03-1352-cr(L)

To Be Argued By:
ALEX V. HERNANDEZ

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 03-1352-cr (L)
05-4731-cr (CON), 05-5968-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DENNIS BRAITHWAITE, aka Den Den,
Defendant-Appellant.

(For continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants.

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STATEMENT OF JURISDICTION

The district court (Alfred V. Covello, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court should exercise its discretion under the Fugitive Disentitlement Doctrine to dismiss defendant's appeal of his conviction, where there is a direct nexus between his eight-year absence and the claims he now raises on appeal.

2. Whether this Court should exercise its discretion under the Fugitive Disentitlement Doctrine to dismiss defendant's appeal of his sentence, where he waived his right to challenge his appeal in his plea agreement; where his fugitive status should preclude him from challenging the validity of that plea, and the Supreme Court's intervening decision in *United States v. Booker,* 543 U.S. 220 (2005), likewise provides no basis for challenging the plea; and where his claim for a remand pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), is occasioned only by his lengthy flight from justice.

3. Whether a defendant may claim for the first time on appeal that his conviction should be reversed because there is no transcript of the plea procedings, absent any allegation of prejudice?

4. Whether the district court abused its discretion in denying defendant's motion for a reconstruction hearing when it relied on the findings of the magistrate judge who conducted the plea canvass that the guilty plea complied with the requirements of Rule 11?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1352-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DENNIS BRAITHWAITE, aka Den Den,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant-appellant Dennis Braithwaite appeals from the judgment and sentence of the district court (Alfred V. Covello, Senior U.S.D.J.) imposed on May 19, 2003, and in accord with the negotiated terms of his guilty plea, and some 8 years after the guilty plea due to the fact that he failed to appear for sentencing.

The United States seeks dismissal of the appeal of the conviction and sentence pursuant to the Fugitive Disentitlement Doctrine, and in the alternative of the appeal of defendant's sentence because he waived his right to appeal. If the Court were to reach the merits, the Untied States seeks denial of defendant's claim that his pre-*Booker* plea was not knowing and voluntary, where he pleaded guilty with the then-accurate understanding that the guidelines were mandatory; denial of his claim that his conviction should be reversed because there is no transcript of the plea proceedings; and affirmance of the district court's denial of his motion for a reconstruction hearing because the findings of the magistrate judge who conducted the plea canvass reflect that the guilty plea complied with the requirements of Rule 11, and, thus, a reconstruction hearing was not necessary.

Statement of the Case

On July 21, 1993, a federal grand jury in the District of Connecticut returned an indictment in the case of *United States v. Raymond Richard Stephenson, et al.*, 3:93CR157 (AVC). [1] Appendix ("A") at 1.

Count One charged defendant-appellant Dennis Braithwaite, and 25 other individuals, with engaging in a conspiracy to possess with intent to distribute and to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 846 & 841(a)(1). A-2 to A-3. On April 13,

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[1] *See United States v. Stephenson*, 183 F.3d 110 (2d Cir. 1999).

1994, the same federal grand jury returned a superseding indictment charging defendant and 18 others in Count One with engaging in a conspiracy to possess with intent to distribute and to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 846 & 841(a)(1) in Count One. A-12 to A-13.

On June 1, 1994, defendant pleaded guilty before United States Magistrate Judge Thomas P. Smith, to a one-count Information charging him with possession with intent to distribute 5 grams or more of cocaine base "crack" in violation of 21 U.S.C. § 841(a)(1). A-116 (docket); A-29 to A-37 (plea agreement); A-38 (waiver of indictment); A-39 (consent form); A-40 (information). The plea agreement included a waiver of defendant's and government's rights to appeal or collaterally attack any sentence of the district court if it fell within the agreed-upon imprisonment range. A-31.

On June 1, 1994, the Magistrate Judge issued his "Finding and Recommendation on a Plea of Guilty" which reflects that the guilty plea complied with Rule 11 of the Federal Rules of Criminal Procedure. A-41 to A-42.

Sentencing was scheduled for November 7, 1994. A-117 (docket). Defendant failed to appear for sentencing and a warrant issued for his arrest. *Id.* Defendant was a fugitive from the justice of the district court until his arrest on October 31, 2002. A-118.

On May 19, 2003, the district court sentenced defendant within the agreed-upon imprisonment range and

imposed an 87-month term of imprisonment. A-47 to A-56 (transcript); A-57 (judgment); A-119 (docket). Judgment entered on May 21, 2003. A-119.

On May 30, 2003, defendant filed a timely Notice of Appeal. A-58; A-119. On January 12, 2004, he moved for copies of documents and transcripts, including a transcript of the guilty plea. A-59 to A-63; A-120. On March 8, 2004, he moved the district court for a hearing to reconstruct his change of plea hearing inasmuch as a transcript of the plea was never transcribed. A-64 to A-67; A-120.

On March 15, 2004, defendant moved this Court to stay his appeal while his motion for a reconstruction hearing was pending before the district court. On July 14, 2005, the district court entered its order denying the motion for a reconstruction hearing. A-94, A-120.

