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CRIMINAL DIVISION

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NO. 79973-3

THE SUPREME COURT FOR THE STATE OF WASHINGTON

CITY OF SEATTLE

Petitioner,

v.

STEPHEN KLEIN and MELISSA DEIBERT,

Respondents.

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SUPREME COURT
STATE OF WASHINGTON

BRIEF OF RESPONDENTS

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I. ISSUES

Where a person convicted of a crime has exercised his or her constitutional right to appeal, is the fact that the trial court issued a bench warrant, by itself, sufficient to establish a knowing, intelligent and voluntary waiver of that right where the appellant was advised that the right is waived by failure to file a notice of appeal within 30 days but is not told that a subsequent failure to appear or comply would constitute a waiver?

Does the superior court have discretion to permit the appeal to go forward when there is a bench warrant outstanding in the trial court?

II. STATEMENT OF FACTS

Seattle v. Deibert. On September 29, 2005, Deibert was charged with misdemeanor theft for an incident which occurred that same date in Seattle Municipal Court No. 476891. Deibert was convicted after a jury trial. CP-D 52, 10-14.¹ As a result, her deferred sentence in Seattle Municipal Court No. 431554 was revoked. CP-D 21. She appealed both judgments. CP-D 14, 21.

While the appeal was pending, Deibert failed to appear for a review hearing and the municipal court issued a bench warrant. The City moved to

¹The clerk's papers for Deibert's case are referred to here as CP-D and those for Klein's case are CP-K.

dismiss her appeal, invoking the fugitive disentitlement doctrine. CP-D 24-28, 1-23. The King County Superior Court denied the City's motion, holding that the warrant, by itself, did not establish a knowing, intelligent and voluntary waiver of the constitutional right to appeal.

Deibert filed her RALJ brief and the matter was set for oral argument. CP-D 29-58. In her brief, Deibert asserts that her trial counsel was ineffective for failing to present a good faith claim of right defense and that the prosecutor committed misconduct. CP-D 29-58.

Seattle v. Klein. On December 30, 2005, Klein was charged with assault for an incident which occurred that same date in Seattle Municipal Court No. 480244. CP-K 10-18. The case went to trial in March 2006, before the United States Supreme Court announced the test for "testimonial" statements --which implicate the accused's right to confrontation-- in *Davis v. Washington*, 126 S.Ct. 2266, 165 L.Ed.2d 224, 2006 U.S. LEXIS 4886, 74 U.S.L.W. 4356 (June 19, 2006). Klein asserted he acted in self-defense. The complaining witness did not testify. Yet, the City convinced the municipal court the complaining witness's statements to the investigating police officers were non-testimonial. Klein was convicted and he filed a timely appeal. CP-K 26-57.

While the appeal was pending, Klein failed to appear for a review hearing. The City moved to dismiss the appeal, and the motion was heard along with the motion in Deibert's case. CP-K 1-20, 21-25. The superior court denied the motion, holding the warrant, by itself, did not establish a valid waiver of the constitutional right to appeal. Klein filed his RALJ brief and the matter was set for oral argument. CP-K 26-57. In his brief, Klein asserts his right to confrontation was violated and he did not receive a fair trial, because his counsel was ineffective and the prosecutor committed misconduct. CP-K 26-57.

The City sought discretionary review in both cases. The Court of Appeals granted review on the dismissal question and stayed review of the RALJ appeals. Review of the dismissal issue was consolidated and transferred to this court.

III. AUTHORITY AND ARGUMENT

A. Introduction

The right to appeal a criminal conviction is guaranteed by the Washington constitution. Wash. Const. art. I § 22. Appeals are essential to protecting our citizens from erroneous convictions and, thus, maintaining the integrity of the criminal justice system. Once a person exercises that right,

the appeal cannot be withdrawn or dismissed unless the government proves a knowing, intelligent and voluntary waiver. Such a waiver will not be presumed and the right to appeal cannot be involuntarily forfeited. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978); State v. Kells, 134 Wn.2d 309, 313, 949 P.2d 818 (1998); State v. Tomal, 133 Wn.2d 985, 988, 948 P.2d 833 (1997).

The constitutional right to appeal and the attendant waiver principles cannot be overcome by the mere incantation of the fugitive disentitlement rule. The rule presumes an appellant has waived or otherwise abandoned the appeal solely from the issuance of a bench warrant in the sentencing court. This fact alone does not satisfy constitutional waiver principles. This court has not had the opportunity to test the fugitive disentitlement doctrine against Washington's constitutional right to appeal. In its most recent discussion of the doctrine, the court did not reach the constitutional question. *See State v. French*, 157 Wn.2d 593, 602 note 2, 141 P.3d 54 (2006). This case squarely presents that issue.

The fugitive disentitlement doctrine is an ancient jurisprudential rule which cannot be reconciled with this state's constitutional right to appeal and modern waiver principles. The doctrine was imported from, and perpetuated

in, jurisdictions where the right to appeal is not guaranteed by the constitution. In *French*, this court observed the seminal decision in *State v. Handy* relied on cases from other jurisdictions. French, 157 Wn.2d at 600-01. The doctrine and its rationale cannot overcome a criminal appellant's constitutional right to appeal and are no substitute for a waiver of that right.

The superior court could not terminate respondents' constitutional right of first review absent a valid waiver. On this record, the City failed to prove either Klein or Deibert knowingly waived their right to appeal. The right to appeal cannot be involuntarily forfeited nor can a waiver be presumed from the mere issuance of a bench warrant. The superior court's decision is fully supported by the law and should be affirmed.

