whether it exemplifies the concerns
21 that motivated the rule in order to have a valid rule.

22 Rules can be based upon
23 generalizations -- generalizations that certain actions on
24 the part of individuals, actions which they can choose not
25 to take, will tend to, in many cases, have certain adverse

1 effects that the court is entitled protect against.

2 And --

3 QUESTION: Well, certainly the -- certainly his
4 taking off prevented the court of appeals from
5 entertaining an appeal in a timely fashion. And if appeal
6 is now allowed, you're going to have two cases instead of
7 one, maybe by different panels -- things like that.

8 So in a normal course of events, the -- the
9 court probably would have heard his appeal along with his
10 codefendant's.

11 MS. WAX: Correct, Your Honor. And our position
12 in this case is even if the Court decides that one has to
13 proceed case by case with fugitive dismissal rules and
14 there has to be a showing of prejudice, there was
15 prejudice in this case. And there was certainly enough to
16 justify dismissal.

17 Petitioner was gone for 11 months. And his
18 appeal was delayed by more than that because there were
19 posttrial motions. He -- in this case, there were
20 codefendants with closely related claims. And because of
21 his fugitivity, the court had to take up the closely
22 related claims of his codefendants separately, and at a
23 different time -- or would have had to -- than his case.

24 And we think that that's enough dislocation and
25 disruption of the appellate process to justify dismissal.

1 Especially considering what the Court has said in cases
2 like Estelle v. Dorrough, where they've said that -- for
3 example -- a State may adopt a fugitive dismissal rule
4 just based on creating a deterrent to flight, number one;
5 and number two, vindicating the orderly and dignified
6 process of the appellate court.

7 QUESTION: May I ask you another question?

8 What was the rule that the court of appeals
9 applied here? Do we know?

10 MS. WAX: Well, it's hard to know because the
11 court simply dismissed the appeal. And so, you know,
12 it's -- it's difficult to say that they --

13 QUESTION: Well, was there some prior case in
14 which they articulated the reasons for dismissing in
15 circumstances like this?

16 MS. WAX: Yes, there were two prior cases that
17 were relied on by the Government here: United States v.
18 Holmes, and United States v. London -- two Eleventh --

19 QUESTION: Well, what did the --

20 MS. WAX: -- Circuit cases.

21 QUESTION: Was this -- from the same circuit, I
22 take it?

23 MS. WAX: Yes, Your Honor.

24 QUESTION: And what did they say?

25 MS. WAX: Well, ah --

1 QUESTION: That in any case they're going to
2 dismiss?

3 MS. WAX: Well, if you read those cases
4 carefully, the Government thinks that, in effect, those
5 cases look both ways.

6 On the one hand, there are statements in Holmes
7 to the effect that because this individual fled, fled
8 custody, we are going to dismiss the case -- which have a
9 categorical tone to them, and imply that this is a blanket
10 rule.

11 QUESTION: Now dismiss the case --

12 MS. WAX: On the other hand --

13 QUESTION: -- dismiss the appeal that had
14 already been filed?

15 MS. WAX: No, that was a case like this one in
16 which the individual fled following conviction, returned
17 to be sentenced, and then filed an appeal. That was a
18 preappeal flight case.

19 Um -- so the court --

20 QUESTION: So he did file a timely appeal?

21 MS. WAX: Yes -- well, that's the whole point of
22 these cases, as you pointed out earlier, Justice White.
23 Individuals can hang up these cases in the district court,
24 just by choosing to flee prior to sentencing. Not showing
25 up at their sentencing, they can keep the case pending

1 before the court of appeals, prevent it from
2 going -- before the district court, and prevent it from
3 going before the court of appeals.

4 And essentially, what petitioner is saying is
5 that these people should be treated differently from
6 people who choose to come to their sentencing, thereby
7 triggering the obligation to file a timely appeal which
8 then either they will not timely file because they're
9 fugitive, or will be dismissed under the pending fugitive
10 dismissal rule this Court accepts.

11 QUESTION: Ms. Wax, is it correct that in the
12 cases where they have dismissed the -- where there was a
13 flight before sentencing, that the flight was long enough
14 to delay the sentencing, ergo the appellate process as
15 well?

16 None of these cases are like my hypothetical, in
17 other words -- they're a flight that didn't delay the
18 sentencing hearing.

19 MS. WAX: No, I -- I don't recall exactly how
20 the long the petitioner was gone in Holmes. But it
21 was a --

22 QUESTION: 2 years, I think.

23 MS. WAX: -- fairly long period. Yeah, it was
24 years.

25 QUESTION: But they don't have to be gone very

1 long to hang up the appellate process.

2 MS. WAX: Right --

3 QUESTION: Could the appellate court prohibit
4 any appeal from the sentencing?

5 MS. WAX: Well, I think the answer is: quite
6 possibly.

7 The Fifth Circuit has recognized its authority
8 to not allow an appeal -- even from a sentencing -- where
9 someone is sentenced after they've returned. In the case
10 in which it recognized that, it refused to exercise that
11 authority. That was a case called United States v.
12 DeValle.