On August 26, 2005, with leave of the district court for an extension of time to file his notice of appeal, defendant timely filed a notice of appeal from the district court's denial of his motion for a reconstruction hearing. A-95 to A-99; A-120.

On August 29, 2005, defendant filed a motion in the district court to compel the court reporter to produce a transcript of the guilty plea, notwithstanding defendant's concession that one of two possible court reporters who may have transcribed the plea had purged her records after seven years and the other did not have a record of the June 1, 1994 plea proceeding. A-102 to A-104; A-120.

On August 30, 2005, defendant moved this Court to reinstate his orignal appeal, which was granted on September 7, 2005.

On October 24, 2005, the district court issued an order denying defendant's motion to compel production of the plea transcript. A-106; A-120. On November 11, 2005, defendant filed a notice of appeal from the district court's denial of his motion to compel production of the plea transcript. A-107; A-120. On November 28, 2005, defendant moved this Court to consolidate his three appeals.

Defendant now appeals his sentence, the district court's denial of his motion for a reconstruction hearing, and the district court's denial of his motion to compel production of the plea transcript. He is presently serving his term of imprisonment.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

On June 1, 1994, defendant appeared before United States Magistrate Judge Thomas P. Smith, waived prosecution by indictment and entered a guilty plea to a one-count Information charging him with possession with intent to distribute 5 grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1). A-29.

The plea agreement included a waiver of defendant's and government's rights to appeal or collaterally attack any sentence imposed by the district court if it fell within the agreed-upon imprisonment range of 78 to 97 months.

A-31. In exchange for defendant's guilty plea, the United States agreed to recommend a three-level reduction for acceptance of responsibility, A-31, and a three-level reduction for his role in the offense. A-37. Defendant stipulated to, among other things, having possessed with intent to distribute 150 grams or more, but not more than 500 grams of cocaine base. A-35.

On June 1, 1994, the same date on which defendant pleaded guilty, the magistrate judge issued a "Finding and Recommendation on a Plea of Guilty." The magistrate found,

> following a hearing held in open court and on the record, on the basis of the waivers the defendant has signed in open court; the answers given by the defendant under oath, on the record, and in the presence of counsel and the remarks of the Assistant United States Attorney, I Thomas P. Smith, United States Magistrate Judge:
>
> (1) FIND that the defendant is competent to waive prosecution by indictment and to plead guilty, that the defendant knows his right to trial, that he knows what the maximum possible sentence is, and what the mandatory minimum sentence and minimum period of supervised release is and that the sentencing guidelines apply; that there is a factual basis for the defendant's plea, that he has knowingly and intelligently waived his right to proceed by indictment; and that the plea of guilty

> by this defendant has been knowingly and voluntarily made and not coerced, and
>
> (2) RECOMMEND to United States District Judge Covello that the defendant's plea of guilty be accepted.

A-41.

Sentencing was scheduled for November 7, 1994, and defendant was permitted to remain at liberty on the same bond conditions. A-117. He failed to appear for sentencing and a warrant issued for his arrest. A-117. He was arrested nearly eight years later on October 31, 2002. A-118.

Approximately six months later, on May 19, 2003, the district court sentenced defendant to 87 months' imprisonment. A-57. At no time between his arrest on October 31, 2002, and the date of sentencing, did he challenge the plea proceedings or seek to withdraw his guilty plea. Judgment entered on May 21, 2003. A-57. On May 30, 2003, he filed a timely notice of appeal from the sentence of the district court. A-58.

On January 12, 2004, while preparing his appeal, counsel moved for the production of copies of transcripts and documents. A-59. On March 8, 2004, after determining that the plea was never transcribed, defendant moved the district court for a "reconstruction hearing" of the plea proceedings on the grounds that a record of the

plea proceeding was necessary to prepare defendant's appellate brief. A-64 to A-65.

On July 14, 2005, the district court entered an order denying defendant's motion for a reconstruction hearing, A-94, finding that Fed. R. Crim. P. 10(c) does not require a reconstruction hearing. Relying on Rule 10(c), the district court observed that when a transcript is missing, "appellant may prepare a statement of the evidence or proceeding from the best means available, including appellant's recollection." A-94. Accordingly, the district court declined to conduct a new hearing because its review of the record showed that "the requirements of Rule 11 were complied with, and the defendant does not assert any claim to the contrary." A-94. Citing *United States v. Kelly*, 167 F.3d 436, 439 (8th Cir. 1999), the district court relied on the signed plea agreement and the fact that defendant requested a reduction in his sentence for acceptance of responsibility at the sentencing hearing as evidence that the guilty plea was knowing and voluntary. A-94. The district court held that the "record coupled with the presumption of regularity compels the conclusion that the requirements of Rule 11 were complied with, foreclosing the relief requested." A-94 (citing *Voorhees v. Jackson*, 35 U.S. 449, 472 (1836), and *Parke v. Raley*, 506 U.S. 20, 29 (1992)).