B. The Washington constitution guarantees the right to appeal which is essential to preventing erroneous convictions and maintaining the integrity of the criminal justice system.

The Washington constitution guarantees a right of first review to all persons convicted of a crime.

In criminal prosecutions the accused shall have the . . . right to appeal in all cases.

Const. art. 1 § 22 (amendment 10). Appendix 1. Our state's constitution "grants not a mere privilege but a 'right to appeal in all cases.'" State v. Sweet, 90 Wn.2d at 286 (quoting State v. Schoel, 54 Wn.2d 388, 341 P.2d

481 (1959)). The right to appeal is set upon equal footing with other constitutional rights that are essential to preventing erroneous convictions and guaranteeing the fair administration of justice.

The presence of the right to appeal in our state constitution convinces us it is to be accorded the *highest respect* from this court. Hence, we decline to dilute the right by application of an analysis which differs in any substantial respect from that which is applicable to other constitutional rights.

Sweet, 90 Wn.2d at 286 (emphasis added).

The right to appeal is a vital component of the criminal justice system. The essential function of appellate review is to reduce the risk of erroneous conviction. State v. Rolax, 104 Wn.2d 129, 139, 702 P.2d 1185 (1985), quoting Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction* 8 U. Puget Sound L. Rev. 375, 383 (1985). "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to correct adjudication of guilt or innocence." Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956) (while the U.S. Constitution does not guarantee the right to appeal, equal protection requires that indigent appellants be provided with transcripts necessary for appellate review provided by state law).

Appeals make a difference in criminal cases. A significant number of appeals lead to the modification or reversal of convictions, supporting the conclusion that abridgment of the right to appeal would subject defendants to a material risk of erroneous conviction. . . .

In addition, recognition of a constitutional right to a criminal appeal insulates basic procedural requirements from the winds of legislative change and invests them with a dignity that otherwise may be lacking.

M. Arkin, *Rethinking The Constitutional Right To A Criminal Appeal*, 39 UCLA Law Rev. 503, 514, 519 (1992) (observing that Washington has placed "stringent requirements on waivers of criminal appeals.")

Washington was the first state to grant an express *constitutional* right to appeal criminal convictions. Lobsenz, *supra*, at 376-77. The right of first review in the federal system and many other states is established only by statute or court rule. *Id.* The Washington right to appeal is protected by constitutional waiver principles which cannot be trumped by a jurisprudential rule developed in jurisdictions without a constitutional right to appeal. Thus, in this state, the fugitive disentitlement doctrine must yield to settled principles of constitutional waiver.

- C. **The right to appeal is not waived unless the prosecution proves that the appellant made a knowing, intelligent and voluntary waiver. The right to appeal may not be involuntarily forfeited.**

As this court held in *Sweet*, the right to appeal is not waived unless the government shows a constitutionally valid waiver.

We have held there exists *no presumption* in favor of waiver of constitutional rights. This principle applies equally well to the constitutional right to appeal.

We hold there is *no presumption* in favor of the waiver of the right to appeal. *The State* carries the burden of demonstrating that a convicted defendant has made a voluntary, knowing and intelligent waiver of the right to appeal.

Sweet, 90 Wn.2d at 286-287 (citations omitted, emphasis added, court's italics). This court has twice applied the *Sweet* standard to reject the government's assertion that a criminal appellant abandoned or forfeited the right to appeal because of the manner in which the appeal was prosecuted. State v. Tomal, 133 Wn.2d 985, 948 P.2d 833 (1997); State v. Kells, 134 Wn.2d 309, 949 P.2d 818 (1998). These decisions are instructive here.

In Tomal, the superior court denied the State's motion to dismiss a criminal appellant's appeal for failure to prosecute the appeal pursuant to RALJ 10.2(a). Under that rule, an appeal is deemed abandoned where no action has been taken for 90 days and is subject to involuntary dismissal. Tomal's attorney had failed to take any action to prosecute the appeal for four

years. Tomal's attorney finally filed a brief, but then did not file a transcript. The superior court found the delay was due purely to attorney error and denied the State's motion.

This court affirmed the superior court. The question was whether the appeal could be "dismissed as abandoned without a showing that the defendant made a waiver of his right to appeal?" The answer was no.

In a criminal appeal of right, knowing waiver by the defendant is required to dismiss an appeal. We agree with the State that there is some tension between RALJ 10.2 and the requirement of a knowing waiver. The rule appears to create a presumption that no action taken on an appeal for 90 days will constitute an abandonment of the appeal. However, there can be no presumption in favor of the waiver of the right to appeal in a criminal case. Rather, the State bears the burden of demonstrating that a convicted defendant has made a voluntary, knowing and intelligent waiver of the right to appeal *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

Tomal, 133 Wn.2d at 989. The court rejected the State's argument "it is not asserting 'waiver' but only 'abandonment' of the appeal," explaining that a waiver via abandonment must still be knowing and voluntary. Tomal, 133 Wn.2d at 990, citing State v. Ashbaugh, 90 Wn.2d 432, 439, 583 P.2d 1206 (1978) (reversed dismissal for failure to pay the \$25 filing fee as required by court rule).

The City may argue *Tomal* is inapplicable here because this case

involves the appellants' conduct, not the attorney's conduct. But the court noted that inaction by the appellant personally may establish a valid waiver when the appellant is informed of the consequences of his or her conduct.

