# RUNAWAY USANCE: LIMITING THE EXERCISE OF THE FUGITIVE DISENTITLEMENT DOCTRINE IN THE CONTEXT OF *WENQIN SUN V. MUKASEY* AND *BRIGHT V. HOLDER*

TABLE OF CONTENTS

## I. INTRODUCTION

Imagine a situation where you, an alien resident of the United States, face removal from the country following a failed application for asylum. The application seemingly should have been granted on any one of a number of theories, including the uncontested fact that you are a battered wife. If you leave as ordered, you will return to China, your country of citizenship, where you have previously been arrested and detained because of your Christian faith. If you leave, you will lose your opportunity to appeal your asylum status because "[a]n order of deportation . . . shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order."[1] Your other option is to stay in the country. If you disobey the order and remain in the United States, the courts may brand you as a fugitive.[2]

Faced with a lose-lose gamble, you choose to remain in the United States so that you may appeal your asylum status. You do not actively evade the Department of Homeland Security (DHS), and you make reasonable efforts to update the agency of your whereabouts. You retain an attorney to handle your appeal, and you apprise him of your whereabouts throughout the process. When your case reaches the circuit court of appeals, you appear on the day of your oral arguments, coming face to face with the judges who will decide your fate.

The circuit court finds merit in your appeal but refuses your petition simply because of your asylum status. The court brands

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[1] 8 U.S.C. § 1105a(c) (1994) (repealed 1996). This repealed law is now codified as a regulation. *See* 8 C.F.R. § 1003.2(d) (2012) ("A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."). However, some courts have called the validity of this regulation into question. *See infra* notes 155–56 and accompanying text.

[2] *See, e.g.*, Antonio–Martinez v. INS, 317 F.3d 1089, 1092 (9th Cir. 2003) ("Although an alien who fails to surrender to the [Immigration and Naturalization Service] despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice." (quoting Bar–Levy v. U.S. Dep't of Justice, 990 F.2d 33, 35 (2d Cir. 1993))).

you as a fugitive and invokes the fugitive disentitlement doctrine, which prevents an evasive defendant form obtaining standing in the court whose authority is evaded.[3] The court thus dismisses your case in spite of the apparent merit of your claims. Your appeal is over. The United States will deport you to China where you face the risk of further incarceration and oppression.

If you live within the jurisdiction of the Fifth Circuit Court of Appeals, this will be your fate. That court applies the fugitive disentitlement doctrine to immigration appeals, even where the alien "has maintained the same address throughout his removal proceedings, the address was known to DHS, and DHS made no attempt to locate or arrest the alien following his failure to report for removal."[4]

Luckily for Wenqin Sun, whose story is described in the opening paragraphs of this Note, the Ninth Circuit refused to invoke the fugitive disentitlement doctrine under similar circumstances.[5] Unfortunately for Ike Romanus Bright, a Nigerian seeking similar review of his immigration status,[6] his substantive appeal will never be heard by the court of appeals because his case originated in Texas, which is located in the Fifth Circuit.[7] This bifurcation is the result of an unresolved circuit split created on August 8, 2011, with the Fifth Circuit's decision in *Bright v. Holder*.[8]

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[3] *See generally infra* Part II.B.

[4] Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2681 (2012).

[5] *See* Wenqin Sun v. Mukasey, 555 F.3d 802, 805 (9th Cir. 2009) (holding that "it would be inappropriate to apply the fugitive disentitlement doctrine to dismiss Sun's case").

[6] Bright's and Wenqin Sun's cases raise the same procedural question: should the circuit court apply the fugitive disentitlement doctrine to an alien who has not reported for deportation pursuant to a removal order after the Board of Immigration Appeals denies the alien's motions to reopen and for reconsideration? Bright's removal case stems from a statutory provision that permits the deportation of permanent aliens who commit an "aggravated felony." *Bright*, 649 F.3d at 398–99 (citing 8 U.S.C. § 1227(a)(2)(A)(iii) (2006)). Bright filed a motion to reopen and a motion for reconsideration to the Board of Immigration Appeals; both were denied. Brief for Petitioner at 7–9, *Bright*, 649 F.3d 397 (No. 10-60300). Bright then timely appealed to the Fifth Circuit. *Id.* at 9.

[7] *See Bright*, 649 F.3d at 400 ("In accordance with the fugitive disentitlement doctrine, we are barred from further review of Bright's petition.").

[8] *See id.* ("There is a split among the circuit courts on whether an alien is a fugitive."); *infra* Part II.C.

In recent years, administrative immigration courts have heard over 300,000 removal cases,[9] and the Board of Immigration Appeals (BIA) has received over 30,000 cases.[10] The Fifth Circuit's decision to apply the fugitive disentitlement doctrine prevents any appeal by an alien who chooses to remain in the United States after a removal order.[11]

The fugitive disentitlement doctrine is a common law principle originally created in the nineteenth century to punish criminal appellants who fled a court's jurisdiction but nonetheless sought to reap the benefits of a successful appeal.[12] Federal courts have increasingly extended application of this doctrine to civil matters in recent years.[13] Despite this expansion, the cumulative rationales for the doctrine continue to reflect its roots in the criminal context.[14] An overzealous application of the doctrine threatens conflicted alien-appellants who do not exhibit the characteristics of groups to which the doctrine has been applied—criminal defendants and civil appellants seeking review of a property-depriving decision.[15]

In *Ortega–Rodriguez v. United States*, the United States Supreme Court engaged in an exhaustive analysis of the fugitive disentitlement doctrine, examining the cumulative common law rationales for the doctrine to determine the appropriateness of its application.[16] The case did not involve an alien-appellant, but the

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[9] U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEARBOOK B2 (2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf.

[10] *Id.* at S1.

[11] *See Bright*, 649 F.3d at 399 ("[P]ursuant to the fugitive disentitlement doctrine, Bright's failure to report for removal rendered him ineligible for consideration of additional relief.").

[12] *See* Smith v. United States, 94 U.S. 97, 97 (1876) ("If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest."); *see also infra* note 30.

[13] *See* discussion *infra* Part II.B.

[14] *See, e.g.*, Antonio–Martinez v. INS, 317 F.3d 1089, 1093 (9th Cir. 2003) (applying the fugitive disentitlement doctrine to further its punitive and deterrent purposes).

[15] *See* discussion *infra* Part III.

[16] *See* 507 U.S. 234, 242–49 (1993) (discussing the rationales of the fugitive disentitlement doctrine and declining to apply the doctrine in a case where a criminal defendant became a fugitive during the district court proceedings but remained in custody during an appeal to the circuit court).

Court's reasoning still provides a comprehensive analytical framework for this Note.[17]

On May 29, 2012, the Supreme Court denied certiorari in Bright's case.[18] The circuit split remains unresolved. Potentially thousands of immigrants seeking relief through appellate review of their cases now face uncertainty.