On August 26, 2005, defendant filed a notice of appeal from the court's denial of his motion for a hearing, A-99, and a motion for extension of time to file a notice of appeal. The motion for extension of time was granted. A-105.

Although counsel's motion acknowledged that one of the two possible court reporters who may have transcribed the plea had purged her records after seven years, and the other did not have a record of the June 1, 1994, plea proceeding, A-102 to A-104, on August 29, 2005, defendant filed a motion to compel the relevant court reporter to produce a transcript of the plea. On August 30, 2005, defendant moved in this Court to reinstate his first appeal, which motion was granted on September 7, 2005.

On October 24, 2005, the district court issued an order denying defendant's motion to compel production of the transcript because, despite due diligence, the district court was unable to identify the responsible court reporter and none of the court reporters known to have transcribed hearings held before Magistrate Judge Smith at that time had a record of the hearing. A-106. On November 11, 2005, defendant filed a notice of appeal from the district court's denial of his motion to compel. A-107. On November 28, 2005, defendant moved this Court to consolidate his three appeals.

Defendant now appeals his sentence, the district court's denial of his motion for a reconstruction hearing, and its denial of his motion to compel production of the transcript.

SUMMARY OF ARGUMENT

Defendant entered a guilty plea before a magistrate judge, which the magistrate judge found had complied with Rule 11 of the Federal Rules of Criminal Procedure, and the matter was adjourned for sentencing. Defendant was allowed to remain at liberty pending sentencing. He failed to appear for sentencing, however, and remained a fugitive for nearly eight years.

1. To the extent that defendant is challenging his guilty plea, this Court should exercise its discretion under the Fugitive Disentitlement Doctrine and dismiss the appeal. Defendant did not move the district court to allow him to withdraw his guilty plea. After sentencing and during the pendency of the instant appeal, he discovered that a transcript of his guilty plea was no longer available. Because there is a nexus between defendant's lengthy status as fugitive and the fact that a plea transcript is no longer extant, he should be precluded from challenging the validity of his plea on appeal.

2. Because defendant entered a knowing and voluntary guilty plea and, in his written plea agreement, waived his right to appeal the agreed-upon term of imprisonment ultimately imposed by the sentencing court, this Court should enforce defendant's appeal waiver and dismiss his appeal of the sentence. Because defendant's flight gives rise to the inability to locate his plea transcript, he should not now be heard to challenge the validity of his appeal waiver. Nor can defendant challenge the validity of his appeal waiver by way of challenging his plea, on the

ground that he was mis-informed about the mandatory nature of the Guidelines. This Court has consistently declined to overturn guilty pleas on the ground that the advice a defendant received at the time of his plea, though an accurate statement of the law then in force, was later invalidated by *Booker*.

3. Assuming *arguendo* that the Court were to reach the substance of defendant's transcript claim, he has failed to make the requisite showing that he is prejudiced by the absence of the plea transcript. This is particularly so where the magistrate judge made specific, written findings that the guilty plea complied with Rule 11.

4. Because the magistrate judge made specific, written findings demonstrating that the guilty plea complied with Rule 11, the district court did not abuse its discretion when it denied defendant's motion for a hearing to reconstruct the plea canvass.

ARGUMENT

I. The Court Should Exercise Its Discretion To Dismiss Defendant's Appeal Under the Fugitive Disentitlement Doctrine

Because defendant became a fugitive after his plea of guilty but before sentencing, the Court should exercise its discretion to dismiss the appeal of his conviction under the Fugitive Disentitlement Doctrine.

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

Under the Fugitive Disentitlement Doctrine, the Supreme Court has "recognized that 'because flight cannot fairly be construed as a waiver of appeal from errors occurring after recapture, defendants who flee presentencing retain their right to appeal sentencing errors, though they lose the right to appeal their convictions.'" *United States v. Bravo*, 10 F.3d 79, 84 (2d Cir. 1993) (quoting *Ortega-Rodriguez v. United States*, 507 U.S. 234, 243-244 (1993)). "Appellate courts likewise have the authority to dismiss a criminal appeal under the fugitive disentitlement doctrine where an appellant is not a fugitive during the pendency of his appeal but there is 'some connection between the defendant's [prior] fugitive status and his appeal.'" *United States v. Awadalla*, 357 F.3d

243, 245 n.1 (2d Cir. 2004) (brackets in original) (quoting *Ortega-Rodriguez*, 507 U.S. at 249); *United States v. Morgan*, 254 F.3d 424, 427 (2d Cir. 2001) ("The most obvious example of such a nexus is where a defendant becomes a fugitive after filing a notice of appeal and remains a fugitive while his appeal is pending. However, an appellate court may apply the doctrine even where a defendant has been recaptured prior to an appeal, as long as the required nexus is present.") (internal citations omitted).