In a case where the judge informs the defendant at the time of sentencing of the right to appeal and the timing requirements, then the defendant's failure to timely pursue an appeal may be found to be a valid waiver. See *CrRLJ 7.2(b)*; former *RALJ 2.7*; [*State v.*] *Perkins*, 108 *Wn.2d* [212], 216-17 [(1987)].

Tomal, 133 *Wn.2d* at 990.

Thus, knowledge is a key component of the waiver of appellate rights. See French, 157 *Wn.2d* at 601, citing Sweet, 90 *Wn.2d* at 287. The lack of knowledge was dispositive in *State v. Kells*. The state charged 15-year old Kells with second degree murder. After the juvenile court declined jurisdiction, Kells plead guilty. The plea form informed Kells he waived his right to appeal the conviction by pleading guilty. At sentencing, as required by *CrR 7.2(b)*, the trial court informed Kells of his right to appeal the conviction and told him the appeal must be filed within 30 days or the right would be "irrevocably waived." Kells, 134 *Wn.2d* at 311, 312. But the rule did not require that Kells be informed of his right to appeal the declination order transferring him to superior court and he was not so informed. Id. Fifteen months later, Kells' attorney discovered his client had a right to

appeal the decline decision and filed a notice of appeal. The Court of Appeals dismissed the case as untimely pursuant to RAP 18.8(b).²

This court unanimously reversed because the Court of Appeals failed to make a *Sweet* analysis before dismissing the appeal. The court explained, "an involuntary forfeiture of the right to a criminal appeal is never valid." Kells, 134 Wn.2d at 313. As in *Tomal*, the court held that enforcement of the rules of appellate procedure must be balanced against a criminal appellant's constitutional right to appeal.

Despite this strong language [in RAP 18.8], this court made clear in *State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978) that the strict application of filing deadlines must be balanced against a defendant's state constitutional right to appeal.

Kells, 134 Wn.2d at 314. The court held the State did not affirmatively demonstrate that Kells understood his right to appeal and "consciously gave up the right." Id.

A person who has exercised the right to an appeal is aware of that right. This knowledge is obtained primarily through the advice of appellate rights.

²The rule permits an extension of time to file an appeal only under extraordinary circumstances to prevent a gross miscarriage of justice and directs the court to find that ordinarily the finality of decisions outweighs the privilege of a litigant to seek an extension of time. RAP 18.8(b).

Waiver is the intentional relinquishment or abandonment of a known right or privilege. The simple reading of *CrR 7.1(b)* to a defendant may well be insufficient in itself to give rise to a conclusion of waiver. Thus, in addition to showing strict compliance with *CrR 7.1(b)* by reading appeal rights to a defendant, the circumstances must at least reasonably give rise to an inference the defendant understood the import of the court rule and did in fact willingly and intentionally relinquish a known right.

Sweet, 90 Wn.2d 286-87. There can be no waiver of the constitutional right to appeal where appellant has not been warned that the conduct in question --failure to appear or comply-- will result in the relinquishment of that right.

CrRLJ 7.2(b) contains the advice of appellate rights given in courts of limited jurisdiction. The only conduct identified as a waiver of the right to appeal is the failure to timely file a notice of appeal. CrRLJ 7.2(b)(2). *See also* CrR 7.2(b)(3) (“unless a notice of appeal is filed within 30 days . . . the right to appeal is irrevocably waived.”) The advice of appellate rights provides no notice that a convicted person will waive his or her constitutional right to appeal through the mere issuance of a bench warrant for a failure to appear or by failing to comply.³ Klein and Deibert had no reason to believe that missing any subsequent court dates would cause their appeal to be

³The express inclusion of the one means of waiving the right to appeal --failure to timely file a notice of appeal-- implicitly excludes others. In re the Detention of Williams, 147 Wn.2d 476, 491, 55 P.2d 597 (2002) (stating the settled rule of *expressio unius est exclusio alterius*).

dismissed. Consequently, they did not knowingly and voluntarily give up this right when they did not appear in municipal court.

This conclusion is consistent with the court's most recent decision analyzing a purported waiver of the constitutional right to appeal, *State v. French*. There the court held that *French* did not waive his right to appeal when he fled the jurisdiction after being convicted, but before sentencing.

We can presume that a defendant who has already filed an appeal has been informed of the right to appeal. The same presumption, however, does not apply to a defendant who has not yet begun the appellate process.

French, 157 Wn.2d at 602.

The superior court correctly denied the City's motion to dismiss these appeals. CP-K 21-25; CP-D 24-28. Had the superior court terminated the appeals, the judge would have committed the same error reversed in *Tomal* and *Kells*. The superior court's ruling that the City failed to prove Klein or Deibert waived the right to appeal is fully supported by the law.

The City's argument is no different from that advanced by the State in *Tomal* and *Kells*. The sole basis offered for the dismissal of these appeals is the purported common law rule "if a defendant flees the jurisdiction of the court pending an appeal, his *constitutional* right to appeal is deemed waived." Brief of Petitioner at 5. Thus, the City is asking this court to presume a

waiver or find an involuntary forfeiture solely because the municipal court issued bench warrants when someone failed to appear at a hearing. The City's argument is contrary to *Sweet*, *Tomal*, and *Kells*. Respondents' failure to appear at a hearing or allegations that they failed to comply with their sentences reveals nothing on the question whether the City has proved a valid waiver. The record does not indicate that either Klein or Deibert were aware of the outstanding warrants or have left Washington state. Indeed, the City has not even established that any attempts have been made to serve the warrants. In any event, Klein and Deibert did not make a conscious decision to waive their constitutional right to appeal and accept the finality of their convictions. There is no correlation between the issuance of the arrest warrants and a knowing and voluntary waiver of the right to appeal.⁴

