

ROD PACHECO
District Attorney
County of Riverside
4075 Main Street, First Floor
Riverside, California 92501
Telephone: (951) 955-0126
Alan D. Tate, Senior Deputy District Attorney
State Bar No. 172413

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
(Appellate Division)

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff/Respondent,

v.

KEITH HENSON,

Defendant/Appellant.

NO. APP004184
(Trial Case No.: HEM014371)

MOTION FOR
RECONSIDERATION OF
MOTION TO DISMISS, OR
MOTION FOR
CLARIFICATION OF
REASONS FOR DENIAL;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF

Hg: To Be Submitted on
Pleadings (Rule 8.705(b))

INTRODUCTION

Respondent moved to dismiss this appeal on the ground that appellant's right to appeal what occurred at trial in 2001 expired in 2002 after he fled to Canada. This Court dismissed his appeal at that time expressly due to appellant's fugitive status. Despite longstanding state and federal authority establishing that appellant forfeited his appellate rights with respect to trial proceedings prior to the dismissal of his earlier appeal, this Court denied the motion without any reasoning or guidance to the

parties. In order to properly evaluate the remedies left available, respondent respectfully asks the Court to reconsider its ruling on the Motion to Dismiss, and if the Court determines again that denial is appropriate, that the Court provide an order setting forth the basis for the denial of the Motion. California Rules of Court, rule 8.705 permits respondent to file this Motion, any opposition is due within seven days, and this Court may dispose of this Motion without hearing.¹

ARGUMENT
THIS COURT SHOULD RECONSIDER ITS RULING ON THE
MOTION TO DISMISS, OR AT A MINIMUM, PROVIDE
RESPONDENT WITH AN ORDER SETTING FORTH THE
REASONS FOR THE DENIAL

As set forth in the Motion to Dismiss, appellant was convicted by jury in 2001, and after he fled to Canada, was sentenced in absentia. (1CT 288-289, 296-312, 318 [court grants motion to sentence in absentia, and sentences defendant to 365 days in jail unless he returns and accepts probation conditions].) While a fugitive from justice, appellant attempted to appeal his conviction and sentence in case number APP003226, but this Court dismissed the appeal in 2002 expressly due to appellant's fugitive status. (1CT 320; 2CT 1-3, 6-7, 10-18, see 10 [OSC why appeal should not be dismissed because appellant is a fugitive], 12-13 [appeal dismissed on court's own motion].)

Appellant ultimately appeared in court almost six years later, pled guilty to an additional charge of failing to appear, and accepted the alternative disposition originally offered in 2001 of informal probation with

¹ As of January 1, 2009, rule 8.705 was replaced by rule 8.808 which appears substantially similar in most material respects. It is respondent's understanding that this Court will apply throughout an appeal the rules in effect at the time the notice of appeal was filed.

a jail term. (2CT 25-31.) On June 19, 2007, appellant filed a notice of appeal challenging the “judgment rendered . . . on May 30, 2007[.]” (2CT 32.) However, on December 17, 2008, appellant filed his opening brief and challenged only 2001 trial matters, and nothing relating to the 2007 plea or judgment.²

Following appellant’s 2001 conviction and sentencing, he had 30 days to initiate an appeal challenging his conviction by filing a notice of appeal. (See Penal Code section 1466, subd. (2); Rules of Court, rule 8.853(a) (prior rule 182, then rule 8.782(a)).) He filed the notice of appeal and attempted to prosecute the appeal, but because of his unwillingness to surrender to the jurisdiction of this Court, his appeal was rightfully dismissed. (1CT 320; 2CT 12-18.)

Established state and federal authority compels the conclusion that appellant forfeited his right to challenge the trial proceedings leading up to his conviction – which are the only proceedings challenged in his opening brief.³ (See AOB 1-19; *Ortega-Rodriguez v. United States* (1993) 507 U.S. 234, 246 [“an appellate court may employ dismissal as a sanction when a defendant’s flight operates as an affront to the dignity of the court’s proceedings”]; *Molinaro v. New Jersey* (1970) 396 U.S. 365, 366 [escape disentitles the defendant to call upon the resources of the Court for determination of his claims]; *Smith v. United States* (1876) 94 U.S. 97, 98 [appeal to remain dismissed unless defendant surrenders to jurisdiction of

² Respondent agrees that appellant has the right to appeal the additional conviction and judgment that occurred on May 30, 2007, but since appellant is challenging neither, the appeal should be dismissed.