When addressing whether the policies supporting the longstanding application of the Fugitive Disentitlement Doctrine to those appeals in which the defendant became a fugitive prior to sentencing, but was recaptured before and was present during his appeal, this Court opined:

> Such defendants demonstrate disrespect for the judicial process that is arguably even greater than that shown by defendants who defer flight until after filing appeals. Moreover, a policy of declining to consider former fugitives' claims will tend to discourage escape and promote the orderly operation of the judicial processes within which defendants should press their claims. Finally, the possibility of prejudice to the prosecution – inuring to the benefit of the fugitive – is an especially significant factor where, as here, a defendant remains a fugitive for an extended period. It would be unconscionable to allow such a defendant to benefit from the delay by forcing the government to reprosecute him long after

> memories have dimmed and evidence has been lost.

United States v. Persico, 853 F.2d 134, 138 (2d Cir. 1988) (internal citation omitted).

Accordingly, this Court has "exercised its discretion to dismiss an appeal when a defendant jumps bail after conviction but is recaptured prior to sentencing." *United States v. Matista*, 932 F.2d 1055, 1057 (2d Cir. 1991) (citing *United States v. Alvarez*, 868 F.2d 547 (2d Cir. 1989) (per curiam)); *Persico*, 853 F.2d 134.

Two examples of the required connection between the defendant's prior fugitive status and his appeal are (1) when a "'long escape, even if ended before sentencing and appeal,' so delays 'the onset of appellate proceedings that the Government would be prejudiced in locating witnesses and presenting evidence at retrial after a successful appeal,'" *Awadalla*, 357 F.3d at 245 n.1 (quoting *Ortega-Rodriguez*, 507 U.S. at 249), and (2) when flight prevents the fugitive-defendant from consolidating his appeal with those of his co-defendants, resulting in multiple appeals if the former fugitive is allowed to appeal after his recapture. *Bravo*, 10 F.3d at 79. *See, e.g., Persico*, 853 F.2d 134 (holding that by jumping bail after conviction but prior to sentencing and remaining a fugitive for 7 years, defendant in effect waived his right to have court review trial court's evidentiary hearing); *Matista*, 932 F.2d at 1057 (where defendant fled prior to closing arguments, verdict rendered in absentia, and defendant was apprehended one year later, court declined to hear appeal regarding defendant's failure

to receive evidentiary hearing and district court's determination of probable cause because allowing the appeal would "encourage piecemeal appeals"); *Alvarez*, 868 F.2d 547 (where defendant jumped bail after guilty verdict but before sentencing, was captured six years later and then sentenced, court declined to consider merits of defendant's claim regarding sufficiency of the evidence); *cf. Bravo*, 10 F.3d at 79 (where defendant fled during trial, convicted in absentia, fugitive for 15 years, and later arrested, court affirmed district court's refusal to decide the merits of defendant's post-conviction motions, including a motion for a reconstruction hearing because certain trial transcripts were missing, because memories were dimmed and evidence had already been lost; "It would be unconscionable to allow [defendant] to benefit from his deliberate attempt to evade justice.").

In *United States v. Morgan*, the defendant fled after pleading guilty and before sentencing. Upon his capture seven years later, he moved to withdraw his guilty plea on the basis that it was involuntary. 254 F.3d at 427-28. The district court applied the Fugitive Disentitlement Doctrine and dismissed the defendant's motion. This Court affirmed and proceeded to apply the Fugitive Disentitlement Doctrine to a claim raised for the first time on appeal, namely, that there was an insufficient factual basis for his plea in violation of Fed. R. Crim. P. 11(c). The Court declined to reach the merits of the fugitive-defendant's belated claim, because, even though the "District Court had an obligation until the entry of judgment to ensure that a factual basis existed for a plea," the former fugitive's "flight disentitles him to call upon

the resources of this court for determination of his claims." *Id*. at 428 (emphasis added).

C. Discussion

Here, as in *Morgan,* defendant fled after pleading guilty and prior to sentencing, and remained a fugitive for almost eight years. *Morgan*, 254 F.3d at 427-28. The government would be prejudiced in finding witnesses and presenting evidence if his appeal were successful and his plea were vacated. *Awadalla*, 357 F.3d at 245 n.1 (quoting *Ortega-Rodriguez*, 507 U.S. at 249). Indeed, the missing transcript of defendant's plea – which forms the basis of two of his claims on appeal – might very well have been available but for the eight-year delay. A-103 (Motion to Compel Production of Transcript) (defendant noted that one of two possible court reporters who may have transcribed the defendant's plea purges her records after seven years).

Further, becasue defendant was a fugitive, he was prevented from consolidating his appeal with those of his co-defendants – a factor which this Court has considered when applying the Fugitive Disentitlement Doctrine. *Bravo*, 10 F.3d at 79. Seven co-defendants filed appeals in this case. The appeals of five co-defendants were consolidated, and this Court rendered final decisions on December 12, 1995. *See United States v. Stephenson*, 99 F.3d 401, 1995 WL 736475, *3 (2d Cir. 1995) (unpublished decision). Antoinette McCurvin, the wife of the lead defendant, also appealed her conviction and sentence, although no record appears in the Westlaw

database. *See United States v. Antoinette McCurvin, a.k.a. "Antoinette Glenn*," Court of Appeals Docket number 96-1241. The appeal of lead defendant Stephenson was heard separately and this Court entered its final decision on June 30, 1999. *United States v. Stephenson*, 183 F.3d 110 (2d Cir. 1999). Accordingly, hearing defendant's appeal would undesirably encourage piecemeal appeals long after the district court proceedings and related appellate proceedings have concluded. *Matista*, 932 F.2d at 1057.