The City claims the fugitive disentitlement doctrine supercedes the constitutional waiver of the right to appeal. Brief of Petitioner at 7-8. The City attempts to summarily sweep aside the prerequisites of the constitutional waiver by asserting *Sweet* does not apply since Sweet had not filed a timely

⁴Bench warrants issue and are quashed all the time for a variety of reasons. See e.g., *State v. Flores-Serpas*, 89 Wn.App. 521, 524 (1998) ("There are any number of circumstances that could result in an offender's involuntary absence from community supervision, e.g., a material witness warrant in a case in another state or a warrant to stand trial for a crime in another jurisdiction.").

notice of appeal. Brief of Petitioner at 8. That difference is meaningless here and fails to explain why the *Sweet* analysis was applied to Tomal--who timely exercised his right to appeal.

The City's primary claim is respondents have *forfeited* their constitutional right to appeal. Brief of Petitioner at 6-7. This novel theory is unsupported by citation to Washington law and is contrary to the case law governing the waiver of constitutional rights. That theory will be discussed further below. Here it suffices to say that the City's claim flies in the face of the court's unequivocal statement in *Kells* that the constitutional right of first review cannot be involuntarily forfeited. *Kells*, 134 Wn.2d at 313. The City's motion to dismiss was not grounded in the principles of constitutional waiver doctrine. Rather, the City's motion turns wholly on the validity of the fugitive disentitlement doctrine.

D. The common law fugitive disentitlement doctrine cannot defeat a criminal defendant's constitutional right to appeal. The doctrine presumes rather than proves a knowing, intelligent and voluntary waiver of the appeal. To the extent that the doctrine operates as a forfeiture of the right to appeal it conflicts with prerequisites for a valid waiver of constitutional rights.

Washington courts have dismissed appeals where the criminal appellant fled the jurisdiction, escaped from jail or violated the conditions of release pending appeal. There is reason to doubt whether the fugitive

disentitlement doctrine can continue to exist in Washington. The court recently declined to address this question in State v. French, 157 Wn.2d at 602 (see note 2, *supra*). In French, this court discussed the origin of the doctrine in Washington, noting that the seminal decision in *State v. Handy* relied on cases *from other jurisdictions*. French, 157 Wn.2d at 600-01. The court went on to hold that the fugitive disentitlement doctrine did not apply to a defendant who absconds after conviction, but before sentencing (*i.e.*, before he is advised of or exercises the right to appeal). Id. at 602-03.

No Washington court has squarely tested the validity of the fugitive disentitlement doctrine against the constitutional right to appeal. Instead, most Washington decisions applying the so-called fugitive from justice rule have merely recited the rule without reference to the requirements of a constitutionally adequate waiver. The City's attempt to terminate the appeals in this case based on the fugitive rule alone cannot be sustained on this questionable authority.

The City relies primarily on *State v. Johnson*, 105 Wn.2d 92 (1986), to argue the fugitive disentitlement doctrine is compatible with the state constitutional right to appeal and the law on constitutional waivers. Brief of Petitioner, at 9. *Johnson* did not so hold.

Johnson reviewed the orders dismissing two appeals where the trial court had issued warrants for the appellants' arrest. The primary issue in *Johnson* was the scope of the trial court's authority to impose conditions of release pending the appeal in two consolidated cases. Johnson, 105 Wn.2d at 94-95. In one case, the court held that Williams was not subject to conditions of release pending appeal, so the trial court had no authority to hail him into court or to issue a warrant when he failed to appear. In the other case, the trial court lawfully conditioned Johnson's release pending appeal on his participation in probation. The court affirmed that dismissal because Johnson was on notice that probation was connected to his appeal.

It is clear from the record that the trial court judge and Johnson's attorney had a clear understanding probation was to be a condition of Johnson's release, pending appeal. By failing to appear at the court-ordered probation revocation hearing and failing to submit to the court's authority . . . Johnson *affirmatively waived his right to prosecute his appeal.*

Johnson, 105 Wn.2d at 97-98 (emphasis added).

While the *Johnson* decision gave a nod to the constitutional waiver analysis from *Sweet*, the court appeared to ground its decision on the common law fugitive disentitlement doctrine. "When [the appellant] withdraws himself from the power of the Court to enforce its judgment, he also

withdraws the questions which he had submitted to the Court's adjudication."

Johnson, 105 Wn.2d at 97, quoting Eisler v. U.S., 338 U.S. 189, 192 (1949).

For this proposition, the court cited to the one United States Supreme Court case and a brief litany of Washington cases on this topic. Id. at 97-98. None of those cases, or others cited by the City, considered whether the fugitive rule was incompatible with the waiver of constitutional rights. See State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984)⁵; State v. Mosley, 84 Wn.2d 608, 528 P.2d 986 (1974)⁶; State ex rel Soudas v. Brinker, 128 Wn.2d 319, 323-24, 222 Pac. 615 (1924)⁷; State v. Rosales-Gonzales, 59 Wn.App. 583,

⁵The court dismissed Koloske's *petition for review* after his conviction was affirmed by the Court of Appeals. Rejecting Koloske's claim that he had not waived his right to appeal, the court explained, "[o]ur refusal to proceed with discretionary review in the absence of defendant does not raise the constitutional issue." Id.