This Note proposes that the circuit split be resolved in favor of the Ninth Circuit's approach, which does not apply the fugitive disentitlement doctrine to appeals by aliens who remain in the United States in defiance of a removal order but do not actively evade capture or custody. Part II provides succinct background information on the immigration appeals process, leading to a thorough review of the history and application of the fugitive disentitlement doctrine. Part II.B.*2* specifically examines the previous application and development of the doctrine within the immigration context. Part II.C introduces *Wenqin Sun v. Mukasey* and *Bright v. Holder* to demonstrate the nature of the circuit split. Part III then systematically applies the rationales for the fugitive disentitlement doctrine in the context of an alien appealing a removal order, using *Ortega–Rodriguez* as a stylistic model. Part IV proposes alternatives to the fugitive disentitlement doctrine for aliens, including statutory amendment, voluntary surrender to custody, and alternative release and monitoring. The Conclusion examines the actual consequences of the respective circuit decisions on the petitioners discussed in this Note.

## II. BACKGROUND

### A. THE IMMIGRATION APPEALS PROCESS

A brief introduction to the immigration appeals process is necessary to investigate the fugitive disentitlement doctrine in the immigration context.[19] The principle appellate body is the Board

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[17] *Id.* at 237.

[18] Bright v. Holder, 132 S. Ct. 2681 (2012).

[19] For a practical overview of the entire immigration appeals process, see generally RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 14 (2d ed. 2012). In additional to the fugitive-disentitlement-doctrine issue, the right of an immigrant to petition in courts is a

of Immigration Appeals (BIA), which is "charged with the review of administrative adjudications under the Immigration and Nationality Act as designated by the Attorney General."[20] Decisions of immigration judges in exclusion, deportation, and removal proceedings may be appealed to the BIA.[21] Additionally, an alien may file one motion to reconsider or reopen proceedings, within specified time limits, in light of new facts relating to the case.[22] Federal courts of appeals have jurisdiction to hear appeals of the BIA's final orders,[23] and a "petition of review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."[24] In both *Wenqin Sun v. Mukasey* and *Bright v. Holder*, the petitioners sought review of removal orders that had been issued following their administrative removal proceedings.[25]

B. THE FUGITIVE DISENTITLEMENT DOCTRINE

*1. Origins, Extension, and Implementation.* The fugitive disentitlement doctrine prevents an evasive party from obtaining standing[26] in the court whose authority is evaded.[27] The Supreme

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complex matter. *See generally* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003) (examining the standing doctrine for immigrants).

[20] STEEL, *supra* note 19, § 2:5.

[21] 8 C.F.R. § 1003.1(b)(1)–(3) (2012).

[22] *See id.* § 1003.2(c)–(d) (setting forth the rules for a motion to reconsider or reopen before the BIA).

[23] *See* Lolong v. Gonzales, 484 F.3d 1173, 1178 (9th Cir. 2007) (holding that the circuit had jurisdiction to hear a petition for review of the BIA's reinstatement of removal order).

[24] 8 U.S.C. § 1252(b)(2) (2006).

[25] 555 F.3d 802, 803 (9th Cir. 2009); 649 F.3d 397, 399 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2681 (2012). Removal orders are meant to force the departure of an alien from the United States. STEEL, *supra* note 19, § 14:1.

[26] Standing is a complicated doctrine rooted in many political and legal theories, the discussions of which are beyond the scope of this Note. For discussions of the standing doctrine, see generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009).

[27] *See Bright*, 649 F.3d at 399 ("[T]he fugitive disentitlement doctrine limits a criminal defendant's access to the judicial system whose authority he evades." (quoting Bagwell v. Dretke, 376 F.3d 408, 410 (5th Cir. 2004))). *See generally* Angelo M. Russo, Note, *The Development of Foreign Extradition Takes a Wrong Turn in Light of the Fugitive Disentitlement Doctrine: Ninth Circuit Vacates the Requirement of Probable Cause for a Provisional Arrest in* Parretti v. United States, 49 DEPAUL L. REV. 1041, 1049–52 (2000)

Court first created and applied the doctrine over a century ago in *Smith v. United States* when it dismissed a fugitive's appeal because the Court was "not inclined to hear and decide what may prove to be only a moot case."[28] Although *Smith* involved a purely criminal matter,[29] federal courts[30] have more recently extended the doctrine to civil matters,[31] and one court noted that "the rule should apply with greater force in civil cases where an individual's liberty is not at stake."[32] Modern courts have invoked the doctrine in the context of criminal appeals,[33] extradition,[34] administrative forfeiture,[35] tax liability,[36] and other circumstances.[37]

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(introducing the fugitive disentitlement doctrine for analysis in the context of international extradition).

[28] 94 U.S. 97, 97 (1876).

[29] *See* Ortega–Rodriguez v. United States, 507 U.S. 234, 239 (1993) ("It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal. The Supreme Court applied this rule for the first time in [1876] . . . .").

[30] This Note focuses on the federal fugitive disentitlement doctrine. Several states have applied some form of the doctrine. *See, e.g.*, Estelle v. Dorrough, 420 U.S. 534, 534–36 (1975) (upholding the constitutionality of a Texas statute that allows for the automatic dismissal when an appellant escapes during the pendency of his appeal); *see also* Henry Tashman et al., *Flight or Fight*, L.A. LAW., Oct. 2006, at 44 (discussing California's fugitive disentitlement doctrine).

[31] *See* Mitchell Waldman, Annotation, *Application of "Fugitive Disentitlement Doctrine" in Federal Civil Actions,* 176 A.L.R. FED. 333, 333 (2002) ("In recent years, the [fugitive disentitlement] doctrine has been extended to civil cases.").

[32] Conforte v. Comm'r, 692 F.2d 587, 589 (9th Cir. 1982).

[33] *See, e.g.,* United States v. Plancarte–Alvarez, 366 F.3d 1058, 1064 (9th Cir. 2004) ("The fugitive disentitlement doctrine . . . gives courts discretion to dismiss appeals by criminal defendants who are fugitives from justice . . . ."). For an extensive discussion of how federal courts have applied of the fugitive disentitlement doctrine to criminal cases, see Brian L. Porto, Annotation, *Application of Fugitive Disentitlement Doctrine in Federal Criminal Cases*, 179 A.L.R. FED. 291 (2002).

[34] *See generally* Russo*, supra* note 27 (discussing the fugitive disentitlement doctrine in the international extradition context).

[35] *See, e.g.,* United States v. Sanders, No. 94-6219, 1995 WL 94666, at *1 (10th Cir. Feb. 28, 1995) (citing United States v. Timbers Preserve, 999 F.2d 452, 453 (10th Cir. 1993)) (stripping the right of a fugitive to challenge administrative forfeiture proceedings); *see also* N. Brock Collins, Note, *Fugitives and Forfeiture—Flouting the System or Fundamental Right?*, 83 KY. L.J. 631, 636–40 (1995) (discussing the fugitive disentitlement doctrine as applied in civil forfeiture cases).