The connection between defendant's eight-year status as a fugitive and his present claims on appeal is manifest. But for the delay occassioned by his flight, he would not have been able to claim as he does now that: (1) subsequent case law should be read to invalidate his guilty plea; (2) the now-missing plea transcript consitutes *per se* prejudice requiring vacatur of his conviction; and (3) the only extant record of his plea is inadequate for him to perfect his appeal. It is difficult to imagine a case more appropriate for this Court to exercise its discretion under the Fugitive Disentitlement Doctrine. Defendant's appeal should be dismissed.

II. Defendant's Appeal of His Sentence Should Also Be Dismissed Under the Fugitive Disentitlement Doctrine And Because He Waived His Right to Appeal

On appeal, defendant also relies on changes in the law which otherwise would not have been available to him, but for the fact that he was a fugitive for nearly eight years. He argues for the first time on appeal that he should be

permitted a remand pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), based on the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005). This Court should invoke the fugitive Disentitlement Doctrine to discourage defendants from becoming fugitives and benefitting from subsequent changes in the law. Defendant, moreover, specifically waived his right to appeal the sentence of the district court, and he should be held to that contractual waiver.

A. Relevant Facts

Facts relevant to defendant's lengthy status as a fugitive are set forth in the Statement of Facts above.

In the plea agreement, defendant waived his right to appeal or collaterally attack any sentence imposed by the court falling within the agreed-upon imprisonment range of 78-97 months. A-37. The plea agreement provides in pertinent part:

> It is specifically agreed that neither the Government nor the defendant will appeal or collaterally attack a sentence imposed by the Court if that sentence falls within the sentencing range calculated in Attachment B which is appended hereto and incorporated by reference, even if the Court reaches that sentencing range by a Guideline analysis different from that set forth in Attachment B.

A-31. The district court sentenced defendant to an 87-month term of imprisonment.[2]

B. Governing Law and Standard of Review

1. The Fugitive Disentitlement Doctrine

The fugitive disentitlement doctrine is set forth in Point Point I.B above.

2. Appellate Waivers

This Court has held that a waiver of appeal rights in a pre-*Booker* plea bars a defendant from challenging his sentence on the basis of *Booker*. "Reasoning that the plea agreement process permitted the defendant and the government 'to allocate risk, to obtain benefits, to achieve

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[2] Construing the waiver narrowly and strictly against the Government, *United States v. Ready*, 82 F.3d 551, 556, 559 (2d Cir. 1996), defendant's waiver is limited to a waiver of appeal of the sentence, not the conviction. "[I]t is established that a defendant's knowing and voluntary waiver of his right to appeal a sentence within an agreed guideline range is strictly enforceable." *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir. 1993) (per curiam) ("In no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless.").

finality, and to save resources," and noting that 'the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements," the Court held that a "waiver of appeal rights in the defendant's plea agreement, entered into before *Booker* was decided, bar[s] him from challenging his sentence on the basis of that decision." *United States v. Hamdi*, 432 F.3d 115, 120 (2d Cir. 2005) (quoting *United States v. Morgan*, 406 F.3d 135 (2d Cir. 2005)); *see also United States v. Haynes*, 412 F.3d 37 (2d Cir. 2005) (holding that appeal waiver is enforceable even if Sixth Amendment objection to the Guidelines was preserved prior to sentencing).

C. Discussion

Under the Fugitive Disentitlement Doctrine as discussed in Point I above, defendant cannot challenge his plea in this appeal. Accordingly, he should not be permitted to challenge any component of his plea agreement, which here includes a waiver of appellate rights. Thus, defendant's appeal waiver should be enforceable against his belated *Booker* claim and should be dismissed.

Moreover, under the Fugitive Disentitlement Doctrine, even though defendants who flee presentencing generally retain their right to appeal sentencing errors, here there exists a nexus between defendant's flight and his appeal of his sentence. The nexus arises from the fact that the nearly eight-year delay resulted in a favorable change in the law regarding the United States Sentencing Guidelines which

are now advisory. This benefit was denied to his co-defendants who did not flee and timely perfected their appeals. Here, therefore, the nexus between his flight and the favorable change in the law warrants dismissal of his claim on appeal. *Ortega-Rodriguez*, 507 U.S. at 251 ("so long as all circuit rules meet the threshold reasonableness requirement, in that they mandate dismissal only when fugitivity has some connection to the appellate process, they may vary considerably in their operation"). Had defendant not been a fugitive, his direct appeal would have been decided along with those of his co-defendants in 1995, well before a *Crosby* remand under *Booker* would have been available to him. *Guzman v. United States*, 404 F.3d 139, 144 (2d Cir. 2005) ("*Booker* . . . does not apply to cases on collateral review where the defendant's conviction was final as of January 12, 2005.").