13 Every other circuit that I know of has
14 distinguished between events taking place before the
15 person fled -- that is, during trial -- and what happens
16 after they come back. And they've just elected to extend
17 the dismissal rule only to events preflight, as is their
18 prerogative. That's just a choice that the courts of
19 appeals have made in fashioning a fugitive dismissal rule.

20 Could they take it one step further? I think
21 that unless it violates a rule or the Constitution, and
22 they think that there are good reasons to do that,
23 probably it would be permissible -- that a person forfeits
24 not just their right to take an appeal as to prior events,
25 but their right to take an appeal as to a sentence. But

1 it just hasn't been applied that way.

2 QUESTION: Ms. Wax, you were frightening me a
3 moment ago when you seemed to be on route to saying that
4 we really don't know in this case whether they were
5 applying a rule or indeed were engaging in case-by-case
6 determination. I mean did we take this case just to
7 decide whether their case-by-case determination was
8 correct?

9 I thought at least there was agreement here that
10 a rule was being applied. But you say maybe not. This is
11 an overwhelmingly insignificant case, if that's so.

12 MS. WAX: Well --

13 QUESTION: Moreso than I had thought.

14 (Laughter.)

15 MS. WAX: Well, it's not insignifi -- well, let
16 me answer your question first.

17 It's not insignificant, Your Honor, in the
18 following sense: the First Circuit has ruled that they
19 are absolutely -- they have no authority to dismiss where
20 the flight is preappeal -- the person flees and comes back
21 before they're sentenced.

22 So you at least took this case to dispel
23 the -- in our opinion -- erroneous view that no court of
24 appeals has the authority --

25 QUESTION: Oh, okay.

1 MS. WAX: -- to dismiss a case under those
2 circumstances --

3 QUESTION: Although you may have to do it --

4 MS. WAX: -- whether they go case by case --

5 QUESTION: -- I see, okay.

6 MS. WAX: -- or as a mandatory rule.

7 QUESTION: Well, that's -- that's comforting.

8 (Laughter.)

9 MS. WAX: We can at least accomplish that much,
10 Justice Scalia.

11 Now, as I stated, a supervisory -- a rule
12 formulated by a court of appeals in its supervisory
13 capacity is valid, as long as that rule does not conflict
14 with the Constitution, a statute, or rules of procedure,
15 is one that can properly be established through
16 adjudication, and is reasonable in light of the concerns
17 it is designed to address.

18 And I would just -- as a respect to the
19 authority to establish these rules through adjudication, I
20 would just like to point out that that authority is
21 expressly conferred by the Federal Rule of Appellate
22 Procedure 47, which says that in all cases not provided
23 for by formal rules promulgated by a vote of the circuit
24 justices, the court of appeals may regulate their practice
25 in any manner not inconsistent with the Federal Rules of

1 Procedure. And this brings up another point that
2 petitioner made in his argument, which I would like to
3 deal with.

4 He makes the argument that if a rule is
5 mandatory -- if a rule adopted by the court of appeals in
6 the exercise of its supervisory power is a general rule, a
7 blanket rule to which it decides to make no exceptions,
8 that means that the court is somehow abridging its
9 jurisdiction. And we would submit that that is absolute
10 nonsense. Because the consequence of that argument would
11 be that every time a court -- through formulating local
12 rules, or this Court through formulating Rules of
13 Appellate Procedure -- makes a general rule, it's somehow
14 amending Section 1291, which is clearly untrue.

15 A court may choose to exercise its dismissal
16 authority in every case. But in a further case, it could
17 always change its mind because it still retains
18 jurisdiction over those particular types of cases.

19 And, of course, in *Molinaro v. New Jersey*, this
20 Court recognized that for fugitive dismissal rules, the
21 fact that an individual is fugitive, does not strip the
22 case of its character as an adjudicable case or
23 controversy.

24 So the issue of lacking jurisdiction is
25 just -- it's a straw man in this case.

1 QUESTION: Ms. Wax, just out of curiosity, how
2 bit a problem is it? How often do these dismissals occur?
3 Do you know? Do you have any idea, statistically -- you
4 know, once every year or 2, or --

5 MS. WAX: Well, they've occurred in every
6 circuit.

7 QUESTION: At least once.

8 MS. WAX: I can tell you -- at least 12 times,
9 Your Honor.

10 (Laughter.)

11 QUESTION: And there was one in the First
12 Circuit that we're curren --

13 MS. WAX: Twice, in some.

14 QUESTION: -- I guess.

15 MS. WAX: Right. Yes, and they have
16 occurred -- there have been four or five cases in this
17 Court -- or more -- involving this problem.

18 Now finally, the most important point in this
19 case is that the rule applied in this case -- the rule of
20 preappeal fugitive dismissal -- is reasonable in light of
21 the concerns that the court sought to address. There have
22 been a number of justifications offered for the dismissal
23 of fugitive appeals, and in the cases in which the courts
24 have dismissed pending appeals. And this Court, itself,
25 has validated that rule of the dismissal of pending

1 appeals.