[36] *See, e.g.*, Edelman v. Comm'r, 103 T.C. 705, 705, 710–11 (1994) (preventing the tax-liability appeal of an escaped prisoner under the fugitive disentitlement doctrine). *See generally* Nathan S. Gindi, *Dismissal of a Petition for Tax Redetermination Under the Fugitive Disentitlement Doctrine: Satisfying a Higher Standard*, 65 GEO. WASH. L. REV. 661

The doctrine is a product of equity, exercised at the court's discretion,[38] and does not automatically disqualify a fugitive from maintaining an action.[39] "The doctrine is a 'severe' sanction that [courts] do not lightly impose,"[40] although it is consistent with the principle "that there is no constitutional right to an appeal."[41]

Courts justify the doctrine with several rationales, the historical rationale being the difficulty of enforcing a judgment against a fugitive.[42] In *Smith*, the Supreme Court stated, "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."[43] Recently, courts have expanded the rationales to include the modern realities of overloaded dockets and the corresponding judicial economy concerns.[44] Prior to its decision in *Wenqin Sun*, the Ninth Circuit explicitly noted a distinct punitive and deterrent purpose in invoking the doctrine.[45]

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(1997) (discussing the D.C. Circuit's analysis of the fugitive disentitlement doctrine in a tax appeal).

[37] For an extensive discussion of how federal courts have applied the fugitive disentitlement doctrine to civil matters, see Waldman, *supra* note 31.

[38] Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2681 (2012).

[39] Sarlund v. Anderson, 205 F.3d 973, 974 (7th Cir. 2000).

[40] Antonio–Martinez v. INS, 317 F.3d 1089, 1091 (9th Cir. 2003) (quoting Degan v. United States, 517 U.S. 820, 828 (1996)).

[41] Abney v. United States, 431 U.S. 651, 656 (1977).

[42] *See* Smith v. United States, 94 U.S. 97, 97 (1876) (expressing doubts that a fugitive defendant would appear in front of the court in any circumstances).

[43] *Id.*

[44] *See* Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2681 (2012) ("The doctrine is justified by several rationales, including: (1) the difficulty of enforcing a judgment against a fugitive; (2) a waiver or abandonment theory, where 'by fleeing custody, the defendant is thought to have waived or abandoned his right to an appeal'; (3) the 'discourage[ment of] the felony of escape and encourage[ment of] voluntary surrenders'; (4) the furtherance of 'the court's interest in efficient practice' 'because a litigant's escape impedes the ability of a court to adjudicate the proceedings before it'; and (5) a response to the fugitive's 'affront to the dignity and authority of the court.' " (alterations in original) (quoting Bagwell v. Dretke, 376 F.3d 408, 411 (5th Cir. 2004)) (internal quotation marks omitted)); *see also id.* ("Everyone understands that the government is overwhelmed with petitioners and procedures, and that it heavily relies on the word and voluntary compliance of numerous aliens within our borders. It is easy to game the system, but we should not treat disregard of government directives as a norm." (quoting Gao v. Gonzales, 481 F.3d 173, 176 (2d Cir. 2007))).

[45] *See Antonio–Martinez*, 317 F.3d at 1093 (applying the fugitive disentitlement doctrine

Supreme Court decisions "consistently and unequivocally" authorize dismissal of an appeal as a suitable penalty "when a prisoner is a fugitive during the ongoing appellate process."[46] The Court held that to properly invoke the fugitive disentitlement doctrine, there must be "some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response."[47] For example, in *Ortega–Rodriquez*, the Court refused to extend the doctrine to an appeal of a prisoner who initially fled during the district court phase of his trial but was in custody during the pendency of his appeal.[48] In formulating its decision, the Court methodically considered each rationale to determine if invoking the doctrine would fulfill the precedential justifications.[49] The Court's exhaustive method provides a model for examining the circumstances in *Wenqin Sun* and *Bright* to determine if the fugitive disentitlement doctrine should be applied to those types of cases.[50]

*2. The Fugitive Disentitlement Doctrine in Immigration Cases.* Prior to *Wenqin Sun v. Mukasey*, federal appeals courts consistently held that the fugitive disentitlement doctrine applies in the immigration context.[51] The doctrine applies to both

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to further its punitive and deterrent purposes).

[46] Ortega–Rodriguez v. United States, 507 U.S. 234, 242 (1993) (internal quotation marks omitted).

[47] *Id.* at 244.

[48] *Id.*

[49] *See id.* at 245–48 (discussing the rationales of appellate process efficiency, appellate court dignity, and deterrence).

[50] This model is appropriate because in *Ortega–Rodriquez*, the Court sought to determine if "the same rationales support a rule mandating dismissal of an appeal of a defendant who flees the jurisdiction of a district court, and is recaptured before he invokes the jurisdiction of the appellate tribunal." *Id.* at 242. Other federal courts have used *Ortega–Rodriquez* as a model for considering novel applications of the fugitive disentitlement doctrine. *See, e.g.,* Daccarett–Ghia v. Comm'r, 70 F.3d 621, 633 (D.C. Cir. 1995) ("It is through the lens of *Ortega–Rodriguez* that we review the Tax Court's decision in this case.").

[51] *See* Giri v. Keisler, 507 F.3d 833, 835 (5th Cir. 2007) ("[W]e now find it proper to extend the fugitive disentitlement doctrine to the immigration context where . . . the petitioners are fugitive aliens who have evaded custody and failed to comply with a removal order. In so holding, we join with every other circuit that has addressed whether the fugitive disentitlement doctrine applies to appeals from the [Board of Immigration Appeals] under similar facts."); Antonio–Martinez v. INS, 317 F.3d 1089, 1092 (9th Cir. 2003) (citing

petitions for reconsideration of orders[52] and to habeas corpus petitions.[53] Courts note the semantic difference between a criminal taking flight from justice and an alien evading immigration orders but make no distinction for the purpose of applying the fugitive disentitlement doctrine.[54] Aliens need not intentionally flee to be in default of legal obligations.[55] By simply failing to notify the government of a change of address, an alien violates federal law.[56]

The Second Circuit first noted the potential disparities in position between a convicted criminal defendant who has been ordered to surrender and an alien ordered to appear for deportation.[57] If the criminal fugitive surrenders, he may pursue an appeal from within the country, albeit while confined.[58] An

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authority to demonstrate that the Ninth Circuit applied the fugitive disentitlement doctrine consistently with other circuits before its decision in *Wenqin Sun*). *But see* Yan Yun Ye v. U.S. Att'y Gen., 383 F. App'x 113, 116 (3d Cir. 2010) (noting that immigration officials' knowledge of the whereabouts of a petitioner may prevent application of the fugitive disentitlement doctrine); Xiang Feng Zhou v. U.S. Att'y Gen., 290 F. App'x 278, 281 (11th Cir. 2008) (refusing to apply the fugitive disentitlement doctrine and noting that DHS should have known of the whereabouts of the petitioner, and the petitioner did not attempt to conceal his location); Nnebedum v. Gonzales, 205 F. App'x 479, 480 (8th Cir. 2006) (refusing to consider petitioner a fugitive because she was not hiding from authorizes nor unable to be located). The Fifth Circuit noted these cases in its decision in *Bright*. 649 F.3d 397, 400 n.2 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2681 (2012).

[52] *See Bright*, 649 F.3d at 399 ("Bright filed a motion to reopen removal proceedings and a request to stay the removal order.").

[53] *See* Armentero v. INS, 412 F.3d 1088, 1088 (9th Cir. 2005) (dismissing a habeas corpus appeal because the petitioner, an immigration detainee, was a fugitive from the law).