It would be contrary to public policy to allow a defendant to benefit from his decision to flee by receiving the advantage of a new rule of law announced after his recapture almost eight years later, while his co-defendants, who did not flee, cannot. Moreover, if a *Crosby* remand were permitted, defendant would use resources of this Court and the district court in deciding a *Crosby* remand and possibly entertaining another sentencing and appeal of that sentence to which he would not have been entitled if he had not fled.

Defendant also argues for the first time on appeal that his pre-*Booker* guilty plea was not knowing and voluntary because it was entered on the incorrect assumption that the guidelines were mandatory, rather than advisory as *Booker*

now holds. A defendant, however, "may not withdraw his plea as unintelligent, involuntary, or otherwise illegal, based solely on changes in federal law effected by United States Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005)." *United States v. Roque*, 421 F.3d 118, 119 (2d Cir. 2005). Thus, even if this Court were to reach this claim, it should also be rejected.

Magistrate Judge Smith's findings, which presently constitute the only record of the guilty plea, show that defendant's plea was knowing and voluntary. Defendant does not argue that his waiver of appeal of his sentence was not knowing or involuntary or that there is any basis to conclude that his plea that contained the waiver was not knowing and voluntary – other than because of the change in law under *Booker*, which as discussed above is meritless.

Moreover, even if the magistrate judge did not specifically address in the plea colloquy defendant's waiver of appeal rights, Rule 11 as it existed at the time of defendant's plea in 1994 did not require the judge to address and determine whether a defendant understands the terms of any plea-agreement provision waiving the right to appeal or collaterally attack the sentence, as it does now. *See Garcia-Santos v. United States*, 273 F.3d 506, 508 (2d Cir. 2001) (even under current Rule 11, Court enforced plea agreement with waiver of right to appeal as entered knowingly and voluntarily when during plea colloquy, magistrate judge did not ask about or specifically address the waiver of appeal and collateral attack); *cf. United States v. Blackwell*, 199 F.3d 623, 625 (2d Cir.

1999) (vacating plea for violation of Rule 11 because judge did not adequately determine that defendant understood nature of charge, and not enforcing appeal waiver where judge did not draw defendant's attention to it).

III. Defendant's Claim That His Conviction Should Be Reversed Because He Cannot Perfect His Appeal Because There Is No Transcript of the Plea Fails Because He Has Failed to Show, Much Less Allege, the Requisite Prejudice

Defendant appears to argue that because a verbatim record of his guilty plea cannot be found or created, there is an insufficient basis to conclude that Rule 11 was complied with. Because there is no transcript, he argues, he is unable to perfect his claim on appeal that Rule 11 was not complied with. As a consequence, he he seeks on appeal to invalidate his guilty plea and nullify the conviction. Def. Brief at 10.

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

"An appellant must show specific prejudice to his ability to perfect an appeal . . . before . . . relief [will be granted] based on gaps in the record." *United States v.*

Weisser, 411 F.3d 102, 108 (2d Cir. 2005). "Prejudice exists if the record is so deficient that it is impossible for the appellate court to determine if the district court committed reversible error." *Id*. at 108.

C. Discussion

Defendant fails to allege or demonstrate any prejudice arising from the absence of a plea transcript, as required by *Weisser*. More specifically, he has failed to explain why the magistrate judge's findings and recommendation are "so deficient that it is impossible for the appellate court to determine if the district court committed reversible error." *Weisser*, 411 F.3d at 108. His claim on appeal should therefore be rejected.

Defendant's claim on appeal, moreover, is tautological. He claims prejudice because he asserts that he is unable to determine whether the plea hearing complied with Rule 11. In other words, he claims prejudice because he cannot demonstrate prejudice. Def. Brief at 12. Under this Court's precedents, that is not enough. For example, in *Weisser*, this Court rejected a defendant's claim that the destruction of certain trial exhibits in the terrorist attacks of September 11, 2001, deprived him of the ability to pursue a meaningful appeal of his conviction. Among other things, he argued that without the exhibits at issue, he could not know whether he had a viable ineffective assistance claim, and that his right to appeal had therefore been prejudiced. 411 F.3d at 108. The Court rejected this argument, holding that the absence of these materials did not prejudice Weisser's right to appeal, after considering

a series of precise arguments raised by the defendant about how his counsel might in theory have been deficient. *Id.* at 108-09.

In the present case, defendant has made an ever sparser showing than that made in *Weisser* about how he has been arguably prejudiced. Unlike the defendant in *Weisser,* who at least had a theory about how his counsel might have been deficient (for example, hypothesizing that the destroyed exhibits might have corroborated elements of his defense), defendant here does not allege any particular defect in his guilty plea. Under the circumstances, his claim is not sufficient to demonstrate the requisite prejudice. *United States v. Kelly*, 167 F.3d 436, 438 (8th Cir. 1999) (where defendant "claims that, were a transcript of the guilty plea hearing available, he would be able to present evidence on appeal that his plea was not knowing or voluntary," but "has not alleged that the court erred in its acceptance of his guilty plea" defendant "has failed to allege, let alone demonstrate, that his ability to perfect an appeal was prejudiced by the lack of the guilty plea transcript"), *cited with approval in Weisser*, 411 F.3d at 107.