³ This is not a situation where this Court is reinstating appellant’s 2001-2002 appeal in case number APP003226, nor has appellant ever asked this Court to take such action nor provided any justification for such an action.

court]; *People v. Redinger* (1880) 55 Cal. 290, 298-299 [appeal dismissed because of defendant's escape]; *People v. Perez* (1991) 229 Cal.App.3d 302, 308 ["It has long been recognized that a convicted defendant who becomes a fugitive from justice forfeits the right to appeal that conviction"]; *People v. Brych* (1988) 203 Cal.App.3d 1068, 1075-1076 [appeal properly dismissed when defendant not subject to jurisdiction of court].)

It would be unfair, illogical, and unlawful to permit appellant to revive his forfeited appellate rights by appearing more than five years later and having sentence reimposed following a plea to a later-added count. (See *People v. Djekich* (1991) 229 Cal.App.3d 1213, 1219 [under similar circumstances, "To hold otherwise would condone extending the jurisdictional time for filing appeals through bootstrapping"]; *People v. Lynn* (1978) 87 Cal.App.3d 591, 593 [defendant may not appeal denial of motion to reconsider sentence when he failed to timely appeal original sentence]; see also *People v. Munoz* (1975) 51 Cal.App.3d 559, 563 [because defendant could have appealed following his conviction, he cannot raise issues from the trial in an appeal following revocation of probation]; *People v. Vest* (1974) 43 Cal.App.3d 728, 731 [trial issues before grant of probation cannot be raised on appeal following revocation of probation]; *People v. Wright* (1969) 275 Cal.App.2d 738, 739 [same].)

In any event, upon reconsideration, if this Court still rules that the Motion to Dismiss should be denied, respondent would ask this Court to provide respondent with an order setting forth the basis for the denial of the Motion. The record on appeal is lengthy, the issues raised on appeal are numerous, and respondent could be substantially prejudiced if appellate relief is granted so many years after trial. Respondent may wish to seek

further review of this Court's ruling depending on the justification for the denial of the Motion to Dismiss. The respondent's brief is presently due January 26, 2009.

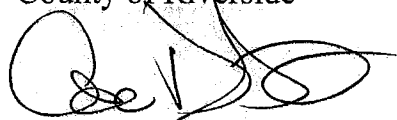
CONCLUSION

Based on the foregoing, respondent respectfully asks this Court to reconsider the Motion to Dismiss and order the appeal summarily dismissed, or in the alternative, provide respondent with a reasoned order setting forth the basis for this Court's denial of the Motion to Dismiss.

Dated: January 12, 2009

Respectfully submitted,

ROD PACHECO
District Attorney
County of Riverside

A handwritten signature in black ink, appearing to read 'Alan D. Tate', is written over the typed name of Alan D. Tate.

ALAN D. TATE
Senior Deputy District Attorney

PROOF OF SERVICE BY MAIL

Case No. APP004184

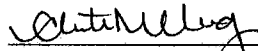
I, the undersigned, say: I am a resident of or employed in the County of Riverside, over the age of 18 years and not a party to the within action or proceeding; that my residence or business address is 4075 Main Street, Riverside, California.

That on January 12, 2009, I served a copy of the **MOTION FOR RECONSIDERATION OF MOTION TO DISMISS APPEAL** to which this proof of service by mail is attached by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Postal Service mailbox, in the City of Riverside, California, addressed as follows:

**Mark J. Werksman, Esq.
Kelly C. Quinn, Esq.
LAW OFFICES OF MARK J. WERKSMAN
888 West Sixth Street, Fourth Floor
Los Angeles, CA 90017**

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2009, at Riverside, California.



DECLARANT