[54] *See* Antonio–Martinez v. INS, 317 F.3d 1089, 1092 (9th Cir. 2003) (noting that the doctrine applies both to convicted criminals who flee "while [their] appeal is pending" and to individuals involved in immigration cases); Bar–Levy v. U.S. Dep't of Justice, 990 F.2d 33, 35 (2d Cir. 1993) ("Although an alien who fails to surrender to the [Immigration and Naturalization Service] despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice.").

[55] *See Antonio–Martinez*, 317 F.3d at 1092 (noting that even if a fugitive simply lost interest in an immigration case without intentionally fleeing, he still must comply with federal alien registration requirements).

[56] *Id.* (citing 8 U.S.C. § 1305(a) (2006)).

[57] *See Bar–Levy*, 990 F.2d at 35 (noting that an alien "who has been ordered to appear for deportation may be in a worse position than a convicted criminal defendant who has been ordered to surrender"). The Ninth Circuit followed the Second Circuit, quoting *Bar–Levy* in *Antonio–Martinez*, 317 F.3d at 1092.

[58] *Bar–Levy*, 990 F.2d at 35.

alien who surrenders and is subsequently deported by the government, however, may be barred from pursuing an appeal of the immigration order.[59]

C. THE SPLIT

*1. The Ninth Circuit:* Wenqin Sun. Wenqin Sun is a Christian[60] citizen of China.[61] She is also a battered spouse.[62] On December 26, 2001, she submitted an asylum application to DHS.[63] The immigration judge denied her asylum request, so she appealed the decision to the Board of Immigration Appeals.[64] The BIA ultimately affirmed the immigration judge's decision.[65] Wenqin Sun then filed a consolidated petition for review of her status[66] in the Ninth Circuit Court of Appeals.[67]

The Ninth Circuit considered the fugitive disentitlement doctrine as a threshold issue in the appeal.[68] The government contended that because Wenqin Sun failed to appear on the date set for her removal, she became a fugitive from justice without entitlement to review in the court of appeals.[69] In its brief, the government analogized Wenqin Sun's case to the facts of *Antonio–Martinez v. INS*,[70] where the Ninth Circuit dismissed an appeal

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[59] *See id.* In *Ortega–Rodriguez*, the Supreme Court did not consider this disparity because the fugitive was not an alien. A consideration of this disparity is included in this Note's full analysis of the equities of the fugitive disentitlement doctrine in *Wenqin Sun* and *Bright*. *See infra* Part III.

[60] Brief of Respondent, Wenqin Sun v. Mukasey, 555 F.3d 802 (9th Cir. 2009) (Nos. 06-74450, 07-70691), 2008 WL 3525176, at *5–6. Sun's religion and previous persecution in China served as a basis for her asylum claim. *See id.* (providing the procedural history of Wenqin Sun's case).

[61] *Wenqin Sun*, 555 F.3d at 803.

[62] *Id.*

[63] Brief of Respondent, *supra* note 60, at *5.

[64] *Id.* at *6.

[65] *Id.*

[66] *Id.* at *1–2. Specifically, Wenqin Sun sought review of her motions to reconsider and reopen her status. *Id.* at *9–10.

[67] *Id.* at *3 (citing 8 U.S.C. § 1252(b)(1) (2006)).

[68] Wenqin Sun v. Mukasey, 555 F.3d 803, 803 (9th Cir. 2009). The Ninth Circuit also considered the timeliness of Wenqin Sun's petition, ultimately allowing equitable tolling and granting her petition. *Id.* at 805–06.

[69] *Id.* at 803.

[70] Brief of Respondent, *supra* note 60, at *15–16.

under the fugitive disentitlement doctrine when the petitioner evaded contact with his attorney and INS for the two years leading up to his appeal.[71] Wenqin Sun argued, contrarily, that because she made no effort to evade authorities and filed change of address forms with DHS, she was not a fugitive.[72] Wenqin Sun's whereabouts were known by her counsel, DHS, and the court.[73] She also appeared in court for oral arguments in her case.[74]

Prior to this case, in the immigration context, the Ninth Circuit dismissed petitions for review by aliens who had fled custody and could not be located.[75] Wenqin Sun's case however presented an issue of first impression because she had not attempted to flee and her whereabouts were known.[76] Applying *Ortega–Rodriguez*, the Ninth Circuit held that "[b]ecause Sun is not currently a fugitive, and has not been a fugitive at least since the time she first filed a petition for review with this court, we hold it would be inappropriate to apply the fugitive disentitlement doctrine to dismiss Sun's case."[77]

*2. The Fifth Circuit:* Bright. Ike Romanus Bright, a legal permanent resident of the United States, is a citizen of Nigeria.[78] He pleaded guilty to attempted second-degree murder in a Texas state court.[79] In March 2007, DHS commenced removal proceedings against Bright because of his criminal conviction.[80]

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[71] Antonio–Martinez v. INS, 317 F.3d 1089, 1091 (9th Cir. 2003).

[72] Transcript of Oral Argument at 2, *Wenqin Sun*, 555 F.3d 802 (No. 06-74450), 2008 WL 5109118. Furthermore, Sun argued that "the Ninth Circuit has specifically found that even in situations where the fugitive disentitlement doctrine applies, both positive and negative factors should be considered." Petitioner's Reply to Brief of Respondent at 1, *Wenqin Sun*, 555 F.3d 802 (Nos. 06-74450, 07-70691) (citing Yepes–Prado v. INS, 10 F.3d 1363, 1366 (9th Cir. 1993)).

[73] 555 F.3d at 805.

[74] Transcript of Oral Argument, *supra* note 72, at 2.

[75] *Wenqin Sun*, 555 F.3d at 804.

[76] *See id.* ("No court has ever applied the doctrine to an alien whose whereabouts are known and who has not fled from custody. This is the first case in this circuit to consider the applicability of the doctrine in such circumstances.").

[77] *Id.* at 805.

[78] Bright v. Holder, 649 F.3d 397, 398 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2681 (2012).

[79] *Bright*, 649 F.3d at 398–99. According to Bright, he pleaded "no contest." Petitioner's Motion for Stay of Mandate Pending Filing of a Petition for Writ of Certiorari at 2, *Bright*, 649 F.3d 397 (No. 10-60300).

[80] *Id.* at 399 (citing 8 U.S.C. § 1227(a)(2)(A)(iii) (2006)).