⁶In *Mosely*, the court noted that the appellant "does not question [the] constitutionality" of the "prevailing practice" to dismiss a fugitive's appeal. Id.

⁷It is interesting to note that the court also denied Brinker's writ of mandamus to compel the trial court to certify the statement of facts to the appellate court after the jurisdictional period had run. The court explained, "The right of appeal in such cases is no doubt granted by the constitution, but the procedure on appeal is entirely statutory, and this court is powerless to grant relief against a failure to comply with the mandatory requirements of that statutes governing appeals." Brinker, 128 Wash. at 321, quoting State v. White, 40 Wash. 428, 82 Pac. 743. This holding probably does not survive the holding in *Tomal*.

799 P.2d 756 (1990).

These cases trace their lineage to a turn-of-the-century Washington case, *State v. Handy*, 27 Wash. 469, 67 P. 1094 (1902), where the court adopted the fugitive disentitlement doctrine as formulated by the United States Supreme Court and the courts in New York and Massachusetts. *Handy*, 27 Wash. at 470-71, citing *Smith v. U.S.*, 94 U.S. 97 (1876); *People v. Genet*, 59 N.Y. 80 (17 Am. Rep. 315) (1874); *Commonwealth v. Andrews*, 97 Mass. 543 (1867). Those jurisdictions do not recognize a constitutional right to appeal. See Lobsenz, *supra*, at 376-77; Arkin, *supra*, at 516 note 64.⁸

A brief review of decisions applying some version of the fugitive

⁸The City claims both Massachusetts and Texas have upheld the fugitive rule against a constitutional right to appeal. Brief of Petitioner at 9-10. The City is wrong. Criminal appeals in those states are not constitutionally mandated. The Massachusetts Declaration of Rights, Art. XII does not provide for an appeal as of right, Appendix 2, and counsel could not find any authority stating that criminal appeals are guaranteed by this provision. The Texas court rejected the constitutional challenge to its fugitive disentitlement statute because criminal appeals in that state are creatures of statute.

It is also true that aside from the right created and given by statute to do so, one has *no constitutional right of appeal at all*. . . . The statute created the right to appeal and may be manifestly prescribe how that right may be forfeited or lost.

Powell v. State, 99 Tex. Crim. 276, 286, 269 S.W. 443 (1925). See also *Bullock v. State*, 709 S.W.2d 669 (1986) (the fugitive disentitlement statute was repealed, but its substance continued by court rule).

disentitlement doctrine reveals that the rule has either been imported from federal precedent or codified by statute or court rule. *See e.g.*, North Dakota v. Bell, 608 N.W.2d 232 (2000) (adopting the fugitive dismissal rule, citing as authority Molinaro v. New Jersey, 396 U.S. 365, 366, 24 L.Ed.2d 586, 90 S.Ct. 498 (1970); Allen v. Georgia, 166 U.S. 138, 41 L.Ed.2d 949, 17 S.Ct. 525 (1987); Estelle v. Dorough, 420 U.S. 534, 43 L.Ed.2d 377, 95 S.Ct. 1173 (1975); Ortega-Rodriguez v. U.S., 507 U.S. 234, 249, 122 L.Ed.2d 581, 113 S.Ct. 1199 (1993) and cases from states where the doctrine has been judicially adopted or codified by statute or court rule). When adopting the fugitive rule, courts in other states have noted that there is no federal constitutional bar to the fugitive dismissal rule and no applicable state constitutional protection for the right to appeal. *Id.*, at 234-35 (“The right of appeal is purely statutory in this state.”). *See also*, Nelson v. State, 210 S.W.3d 477, 479 (Mo. App. 2007) (“Application of the escape rule does not violate Nelson’s constitutional rights; he has no constitutional right to appeal his conviction . . .”).

It is important to note that the fugitive disentitlement doctrine has not been codified by the Washington Supreme Court or the Legislature, as some jurisdictions have done. *See* 5 W. LaFave, J. Isreal & N. King, *Criminal*

Procedure § 27.5(c), at 920, not 64 (2nd Ed. 1999). Thus, the fugitive disentitlement doctrine is not a mandatory rule.⁹ Rather, it is a judicially created rule that permits the court the discretion to further specific judicial goals. It is not an absolute bar to appellate review. *See e.g., City of Seattle v. Patu*, 147 Wn.2d 717, 722, 58 P.3d 273 (2002) (Johnson, J., dissenting) ("Because the invited error doctrine is a judicially created prudential doctrine, it is not an absolute bar to review of fundamental constitutional rights . . . I would apply invited error as we do other prudential doctrines, with discretion and to further specific judicial goals."). Given the constitutional right at stake, this practice requires close examination.

Washington cases discussing the fugitive disentitlement doctrine have listed the oft-cited rationale for the rule: (1) a fugitive's case is "moot," because if it is affirmed the fugitive is unlikely to appear to submit to sentence and if a new trial is ordered the fugitive may or may not appear; (2) having demonstrated disrespect and scorn for the court's authority by fleeing, the fugitive should not be entitled to review, (3) the fugitive who remains at

⁹There are exceptions to the rule. *State v. Rempel*, 114 Wn.2d 77, 80, 785 P.2d 1134 (1990) (sufficiency of the evidence may be heard on appeal despite the defendant's fugitive status); *State v. Ortiz*, 113 Wn.2d 32, 774 P.2d 1229 (1989) (defendant who is absent from the jurisdiction due to deportation is still entitled to have his appeal decided on the merits).

large for an extended period of time may prejudice the prosecution and obtain a benefit if the government must retry the case after evidence grows cold and (4) the fugitive dismissal rule discourages escape and promotes the orderly administration of justice. State v. French, *supra*, at 600-01; State v. Remple, 114 Wn.2d 77, 785 P.2d 1134 (1990). The City urges these traditional justifications for the rule. Brief of Petitioner at 5-6.