Moreover, while there may be a gap in the record, it is not impossible to determine that the plea complied with Rule 11 as it existed in 1994. The Magistrate's "Finding and Recommendation on a Plea of Guilty" establishes that the guilty plea was performed in accordance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure. Further, the presumption of regularity supports

a finding that the plea proceeding was in accordance with Rule 11.

Here, defendant was represented by counsel and the detailed plea agreement contained two attachments, a stipulation of offense conduct and a two-page document setting forth the offense and applicable sentencing guidelines, all three of which were signed at the bottom by the Government, defendant's counsel and defendant. The magistrate judge held a hearing and questioned defendant under oath, and on the record. A-76. At sentencing, defendant requested a reduction to his Guidelines for acceptance of responsibility, which suggests that he was fully aware of the terms of the plea agreement and the consequences of pleading guilty. Further, defendant does not argue or set forth any basis for concluding that his plea was other than knowing and voluntary. Notably, defendant's claim was not raised before the district court which sentenced defendant, but rather was made for the first time when he discovered that the plea transcript was missing. Indeed, he raised the claim more than ten years after pleading guilty.

Defendant nevertheless relies on *Herron v. United States*, 512 F.2d 439 (4th Cir. 1975) (per curiam), for the proposition that a failure to maintain transcripts for ten years as required by the Court Reporters Act, 28 U.S.C. § 753(b), requires automatic reversal. In that case, after the defendant pleaded guilty and was serving his sentence, he filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, alleging that he had pleaded guilty without knowledge of one of the elements of the charged offense

and without benefit of counsel. The court noted that the CRA requires a court reporter to be present and to report and file the proceedings with the clerk of the court, and the clerk to preserve the record of those proceedings for ten years. *Id*. at 440. There was no record of the guilty plea proceeding and the court reporter had no recollection of the proceedings. Extrapolating from the rule that strict compliance with Rule 11 is required, the court held that "[a] failure to strict compliance" with § 753(b) should likewise prompt vacatur of the plea. Accordingly, the court held that the defendant's § 2255 motion should be granted, the guilty plea be stricken, and the defendant permitted to plead anew. *Id*.

Herron is inapposite for at least three reasons. First, to the extent that the Fourth Circuit's call for "strict compliance" with § 753(b) is read as requiring automatic reversal, it directly conflicts with this Court's requirement that a defendant demonstrate "specific prejudice," *Weisser*, 411 F.3d at 107, and must therefore be disregarded. Second, *Herron* involved a case in which the defendant had at least alleged some form of error at his guilty plea – specifically, a failure to establish a factual basis for the plea, in light of his claimed failure to have understood one element of the charge. 512 F.2d at 441. Here, by contrast, defendant has not alleged any particular prejudice at all (apart, arguably, from the *Booker* claim rejected by this Court in *Roque* and *Haynes*). Third, even on its own terms *Herron* has been superseded; strict compliance with Rule 11 is no longer required. *See* Fed. R. Crim. P. 11(h); *United States v. Vonn*, 535 U.S. 55, 58-59 (2002).

Here, in contradistinction to *Herron*, defendant was represented by counsel during his plea and a court reporter was present. A-41 (Finding and Recommendation on a Plea of Guilty) (indicating that defense counsel was present at the plea); A-69 n.1 (Gov. Response) (reporting that the supervisor of the clerk's office indicated that a court reporter was present at the guilty plea). Moreover, defendant's flight, which caused a period of almost ten years to elapse between his plea and his belated request for a transcript, contributed to the problem. As set forth above, one of the two court reporters who may have been present during the plea proceeding purges her records after seven years. *Herron*, therefore is inapposite and defendant's claim of prejudice should be denied.

IV. As an Alternative to Dismissal of the Appeal Pursuant to the Fugitive Disentitlement Doctrine, The Court Should Affirm The District Court's Denial of a Reconstruction Hearing.

A. Relevant Facts

The district court first noted that Rule 10(c) does not require a reconstruction hearing.[3] A-94. The district court

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[3] Notably, defendant applied for copies of the transcript in January 2004, more than ten days after the filing of his notice of appeal in violation of Fed. R. App. P. 10(b)(1)(a) (which requires defendant within ten days after the filing of the notice to order from reporter transcript of parts of proceeding not on (continued...)

declined to conduct a new hearing because its review of the record showed that "the requirements of Rule 11 were complied with, and the defendant does not assert any claim to the contrary." A-94. The record includes the signed plea agreement and the Magistrate Judge's "Finding and Recommendation on a Plea of Guilty", drafted following not less than

> a hearing held in open court and on the record, on the basis of the waivers the defendant has signed in open court; the answers given by the defendant under oath, on the record, and in the presence of counsel and the remarks of the Assistant United States Attorney.