Bright failed to surrender for removal when ordered, so DHS issued a warrant for his arrest.[81] Like Wenqin Sun, Bright's address was known to Immigration and Customs Enforcement, he did not change addresses, and he made no attempt to evade arrest.[82] In fact, Bright's address was the same as that listed on the I-830 form, an internal form used by the Department of Justice to track the movement of aliens.[83]

Bright filed a motion with the BIA to reopen his removal order.[84] The BIA denied both the motion and a subsequent request for reconsideration based on Bright's fugitive status.[85] Bright then filed a timely petition for review with the Fifth Circuit Court of Appeals.[86]

The Fifth Circuit only considered whether the fugitive disentitlement doctrine should apply when an alien "has maintained the same address throughout his removal proceedings, the address was known to DHS, and DHS made no attempt to locate or arrest the alien following his failure to report for removal."[87] The Fifth Circuit, although listing the rationales for the fugitive disentitlement doctrine, failed to exhaustively "consider the equities of Mr. Bright's case and made the attempt to determine whether dismissal was consistent with the reasons for the fugitive disentitlement doctrine."[88] Instead, the court concluded: "Applying the fugitive disentitlement doctrine to those who evade removal despite their address being known by DHS will encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and rule of law."[89]

*3. Why the Split?* Examining the appellate briefs and cited precedent offers greater insight into this bifurcation. In *Bright*,

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[81] *Id.* Bright's brief to the Fifth Circuit contradicts this fact. *See* Brief for Petitioner, *supra* note 6, at 19 ("A warrant for Petitioner's arrest was never issued.").

[82] Brief for Petitioner, *supra* note 6, at 18–19.

[83] *Id.* at 19 n.2.

[84] *Bright*, 649 F.3d at 399.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 400.

[88] Petitioner's Motion for Stay, *supra* note 79, at 10.

[89] *Bright*, 649 F.3d at 400.

the Fifth Circuit identified an apparent existing split in how the Second and Seventh Circuits and the Ninth Circuit apply the fugitive disentitlement doctrine.[90] But the better interpretation is that *Bright* created the split, and the Fifth Circuit misinterpreted the factual circumstances of both *Gao v. Gonzales*,[91] the Second Circuit case, and *Sapoundjiev v. Ashcroft*,[92] the Seventh Circuit case.[93] Both Bright and Wenqin Sun maintained their addresses throughout their removal proceedings, their addresses were known to DHS, and DHS made no attempt to locate or arrest them following their failure to report for removal.[94]

*Gao* and *Sapoundjiev*, the cases the Fifth Circuit relied upon, are factually distinguishable. In *Gao*, the Second Circuit applied the doctrine when the fugitive alien had failed to contact immigration authorities for seven years.[95] In *Sapoundjiev*, an alien and his family "asserted through counsel that they [were] entitled to ignore the bag-and-baggage order [or removal notice] and wait for agents to locate and arrest them"; the Seventh Circuit thus dismissed their petition for review.[96] Furthermore, the Ninth Circuit also claimed in *Wenqin Sun*, a case decided after both *Gao* and *Sapoundjiev*, that "[n]o court has ever applied this doctrine to an alien whose whereabouts are known and who has not fled from custody."[97] Nevertheless, the Fifth Circuit interpreted these cases as justifying application of the fugitive disentitlement doctrine to Bright's case and dismissed his petition for review.[98]

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The Fifth Circuit's decision in *Bright* on August 8, 2011 created a circuit split that the remainder of this Note analyzes.

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[90] *Id.*

[91] 481 F.3d 173 (2d Cir. 2007).

[92] 376 F.3d 727 (7th Cir. 2004).

[93] The government heavily relied on *Gao* and *Sapoundjiev* in its brief to the Fifth Circuit. *See* Brief for Respondent at 12–14, *Bright*, 649 F.3d 397 (No. 10-60300).

[94] *See Bright*, 649 F.3d at 400 (noting that like Bright, Sun's "whereabouts were known to her counsel, DHS, and the court").

[95] 481 F.3d at 175.

[96] 376 F.3d at 730.

[97] Wenqin Sun v. Mukasey, 555 F.3d 802, 804 (9th Cir. 2009).

[98] *Bright*, 649 F.3d at 400.

Ultimately, this Note suggests resoling the split in favor of the Ninth Circuit.

## III. ANALYSIS—THE "LENS OF *ORTEGA–RODRIGUEZ*"[99]

As noted above, the Supreme Court decision in *Ortega–Rodriguez* has served as a framework for considering the applicability of the fugitive disentitlement doctrine to novel factual circumstances.[100] The case offers a detailed—although not exhaustive—discussion of the rationales for the doctrine.[101] In that case, the Court considered whether those rationales supported dismissing the appeal of a defendant who had fled during district court proceedings but was recaptured before his appeal.[102] As a threshold matter, the Court noted: "Our review of rules adopted by the courts of appeals in their supervisory capacity is limited in scope, but it does demand that such rules represent reasoned exercises of the courts' authority."[103]

The Court clearly limited the use of the fugitive disentitlement doctrine to certain instances where dismissal serves substantial interests.[104] The Court then established a baseline rule that "[a]bsent 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 justifications advanced for

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[99] Daccarett–Ghia v. Comm'r, 70 F.3d 621, 623 (D.C. Cir. 1995) ("It is through the lens of *Ortega–Rodriguez* that we review the Tax Court's decision in this case.").

[100] *See supra* note 50 (discussing the appropriateness of employing the *Ortega–Rodriguez* model to analyze fugitive disentitlement cases).

[101] Ortega–Rodriguez v. United States, 507 U.S. 234, 242–51 (1993). Some of the Court's analysis relates to the authority of a district court to sanction a fugitive defendant during the trial phase of criminal proceedings. This authority appears to have influenced the Court's decision not to uphold the Eleventh Circuit's application of the fugitive disentitlement doctrine to a defendant who absconded prior to sentencing but was recaptured before the appeal. *See id.* at 244 (observing that "[a] defendant returned to custody before he invokes the appellate process presents no risk of unenforceability").

[102] *Id.* at 242.

[103] *Id.* at 244 (citing Thomas v. Arn, 474 U.S. 140, 146–48 (1985)).

[104] *Id.* at 249 ("Accordingly, we conclude that while dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a rule of dismissal for all appeals . . . .").

dismissal of fugitives' pending appeals generally will not apply."[105] The Court considered this connection throughout its entire analysis. The factors discussed below, although addressed independently, overlap and merge somewhat in the Supreme Court's analysis.[106] The *Ortega–Rodriguez* factors include enforceability of a judgment against a fugitive, resources of the courts and efficient appellate practice, dignity of the courts, discouragement of the felony of escape and encouragement of voluntary surrender, and waiver or abandonment of appeal.

### A. ENFORCEABILITY OF A JUDGMENT AGAINST A FUGITIVE

The inability of an appellate court to enforce a judgment against a fugitive originally motivated the creation of the fugitive disentitlement doctrine in the nineteenth century.[107] The Supreme Court reasoned that "there could be no assurance that any judgment [an appellate court] issued would prove enforceable" against a fugitive defendant.[108] In *Ortega–Rodriquez*, because the petitioner fled only during the district court phase of his proceedings but remained in custody throughout the appeal process, dismissal of his appeal could not be justified by concerns of enforceability.[109]

Like Ortega–Rodriguez, who remained in custody throughout his appeal,[110] Wenqin Sun and Bright were always within the reach of their respective court of appeals: their whereabouts were known to DHS; they kept their same addresses during their removal proceedings; and DHS did not attempt to locate or arrest them after they failed to surrender for removal.[111] On the day of her oral arguments, Wenqin Sun appeared before the Ninth Circuit.[112] All of these circumstances point to the enforceability of

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[105] *Id.* (citations omitted) (quoting Estelle v. Dorrough, 420 U.S. 534, 542 (1975)).