But these reasons do not justify dismissal of respondents' appeals in a state where an appeal is a constitutional right. First, respondents' appeals are not moot because the courts can provide effective relief by reversing their convictions, State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983), even if that means remanding for a new trial where they may or may not appear. The U.S. Supreme Court recognizes: "an escape does not strip the case of its character as an adjudicata case or controversy. . . ." Molinaro v. New Jersey, 396 U.S. at 366 (emphasis added). Moreover, the City asked the superior court to dismiss respondents' appeals now, because there is some possibility that they may not appear in the future. This assertion is wholly speculative and cannot defeat respondents' constitutional right to appeal.

Second, scorning the court's authority is not sufficient to justify dismissal of an appeal that this is a constitutional right and any waiver of this

right must be knowing, intelligent and voluntary. Showing disrespect for the court or failing to comply with court orders is analogous to the failure to comply with the rules on appellate procedure. There is tension between the procedural rules and preserving respect for the authority of the court and the constitutional right to appeal. Tomal, 133 Wn.2d at 989. The court has resolved that tension in favor of the right to appeal and found other means to address an appellants' non-compliance with the rules. Tomal 133 Wn.2d at 990-91 (sanctions may be imposed after proper notice has been given). *See also* Kells, 134 Wn.2d 314 (application of the rules of appellate procedure must be balanced against the state constitutional right to appeal). While disrespect for the court should not be encouraged nor condoned, it cannot defeat respondents' constitutional right to appeal. Some sanction short of dismissal may be necessary and appropriate to address such misconduct if it detrimentally affects the appellate process.

Third, the City has failed to demonstrate any specific prejudice suffered by the prosecution from respondents' absence. There are cases from other jurisdictions where the courts have dismissed or limited appeals where the record was lost or destroyed due to the appellant's escape. *See e.g., State v. Brown*, 116 N.M. 705, 866 P.2d 1172 (1993). In New Mexico, a fugitive

does not forfeit his or her constitutional right to appeal. Brown, 866 P.2d at 1174, citing Mascarenas v. State, 94 N.M. 506, 612 P.2d 1317 (1980). Nonetheless, Brown escaped from custody during jury deliberations and remained a fugitive for 13 years. During his long absence, the court reporter destroyed his notes in accordance with applicable regulations. Brown, 866 P.2d at 1173, 1175. The court dismissed the appeal because Brown's fugitive status "significantly interfered with the appellate process and made meaningful appeal impossible, as well as effectively foreclosing the possibility of re prosecution." Brown, 866 P.2d at 1175. Here, the record has been properly preserved and transcripts have been filed. In the event a new trial is granted, the City can introduce the written testimony of any witnesses who may no longer be available for trial. ER 804(b)(1). Respondents' absence has not prejudiced the City nor detrimentally affected the appeals process.

Fourth, any deterrent effect of dismissal is adequately addressed by the fact that punishment can, and likely will, be imposed on probationers who fail to appear or comply with their sentences and on prisoners who escape. French, 157 Wn.2d at 602. *See also* Mascarenas v. State, 94 N.M. 506, 612 P.2d 1317, 1318 (New Mexico 1980); State v. Byrd, 448 N.W.2d 29, 31

(Iowa 1989); State v. Tuttle, 713 P.2d 703, 705 (Utah 1985). In Tuttle, the court explained, “[n]either law nor logic justifies our undertaking to impose such a sanction . . . Nothing in the law warrants this Court’s imposing an additional punishment [than already prescribed by the legislature] for escape.” Tuttle, 713 P.2d at 704.

In *French*, this court found the rationales for the fugitive rule “become attenuated when applied in the context of a convicted but unsentenced defendant.” French, 157 Wn.2d at 602. Those rationale are equally inapplicable where a criminal appellant has asserted the constitutional right to challenge a potentially erroneous conviction on appeal.

Courts in other jurisdictions have rejected the fugitive disenfranchisement doctrine for similar reasons. In New Mexico and Utah, the courts have held that the constitutional right to appeal cannot be waived or forfeited by operation of appellant’s fugitive status. The New Mexico rejected the fugitive rule for the following reasons.

The Constitution of New Mexico provides that an aggrieved party shall have an absolute right to one appeal. N.M. Const. Art. VI, § 2. A person convicted of a crime does not forfeit his right to appeal simply because he has escaped from confinement. He still has a right to have his conviction reversed if he was erroneously convicted or if his constitutional rights were violated. If he is granted a new trial, that trial can always be held when he is recaptured. If

his conviction is affirmed, he stands in the same position as before the appeal, but his rights have been protected as required by the New Mexico Constitution.

Mascarenas, 612 P.2d at 1318.

The Utah court held that a fugitive who returned to custody may have his or her appeal reinstated. Tuttle, 713 P.2d at 704-05. In doing so, the court questioned the rationale for the fugitive rule and the validity of the fugitive disentitlement doctrine in light of that state's constitutional right to appeal.