A-41.

The findings of the Magistrate Judge reflect that the court substantially complied with Fed. R. Crim. P. 11(c) as it existed in 1994. A-41 The district court held that the "record coupled with the presumption of regularity compels the conclusion that the requirements of Rule 11 were complied with, foreclosing the relief requested." A-94 (citing *Voorhees v. Jackson*, 35 U.S. 449, 472 (1836), and *Parke v. Raley*, 506 U.S. 20, 29 (1992)).

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[3] (...continued)
file, and simultaneously file a copy of the order with the court), causing further delay.

B. Governing Law and Standard of Review

The United States has been unable to locate any cases announcing the standard of review for a district court's denial of a reconstruction hearing under these circumstances. In the habeas context, this Court has reviewed for abuse of discretion a district court's decision to hold a reconstruction hearing with respect to a *Batson* challenge. *See*, *e.g., Green v. Travis*, 414 F.3d 288, 299-300 (2d Cir. 2005) ("the district court did not abuse its discretion when it permitted the reconstruction hearing"); *Harris v. Kuhlmann*, 346 F.3d 330, 348 (2d Cir. 2003) ("the decision to hold such a [reconstruction] hearing is within the discretion of the District Court, this Court has said that if appropriate findings may be conveniently made, this should be done"); *Jordan v. Lefevre*, 293 F.3d 587, 594 (2d Cir. 2002) ("We view the reconstructing court's assessment of the feasibility of reconstruction as entitled to substantial deference").

Because both settings involve the reconstruction of the record of prior proceedings in order to ascertain whether or not error occurred, and both involve fact-intensive and case-specific assessments of whether, given the record, further proceedings are necessary to ascertain the existence of historical facts, the Government respectfully urges that the abuse of discretion standard applicable in the context of a habeas proceeding is also appropriate here. Nevertheless, the Court need not definitively resolve the question of which standard applies, because the district court's decision was correct even if reviewed *de novo*.

C. Discussion

Where, as here, there is no claim that the plea did not comply with Rule 11 and the record amply supports the conclusion that it did; where defendant articulates no specific reason for a need to have the plea transcript for the appeal; and where almost ten years have elapsed between the plea and the request for a transcript (due to defendant's fugitive status) and memories would most likely have faded, the district court did not abuse its discretion in determining not to hold a reconstruction hearing.

Defendant argues that *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), entails a presumption of invalidity of the plea, as termed by the court in *Parke*. In *Boykin*, the defendant pleaded guilty to five counts of armed robbery at arraignment and the judge did not question the defendant at all. A jury established to decide punishment then sentenced defendant to death on all five counts based on his guilty plea. The court held "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Boykin,* 395 U.S. at 242. The Court held that

> [p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. We think

> that the same standard must be applied to determining whether a guilty plea is voluntarily made."

Id.

In *Parke v Raley*, the defendant moved to suppress his two guilty pleas, claiming that they were invalid because the records contained no transcripts of the proceedings and hence did not affirmatively show, as required by *Boykin,* that the pleas were knowing and voluntary. The Court distinguished *Boykin*, where there was nothing on the record, from *Parke*, where the

> government's evidence showed . . . respondent signed . . . a "Plea of Guilty" form for one plea, which stated that he understood the charges against him, the maximum punishment he faced, his constitutional rights, and that a guilty plea waived those rights, . . . the attorney . . . verified his own signature on another part of the form indicating that he had fully explained respondent's rights to him . . . . and [for the second plea] respondent acknowledged signing a form that specified the charges to which he agreed to plead guilty . . . and admitted that the judge had at least advised him of his right to a jury trial."

Id. at 24-25 ("This is not a case in which an extant transcript is suspiciously "silent" on the question whether the defendant waived constitutional rights. Evidently, no

transcripts or other records of the earlier plea colloquies exist at all."). In *Parke*, the Court held

> [i]n the absence of an allegation of government misconduct, it cannot be presumed from the mere unavailability of a transcript on collateral review that a defendant was not advised of his rights. The presumption of regularity makes it appropriate to assign a proof burden to the defendant even when a collateral attack rests on constitutional grounds. And the difficulty of proving the invalidity of convictions entered many years ago does not make it fundamentally unfair to place a burden of production on the defendant, since the government may not have superior access to evidence.

Id. Further, it is not fundamentally unfair to deny defendant's motion for a reconstruction hearing where the delay was caused by defendant's criminal flight from prosecution.

Thus, the Court should affirm the district court's denial of defendant's motion for a reconstruction hearing.

CONCLUSION

For the reasons set forth above, the Court should dismiss defendant's appeal of his conviction and sentence, or, in the alternative, summarily affirm the judgment of the district court.

Dated: August 28, 2006

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,833 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

Rule 11 of the Federal Rules of Criminal Procedure (1994):

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self- incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the

understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo

contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Rule 10(c) of the Federal Rules of Appellate Procedure

* * *

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served.

The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.