[106] *See, e.g*, *id*. at 242 (blending the concepts of an efficient appellate practice and a dignified appellate practice in a single statement).

[107] *See id*. at 239–40 (discussing the origins of the fugitive disentitlement doctrine).

[108] *Id*.

[109] *Id*. at 244.

[110] *Id*.

[111] See supra notes 72–74, 81–83 and accompanying text.

[112] Transcript of Oral Argument, *supra* note 72, at 2 ("Judge: [S]he's here, she's here and

a failed removal appeal. Assuming that a petitioner does not voluntarily comply with an adverse appellate decision—and compliance with reporting requirements and attendance at oral arguments suggests probable voluntary compliance—DHS need only search for a petitioner at the known address.

Admittedly, however, the Court noted that Ortega–Rodriquez's fugitive status "at no time coincide[d] with his appeal"[113] because he remained in physical custody at all times during the appellate process.[114] Accepting the technical definition of "fugitive" in *Bar–Levy v. U.S. Department of Justice*,[115] both Wenqin Sun and Bright were fugitives at the time of their appeal because neither was in physical custody of the authorities.[116] In its brief to the Supreme Court opposing certiorari, the Government contended that "it [is] far from clear that [the absconder will] choose to be at home when agents arriv[e] to arrest [him]."[117]

Notwithstanding this possibility, the fact that Wenqin Sun and Bright's whereabouts were known likely meant that DHS could have arrested them at any reasonable time. The government's ability to easily arrest the petitioners meant that a judgment of an appellate court could be readily enforced. In fact, in the case of Bright, the government located and arrested him after the Fifth Circuit refused to hear his substantive appeal.[118] If the Fifth

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that's all you need to say it [sic] from my perspective.").

[113] *See Ortega–Rodriguez*, 507 U.S. at 244 (noting that the fugitive disentitlement doctrine's "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").

[114] *See id.* at 237 ("The District Court issued a warrant for petitioner's arrest . . . [and] he was apprehended.").

[115] *See* 990 F.2d 33, 35 (2d Cir. 1993) ("Although an alien who fails to surrender to the [Immigration and Naturalization Service] despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice.").

[116] *See supra* Part II.C (discussing the background of the *Wenqin Sun* and *Bright* cases).

[117] Brief for the Respondent in Opposition at 11, Bright v. Holder, 132 S. Ct. 2681 (2012) (No. 11-890) (alterations in original) (quoting Sapoundjiev v. Ashcroft, 376 F.3d 727, 729 (7th Cir. 2004) (internal quotation mark omitted)).

[118] *See* E-mail from Sean Keane–Dawes, Attorney, Law Offices of Sean Keane–Dawes, P.C., to author (Oct. 23, 2011, 16:01 EST) (on file with author) ("This is a very important issue. . . . By the way, the government did take Ike [Bright] into custody, so this issue becomes critical.").

Circuit had chosen to consider Bright's substantive appeal and still upheld the removal order, apprehension and enforcement of the judgment would have been identical. The rationale of judgment enforceability is not supported by applying the fugitive disentitlement doctrine to Wenqin Sun, Bright, or similarly situated immigration appellants.

### B. RESOURCES OF THE COURTS AND EFFICIENT APPELLATE PRACTICE

The Supreme Court explicitly identified the concern of an efficient appellate practice in *Estelle v. Dorrough*.[119] In *Ortega–Rodriguez*, the Court held that dismissal of appeals filed by former fugitives does not advance appellate efficiency.[120] While an escape may give rise to a "flurry of extraneous matters," the usual course of events of an appeal will provide sufficient time to exhaust the disturbance of the process once the authorities recapture a fugitive.[121]

The Court, however, did recognize that the earlier flight by the defendant, Ortega–Rodriguez, could have impacted the appellate process: "Here, for instance, petitioner's flight prevented the Court of Appeals from consolidating his appeal with those of his codefendants, which we assume would be its normal practice."[122] Nevertheless, the Court held that nothing in the record below presented "an obstacle to orderly appellate review."[123] Despite appellate process concerns, the Court held that Ortega–Rodriquez's conduct was not "sufficiently disruptive" and vacated the Eleventh Circuit's order dismissing his appeal under the fugitive disentitlement doctrine.[124]

Considering the circumstances of Ortega–Rodriguez's case and his actual flight from criminal adjudication, Wenqin Sun and Bright likely have even stronger cases against imposition of the

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[119] 420 U.S. 534, 541–42 (1975) (upholding a Texas statute that automatically dismissed a defendant's appeal when that defendant escaped while the appeal was pending).

[120] Ortega–Rodriguez v. United States, 507 U.S. 234, 241 (1993).

[121] *Id.* (quoting United States v. Puzzanghera, 820 F.2d 25, 26 (1st Cir. 1987)).

[122] *Id.* at 250.

[123] *Id.* at 251.

[124] *Id.* at 251–52.

fugitive disentitlement doctrine on appellate efficiency concerns. Neither Wenqin Sun nor Bright escaped from custody.[125] Neither created a "flurry of extraneous matters"[126] for the appellate courts. Both hired immigration attorneys to handle their appeals in a linear fashion.[127] Their status did not affect the appellate court's ability to communicate with their advocates. The court could disseminate information through their attorneys or directly to the current addresses reported to DHS.[128] In *Ortega–Rodriguez,* a petitioner who was unreachable and unlocatable during district court proceedings did not adversely interrupt efficiency of the appellate process such as to justify application of the fugitive disentitlement doctrine.[129] *A fortiori*, the application of the fugitive disentitlement doctrine would not be justified in a case where the petitioners actively aided the efficiency of the appeals process by hiring experienced attorneys and continuously communicating with the courts. In fact, the record of Bright's appeals suggests that the process progressed quickly, demonstrating great efficiency and adherence to appellate procedure.[130] Through the lens of *Ortega–Rodriquez*, the rationale of appellate court efficiency is persuasively absent from both *Wenqin Sun* and *Bright*.

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[125] *See supra* Part II.C (describing the facts of *Wenqin Sun* and *Bright*, where both petitioners kept DHS apprised of their whereabouts even though DHS did not take them into custody and they did not surrender).

[126] *See Ortega–Rodriguez*, 507 U.S. at 245 (noting that an escape may be disruptive enough to divert a court's attention from the case's merits).

[127] The attorney for Bright was Sean Keane–Dawes. Bright v. Holder, 649 F.3d 397, 398 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2681 (2012). The attorney for Wenqin Sun was Drew Sieminski. Wenqin Sun v. Mukasey, 555 F.3d 802, 803 (9th Cir. 2009).

[128] DHS communicated an order to surrender Bright through his attorney. *Bright*, 649 F.3d at 399.

[129] 507 U.S. at 251.

[130] A timeline in the *Bright* opinion shows that from the motion to reopen removal proceedings (March 9, 2009) to the Fifth Circuit's publication of opinion (August 8, 2011), the appeals process proceeded swiftly through the various motions and petitions. *See Bright*, 649 F.3d at 399.