The Utah Constitution provides that a defendant in a criminal prosecution shall have a "right to appeal in all cases." *Utah Const. art. I § 12*. This shows that the drafters of our constitution considered the right of appeal essential to a fair criminal proceeding. Rights guaranteed by our state constitution are to be carefully protected by the courts. We will not permit them to be lightly forfeited. The stated premise of *Brady*—that an escape is an intentional abandonment of an appeal—is founded upon a questionable assumption, *i.e.*, that one who escapes has actually made a decision to abandon his appeal. A far more reasonable assumption is that the escapee has not even considered how his escape will affect his appeal rights.

Tuttle, 713 P.2d 704.

The fugitive disentitlement doctrine has been questioned in two states that have only a statutory right to appeal. White v. State, 514 P.2d 814 (Alaska 1973); State v. Byrd, 448 N.W.2d (Iowa 1989). In these cases, the

courts held that the rule did not bar reinstatement of the fugitive's previously dismissed appeal. The rationale adopted by those courts is persuasive here.

While the strict standards of waiver applicable to constitutional rights are not here involved, we nevertheless are confronted with a statutory right of the utmost importance. It is one that may mean the difference between incarceration or freedom. To find a waiver of such a right, we must be convinced that there was "an intentional relinquishment or abandonment of a known right or privilege." There has been no showing that White, by his escape, intended to waive his right of appeal.

White, 514 P.2d at 815 (footnotes omitted). *Accord* Byrd, 448 N.W.2d at 30.

The balance between the common law fugitive rule and the right to appeal should be struck in favor of the constitutional right. This court should adopt the argument presented, but not ruled upon, in French.

French asserts that because there is no federal constitutional right to appeal, federal [and other state] courts may rely on utilitarian and pragmatic concepts such as mootness and disrespect to the judiciary to justify using the fugitive disentitlement doctrine. He argues, however, that Washington's guaranty of the right to appeal in all criminal cases trumps the doctrine's traditional justifications.

French, 157 Wn.2d at 602. French correctly argued that the fugitive disentitlement doctrine conflicts with the constitutional right to appeal. Respondents urge the court to address his arguments now and hold that the constitutional right prevails over the fugitive rule.

E. Washington's waiver-by-conduct cases provide sufficient guidance, and the court should reject the City's suggestion that the right to appeal can be forfeited.

The City urges this court to hold that respondents have forfeited their constitutional right to appeal. Brief of Petitioner at 6-7. As noted above, this novel theory conflicts with this court's statement in Kells that an involuntary forfeiture of an appeal is never valid.

Additional guidance arises from Washington "waiver-by-conduct" cases. City of Tacoma v. Bishop, 82 Wn.App. 850, 859, 920 P.2d 214 (1996); State v. Nordstrom, 89 Wn.App. 737, 745, 950 P.2d 946 (1997). Waiver of counsel requires a clear record that the accused has requested to proceed pro se and has been adequately warned of the risks of self-representation. Bishop, 82 Wn.App. at 858. Forfeiture occurs even where the accused was not so warned, but only when the accused's conduct is "extremely dilatory." Bishop, 82 Wn.App. at 859. Waiver-by-conduct combines elements of waiver and forfeiture. Bishop, 82 Wn.App. at 859.

Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel Contrary to forfeiture, "waiver by conduct" requires that the defendant be warned about the consequences of his actions, including the risks of proceeding pro se, and can be based upon conduct less severe than that constituting forfeiture.

Bishop, 82 Wn.App. at 859 (citations omitted).

In Bishop, the Court of Appeals did not find waiver by either forfeiture or conduct despite the trial court's unchallenged finding that Bishop "failed to demonstrate due diligence in obtaining counsel [and] that his conduct was dilatory." Bishop, 82 Wn.App. at 855, note 2, and 860. Bishop had failed to contact the public defenders office, as he had been instructed to do, before appearing at three separate court hearings.

Nonetheless, the Bishop court reversed and remanded the case for a new trial.

Although we do not condone Bishop's conduct, the facts do not support misconduct serious enough to require forfeiture, and we decline to hold that Bishop forfeited his right to counsel by failing to obtain counsel before trial. We hold that the municipal court erred in requiring Bishop to proceed to trial unrepresented, *without first warning him of the dangers and consequences of proceeding pro se*.

Bishop, 82 Wn.App. at 860. In sum, even though Bishop's conduct could have been an "implied request" to proceed pro se, such a request did not become a valid waiver because the court did not warn him of the risks of self-representation.

When this analysis is applied here, the City's claim fails. There is no record that either respondent was warned that the failure to appear in the trial

court or to comply with the terms of the sentence or probation might be construed as a waiver of the right to appeal. It is not logical to presume a person would know the constitutional right to appeal might be waived for non-compliance with her sentence. On these facts, neither a waiver by conduct nor forfeiture can be found.

EP is not persuasive here. The right to counsel involved in that case statutory right to counsel which is derived from the due process clause. It is not a fundamental constitutional right necessary to protect the person's physical liberty. EP, 136 Wn.App. at 403. There the court held a trial to terminate the mother's parental rights *in absentia* and without counsel. The court held that the mother had forfeited her statutory right to counsel by failing to appear at court hearings, of which she had notice, and failing to have any contact with her trial counsel so that he could provide effective representation. The court found this conduct to be "extremely dilatory" constituting a forfeiture. Also, the court observed the "child's right to a stable home cannot be put on hold interminably because the parent is absent from the courtroom and has failed to contact his or her attorney." EP, 136 Wn.App. at 406.

Those same concerns are not present here. Respondent conduct has

not been extremely dilatory. Their presence is not required at any hearing on the appeal. Since the appeal must be conducted solely upon the existing record, respondents lack of personal participation does not necessarily prevent counsel for rendering effective assistance. Finally, respondents' absence does not prejudice to the City or any other party.