2 And most of the justifications offered in those
3 cases apply with equal force to cases in which the
4 individual flees and returns prior to sentencing and
5 filing his appeal.

6 QUESTION: Do you know whether the United States
7 Attorney appeared personally to oppose, or filed a piece
8 of paper, himself, opposing the motion to resentence?

9 MS. WAX: He was there, Your Honor. He was at
10 the resentencing. And he opposed it.

11 QUESTION: Well, at the resentencing, but was he
12 at the -- when the motion was granted? Because I --

13 MS. WAX: Yeah, he was there.

14 QUESTION: -- I see the last paragraph of the
15 Public Defender's statement says I am -- the United States
16 Attorney opposes this motion.

17 MS. WAX: Right, he opposed it. But it's
18 our -- he opposed the reduction of sentence, Your
19 Honor -- the reduction --

20 QUESTION: Well, all right --

21 MS. WAX: -- from 235 months --

22 QUESTION: -- but was he --

23 MS. WAX: -- to 188 --

24 QUESTION: -- there to --

25 MS. WAX: -- months.

1 QUESTION: Was he there to oppose the granting
2 of the motion to --

3 MS. WAX: He was there. There is a transcript.
4 I believe it's in the joint appendix, yes.

5 The reasons that the Court -- this Court and
6 other courts have given, as I said, apply with equal force
7 to preappeal and postappeal flight. And briefly, those
8 reasons are: number one, the flouting, the defiance, and
9 the contempt for the court that's shown by someone who
10 absconds. And, of course, that's equally grave, whether
11 the person goes during the pendency of the appeal or
12 before he's sentenced and fails to show up at sentencing.

13 The second reason is to deter flight -- to
14 provide a disincentive for flight. And once again, if we
15 have a rule that during a pending appeal if someone flees
16 his case is dismissed, but if someone flees before his
17 appeal is filed it won't be dismissed, that will simply
18 offer an incentive to people -- for people to flee sooner,
19 rather than later.

20 QUESTION: May I go back to your flouting
21 authority rationale?

22 Supposing the defendant went on the air and
23 called all the judges that are going to sit on the appeal
24 dishonest, and crooked, and so forth -- and really flouted
25 the authority. Could you dismiss the appeal for that

1 reason? And if not, why isn't the flight just a form of
2 symbolic speech?

3 (Laughter.)

4 MS. WAX: Well, I -- I think the point, Your
5 Honor, is is that if someone removes himself from the
6 reach of the court, it's not just a matter of, you know,
7 thumbing your nose --

8 QUESTION: Well, I'm just confining --

9 MS. WAX: -- at the court.

10 QUESTION: -- it to that one rationale.

11 MS. WAX: I don't think that's what's meant
12 by --

13 QUESTION: Your flouting the --

14 MS. WAX: -- flouting.

15 QUESTION: Your flouting the authority
16 rationale, seems to me strictly a First Amendment problem.

17 MS. WAX: Well, I think --

18 QUESTION: We understand the rest of the reason,
19 if you delay, and all that.

20 MS. WAX: I think this would come under a speech
21 act, rather than speech, Your Honor. I --

22 QUESTION: Well, but the --

23 MS. WAX: This would be O'Brien. The O'Brien
24 test would definitely apply here.

25 QUESTION: What if he burned the flag. Could

1 you dismiss his appeal for that reason?

2 MS. WAX: I don't -- Your Honor, I would say no,
3 because I think what we mean by flouting and contempt for
4 the court is to remove yourself from the court's
5 process -- not just thumbing your nose --

6 QUESTION: Not burning pictures of --

7 MS. WAX: -- showing your contempt --

8 QUESTION: -- judges or anything like that?

9 (Laughter.)

10 MS. WAX: -- for the judges and that sort of
11 thing.

12 QUESTION: If he burned the flag in the
13 courtroom you could penalize him, couldn't you?

14 MS. WAX: You might be able to do that -- well,
15 I'm not sure --

16 (Laughter.)

17 QUESTION: Burn the --

18 MS. WAX: -- after this Court's --

19 QUESTION: -- courtroom, right?

20 MS. WAX: -- cases.

21 (Laughter.)

22 QUESTION: I mean --

23 MS. WAX: I think under this Court's most recent
24 flag-burning cases, probably not.

25 As I said, the second reason is to deter flight.

1 And the deterrent operates equally in both the situations.

2 And finally, dismissal promotes the orderly and
3 efficient operation of the courts and protects against
4 adverse effects on the prosecutor and on the court. And
5 those adverse affects can be felt -- not necessarily in
6 every case, but potentially in as many cases, and as
7 severely -- whether flight is preappeal or during the
8 pendency of the appeal.

9 If the Court has no further questions.

10 QUESTION: Thank you, Ms. Wax.

11 The case is submitted.

12 (Whereupon, at 2:13 p.m., the case in the above-
13 entitled matter was submitted.)

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Jose Antonio Ortega Rodriguez ✓

United States

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Mari Federico* -----

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'92 DEC 23 A11:15