C. DIGNITY OF THE APPELLATE COURTS

Another rationale for applying the fugitive disentitlement doctrine is protecting the dignity of an appellate court. This rationale has its origins in *Molinaro v. New Jersey*.[131] In that case, the Court dismissed a fugitive's criminal appeal even though the case was still an "adjudicable case or controversy."[132] As the *Ortega–Rodriguez* Court noted, "dismissal by an appellate court after a defendant has fled its jurisdiction serves an important deterrent function and advances an interest in efficient, dignified appellate practice."[133] The Court further affirmed the right of an appellate court to employ dismissal as a sanction when flight harms dignity of the court's proceedings.[134]

Notwithstanding these concerns, the Court found that Ortega–Rodriguez had manifested his disrespect by fleeing from the district court, not the court of appeals that dismissed his case.[135] In the case of a fugitive who flees during the district court phase, the responsibility to defend the dignity of the court lies only with the district court.[136] The Supreme Court then halted an expansion of the dignity rationale of the fugitive disentitlement doctrine, limiting implementation on this ground only to where the conduct has a direct connection to the appellate proceedings.[137]

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[131] *See* 396 U.S. 365, 366 (1970) ("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."). The language in *Molinaro* has also served as the basis for several federal courts to extend the fugitive disentitlement doctrine from the criminal context to civil contexts. *See, e.g.*, Mitchell Waldman, *Annotation, Application of "Fugitive Disentitlement Doctrine" in Federal Civil Actions*, 176 A.L.R. FED. 333, § 10 (2002) (discussing the extension of the fugitive disentitlement doctrine after *Molinaro* to tax cases).

[132] *Molinaro*, 396 U.S. at 366.

[133] *Ortega–Rodriguez*, 507 U.S. at 242.

[134] *Id.* at 246.

[135] *Id.*

[136] *Id.*

[137] *See id.* ("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

In the cases at hand, immigration judges issued removal orders that the petitioners ignored; the BIA then rejected Wenqin Sun and Bright's requests for reconsideration.[138] These administrative courts are analogous to the lower district court in *Ortega–Rodriguez*. Like the petitioner in *Ortega–Rodriguez* who never attempted to flout the circuit court's jurisdiction or dignity, at no time during their appeals did Wenqin Sun or Bright avoid contact with the circuit court, ignore an order of the circuit court, or otherwise act to affront the dignity of the circuit court.[139]

Proponents of implementation of the fugitive disentitlement doctrine may distinguish the greater power of district courts from the limited power of the administrative immigration courts. In *Ortega–Rodriguez*, the Court noted:

> Once jurisdiction has vested in the appellate court, . . . then any deterrent to escape must flow from appellate consequences, and dismissal may be an appropriate sanction by which to deter. Until that time, however, the district court is quite capable of defending its own jurisdiction.
>
> . . . Most obviously, because flight is a separate offense punishable under the Criminal Code, . . . the district court can impose a separate sentence that adequately vindicates the public interest in deterring escape and safeguards the dignity of the court.[140]

Immigration judges have no capacity to bring such additional charges. However, DHS can enforce the removal order of the immigration judge by issuing a warrant for the arrest of the alien.[141] Issuance of such a warrant could serve as a tool for the administrative agency to enforce the removal order and defend its

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proceedings.").

[138] *See supra* Part II.C.

[139] As discussed in Part III.A, Wenqin Sun even appeared for oral arguments in front of the court. Transcript of Oral Argument, *supra* note 72, at 2.

[140] *Ortega–Rodriguez*, 507 U.S. at 247–48.

[141] *See* AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 7:5.5 (2012) (describing the execution of removal orders).

dignity. In the case of Bright, the government never issued a warrant for his arrest.[142] Because neither Bright nor Wenqin Sun demonstrated an affront to the dignity of the circuit court of appeals and because the administrative immigration courts are sufficiently able to defend their own dignity, application of the fugitive disentitlement doctrine to these circumstances would not further the rationale of upholding the court's dignity and authority.

### D. DISCOURAGEMENT OF THE FELONY OF ESCAPE AND ENCOURAGEMENT OF VOLUNTARY SURRENDER

The Supreme Court crafted the rationale of discouraging the felony of escape and encouraging voluntary surrenders in *Estelle v. Dorrough*.[143] The Court again mentioned the rationale in *Ortega–Rodriguez*[144] but failed to elaborate explicitly upon the matter in its consideration of the applicability of the doctrine to criminals who flee during the district court phase but remain in custody during the appeal process.[145]

To see how the doctrine's incentives function in the immigration context, consider the position of an alien subject to removal. For the sake of this argument, the only possible successful outcome is remaining in the United States.

First, assume the fugitive disentitlement doctrine will not be applied, which is the approach of the Ninth Circuit in this context. If the alien chooses to ignore the removal order, she will have two options in the absence of the fugitive disentitlement doctrine: First, she may appeal, possibly succeed and obtain favorable immigration status, and ultimately remain in the United States. Second, she may also ignore the order and choose not to appeal, which may ultimately result in deportation if she is apprehended.

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[142] Brief for Petitioner, *supra* note 6, at 19.

[143] *See* 420 U.S. 534, 537 (1975) ("[The fugitive disentitlement doctrine] discourages the felony of escape and encourages voluntary surrenders.").

[144] 507 U.S. 234, 241 (1993).

[145] Because the Supreme Court rejected the fugitive disentitlement doctrine in the context of *Ortega–Rodriguez*, it presumably did not find the rationale compelling. This Note will draw on this presumption in the Conclusion.

Worse, she must become a true fugitive from justice, intentionally avoiding law enforcement in order to remain in the country. Of course, just as when the doctrine is applied, she may also obey the removal order and turn herself in, but this will result in deportation[146] without an opportunity to appeal because an alien's appeal of a deportation order will be considered withdrawn if she departs the country.[147] Thus, without the fugitive disentitlement doctrine in place, a successful appeal of the removal order provides a lawful avenue for the alien to remain in the United States.

Now, consider the path in the Fifth Circuit, which applies the fugitive disentitlement doctrine to an alien seeking review of a removal order. If an alien chooses to ignore the order—thus becoming a technical fugitive—the right to appeal will be lost because the court will apply the doctrine. If an alien surrenders, the alien will be deported under the removal order and will still lose the opportunity to appeal because any appeal will be considered withdrawn after the deportation.[148] The only option allowing an alien to remain in the United States is ignoring the order and evading authorities. No lawful avenue would be available if courts applied the fugitive disentitlement doctrine.

Thus, imposing the fugitive disentitlement doctrine actually incentivizes aliens to ignore their removal orders and test their luck as fugitives that actively evade law enforcement, because this is their only chance to remain in the United States. The imposition of the fugitive disentitlement doctrine, therefore, discourages voluntary surrender, resulting in the opposite effect than the Supreme Court intended.

### E. WAIVER OR ABANDONMENT OF APPEAL

The Supreme Court also failed to flesh out an abandonment or waiver of appeal argument in the *Ortega–Rodriguez* opinion. As

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[146] Voluntary surrender coupled with request for judicial review "does not require the Attorney General to defer removal of the alien." 8 U.S.C. § 1252(b)(8)(C) (2006).

[147] 8 C.F.R. § 1003.2(d) (2012).