F. The failure to provide notice to the appellant that the appeal will be dismissed violates due process.

This City's forfeiture theory also violates due process. The federal and state constitutions guarantee that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends 5, 14; Const. art. 1, § 3. Due process requires timely notice and a meaningful opportunity to be heard. "In the criminal context, due process requires that a criminal defendant be given notice prior to deprivation of a substantial right." Seattle v. Agrellas, 80 Wn. App. 130, 136-37, 906 P.2d 995 (1995) (citing State v. Fleming, 41 Wn. App. 33, 35-36, 701 P.2d 815 (1985)). The right to appeal is a fundamental constitutional right which applies "in all cases" and may be waived only by a knowing, intelligent, and voluntary waiver. Const. art. 1, § 22; Kells, 134 Wn.2d at 315; State v. Tomal, 133 Wn.2d at 989; State v. Sweet, 90 Wn.2d at 286. Due process also requires notice of proscribed conduct, and standards to prevent arbitrary enforcement, so that there is fair warning of

potential penalties from a chosen course of action. In re Powell, 92 Wn.2d 882, 888, 602 P.2d 711 (1979); State v. Jordan, 91 Wn.2d 386, 389, 588 P.2d 1155 (1979); State v. Dougall, 89 Wn.2d 118, 121-22, 570 P.2d 135 (1977); State v. Hovrud, 60 Wn. App. 573, 575, 805 P.2d 250, rev. denied, 117 Wn.2d 1005 (1991).

As noted above, respondents were not given notice that any failure to appear or comply with probation would result in the forfeiture, waiver or relinquishment of their right to appeal. Due process requires such notice before the appeal can be dismissed for such a reason.

Respondents' argument finds support in State v. Fleming, 41 Wn. App. at 35-36. There the court held that Fleming was denied his right to a jury trial without due process. A local rule provided that the accused's failure to personally appear at the pretrial conference would waive a previously filed jury demand. The jury trial notice sent to Fleming's counsel did not give notice of the rule. Fleming's attorney appeared at the pretrial hearing with a signed waiver of his client's presence, but Fleming did not personally appear. Based on Fleming's absence, the district court struck the jury trial demand. Fleming, at 35.

On appeal, Fleming argued that he was denied due process because the pretrial hearing notice did not notify him that his absence might result in waiving

the right to a jury trial. He also argued that the local rule was unconstitutional. The court of appeals agreed with both arguments, holding that the failure to notify Fleming of the consequences of non-appearance violated Fleming's rights under the state and federal due process clauses. Fleming, 41 Wn.App. at 35-36. The court further found the local rule unconstitutional, reasoning that "[p]rocedural rules of court cannot be used to take away substantive rights." Fleming, 41 Wn.App. at 36 (citations omitted).

Fleming is controlling here. Respondents received no notice that a failure to appear would result in waiver of the substantive right to appeal. Without such notice, dismissal of respondents appeals violates due process.

In reply, the state may nonetheless contend that notice is not required. This contention would fail the basic procedural due process balancing test of Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). When determining the appropriate process that is due, the three part Mathews test requires courts to balance the nature of the individual interest involved and the risk of erroneous deprivation against the probable value of the added safeguards and the additional burden the procedural requirement would entail. Mathews, 424 U.S. at 335; In re Harris, 98 Wn.2d 276, 285, 654 P.2d 109 (1982).

The private interest affected here is the fundamental constitutional right

to appeal which, as noted above, is a vital component of the administration of justice. The risk of an erroneous deprivation is unreasonably high based on the state's currently chosen procedure. *See e.g., Dependency of C.R.B.*, 62 Wn. App. 608, 615, 814 P.2d 1197 (1991) ("The risk of error in a default proceeding that does not reach the merits of the case is obviously great"). Also, there is no additional fiscal or administrative burden posed by a requirement that the state give timely notice that a failure to comply with a court order might result in waiver of the right to appeal. The trial court already has the duty to give notice of the right to appeal and to inform a defendant that the right is waived if not exercised within 30 days. *See* CrRLJ 7.2. The duty can be easily met by providing written notice that certain conduct may result in waiving the right to appeal. A colloquy on the record can ensure that every defendant is informed of the right to appeal and the possibility of waiving that right. Giving such notice already is a routine judicial function and is not burdensome in practice.

Here the prosecution and the sentencing court had every opportunity to give notice that the state might seek to dismiss respondents' appeals as a sanction for a violation of the conditions of their sentence or for the failure to appear. The court and the City failed to give notice not because it is burdensome, but because the City sees no incentive in it. The City should not be rewarded by the windfall

of dismissal when it fails to provide notice.

IV. CONCLUSION

To the superior court's decision to deny the City's motion to dismiss is fully supported by Washington law governing the waiver of constitutional rights, particularly the right to appeal. The court should reject the fugitive disentitlement doctrine as inconsistent with this state's right to appeal and the principles of the waiver of such rights.

Respectfully submitted this 30th day of April, 2007.



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APPENDIX 1

**ARTICLE I
DECLARATION OF RIGHTS**

SECTION 22 RIGHTS OF THE ACCUSED.

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

APPENDIX 2

A CONSTITUTION OR FORM OF GOVERNMENT
for the Commonwealth of Massachusetts
PART THE FIRST A Declaration of the Rights of the Inhabitants of the
Commonwealth of Massachusetts

◆Art. XII. Prosecutions Regulated; Jury Trial.

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.