[148] *See* 8 C.F.R. § 1003.2(d) (stating that motions to reopen or reconsider exclusion, deportation, or removal proceedings cannot be made after an alien departs the United States).

with the discouragement of escape rationale,[149] the Court did not find compelling fulfillment of the waiver or abandonment of appeal rationale by a petitioner who fled during the district court phase but remained in custody during the appeal process.[150]

Both Wenqin Sun and Bright aggressively pursued their appeals. Both hired lawyers. Their actions were clearly contrary to the definition of abandonment: "The relinquishing of a right or interest with the intention of never reclaiming it."[151] Because the petitioners actively and continuously followed appellate process without any interruption, they never relinquished any interest and certainly manifested a continuing intention to seek relief from the court. Waiver encompasses the term *abandonment* in its definition: "The voluntary relinquishment or abandonment—express or implied—of a legal right or advantage . . . ."[152] Semantically, a petitioner must abandon an appeal in order to waive an appeal. Where abandonment has not occurred, waiver is impossible. Thus, applying the fugitive disentitlement doctrine to cases such as *Wenqin Sun* or *Bright* is inappropriate because the petitioners neither abandoned nor waived their appeals; on the contrary, the petitioners aggressively and diligently pursued their appeals.

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Looking individually at each of the rationales for the fugitive disentitlement doctrine through the lens of *Ortega–Rodriguez*, none seems fulfilled when applied to the cases like *Wenqin Sun* and *Bright*. Thus, the Supreme Court should resolve the circuit split in favor of the Ninth Circuit, which does not apply the doctrine to immigration appeals in the this context.[153]

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[149] *See supra* Part III.D.

[150] *See* Ortega–Rodriguez v. United States, 507 U.S. 234, 243–44 (1993) (noting that a defendant who flees and is recaptured after connection but before sentencing does not waive the right to appeal sentencing errors, although he waives the right to appeal the conviction).

[151] BLACK'S LAW DICTIONARY 2 (9th. ed. 2009).

[152] *Id.* at 1717.

[153] *See supra* Part II.C.*1*.

## IV. ALTERNATIVES TO THE FUGITIVE DISENTITLEMENT DOCTRINE

The rationales of the fugitive disentitlement doctrine are not without merit, and alternative measures could permit aliens to complete an appeal while avoiding the concerns presented by the courts.[154] First, the Third Circuit has criticized and invalidated the regulatory provision that prevents an alien who complies with a removal order from pursuing relief.[155] In *Prestol Espinal v. Attorney General of the United States*, the circuit court held the regulation inconsistent with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[156] If all circuits follow this holding, an alien who complies with the removal order could continue to pursue administrative relief after departing the United States in the absence of such regulation. This solution lacks efficiency, especially for the alien, as communication with attorneys may be more difficult from abroad. Furthermore, if the alien receives favorable relief, the alien will need to pay to return to the United States, a costly expenditure that could be avoided by allowing the alien to remain in the country during the appeal process.

Another option would be for Congress to pass a statutory amendment to 8 U.S.C. § 1252(b)(8)(C)[157] to allow aliens subject to removal orders to surrender to custody but not face deportation until all appeal options are exhausted. Remaining in custody during the pendency of appeal would align with the circumstances of *Ortega–Rodriguez*, giving a court no authority to apply the

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[154] An alien may also file for an administrative stay of removal. 8 C.F.R. § 1241.6 (2012). However, should the Department of Homeland Security deny the stay, the alien will find herself in the same predicament.

[155] Prestol Espinal v. U.S. Att'y Gen., 653 F.3d 213, 222–23 (3d Cir. 2011) (finding the regulation, 8 C.F.R. § 1003.2(d), in conflict with congressional intent). Additionally, the Fifth Circuit Court of Appeals recently found this regulation to be in conflict with congressional intent). *See* Garcia–Carias v. Holder, 697 F.3d 257 (5th Cir. 2012), *available at* 2012 WL 4458228 at *5 (concluding that 8 U.S.C. § 1229a(c)(7) (2006) "unambiguously gives aliens a right to file a motion to reopen regardless of whether they have left the United States").

[156] 652 F.3d 213, 224.

[157] "[Request for review of an administrative immigration decision] does not require the Attorney General to defer removal of the alien." 8 U.S.C. § 1252(b)(8)(C) (2006).

fugitive disentitlement doctrine.[158] Considering the duration of the appeals process, however, this could subject a petitioner to a lengthy, expensive confinement. In order to shift the financial burden to the petitioner and prevent prolonged confinement, Congress could provide for alternative monitoring, such as an ankle bracelet, at the expense of the appellant.[159] Such a device could also eliminate enforcement concerns should an appeals court decide unfavorably for the alien.[160]

## V. CONCLUSION

Application of the fugitive disentitlement doctrine to immigration appeals where the petitioner "has maintained the same address throughout his removal proceedings, the address was known to DHS, and DHS made no attempt to locate or arrest the alien following his failure to report for removal"[161] fails to fulfill any of the Supreme Court's rationales for the doctrine. Thus, the existing split between the Fifth and Ninth Circuits should be resolved in favor of the Ninth's rejection of the doctrine. Considering the volume of immigration appeals,[162] other immigrants will face the lose-lose decision of surrendering for removal or evading the government if courts apply the doctrine.

Events after the Ninth Circuit's decision to shun the fugitive disentitlement doctrine demonstrates the practical justice of such a choice. In May 2010, an immigration judge vindicated Wenqin Sun by adjusting her status, allowing her to remain in the

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[158] Conceptualized differently, if an alien immediately surrendered upon notice of removal, she would never become a fugitive. For a discussion of current regulations regarding the detention of an alien during the removal period, see 8 C.F.R. § 241.3–.4 (2012).

[159] *See generally* Jody Klein–Saffran, *Electronically Monitored Home Confinement—Not a Panacea for Corrections, but a Useful Tool*, INT'L ASS'N OF RESIDENTIAL AND CMTY. ALTS. J., May/June 1991, at 30 (discussing successes and the future of the federal home-confinement program).

[160] *See supra* Part III.A.

[161] Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2681 (2012).

[162] *See* U.S. DEP'T OF JUSTICE, *supra* note 9 (showing the Board of Immigration Appeals received over 30,000 cases in recent years).

country.[163] Her appeal clearly demonstrated substantive merit, and an application of the fugitive disentitlement doctrine would have stripped her of legal entitlement to remain in the United States. By contrast, countless other immigrants could lose their ability to seek justice under the Fifth Circuit's ruling. Ike Romanus Bright remains incarcerated in a South Texas Detention center desperately pursuing post-conviction relief.[164] His deportation looms imminently.[165]

*Lawrence Serkin Winsor*

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[163] Order of the Immigration Judge *In re* Sun (May 21, 2010) (No. A079-592-229); E-mail from Drew Sieminski, Assoc., Law Offices of Chung N. Phang, to author (Sept. 22, 2011, 17:17 EST) (on file with author) ("Ms. Sun's adjustment of status application was granted by the Immigration Judge in May 2010.").

[164] E-mail from Sean Keane–Dawes, Att'y, Law Offices of Sean Keane–Dawes, P.C., to author (Aug. 2, 2012, 15:53 EST) (on file with author).

[165] *Id.*