

1 **FOR PUBLICATION**

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3
4 **IN THE SUPERIOR COURT** 
5 **FOR THE**
6 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

7 **COMMONWEALTH OF THE**
8 **NORTHERN MARIANA ISLANDS,**

9 **Plaintiff,**

10 **v.**

11 **EDWARD T. BUCKINGHAM,**

12 **Defendant.**

13 **CRIMINAL CASE NO. 12-0134**

14 **ORDER DENYING DEFENDANT'S**
15 **MOTION TO QUASH**
16 **ARRESTWARRANT WITHOUT**
17 **PREJUDICE**

18 **I. INTRODUCTION**

19 **THIS MATTER** came before the Court on August 29, 2012 at 9:00 a.m. in Courtroom
20 223A. Brien Sers Nicholas, Esq.,¹ appeared on behalf of the defendant, Edward T.
21 Buckingham ("Defendant"). George L. Hasselback, Esq., appeared telephonically on behalf of
22 the Office of the Public Auditor (OPA). Defendant moved the Court to quash Defendant's
23 bench warrant or, in the alternative, hold it in abeyance. This matter was first heard on August
24 22, 2012 at which time Mr. Hasselback opposed the motion, raising the issue of the fugitive
25 disentitlement doctrine. Upon Defendant's request, the Court continued this matter to August
26 29, 2012 to give Defendant time to adequately respond to the issue of the fugitive
27 disentitlement doctrine.

28 Based on the papers submitted and a review of the pertinent law, the Court hereby
DENIES Defendant's Motion without prejudice based on the fugitive disentitlement doctrine.

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¹ Defendant Edward T. Buckingham first retained private counsel in Michael N. Evangelista. Soon thereafter, Brien Sers Nicholas was substituted as counsel for Mr. Buckingham.

1 **II. FACTUAL BACKGROUND**

2 On or about August 3, 2012, Defendant resigned as Attorney General of the
3 Commonwealth of the Northern Mariana Islands and publicly announced he would leave the
4 CNMI and go to the United States. Soon thereafter, the OPA attempted to serve Defendant
5 with a penal summons but was unable to locate him. The OPA then called upon the assistance
6 of the Federal Bureau of Investigations to locate and serve Defendant before he left for the
7 United States.

8 On August 4, 2012, Defendant went to the Saipan International Airport with a police
9 escort. While waiting in the airport's club lounge in the departure area, FBI special agent Hae
10 Jun Park served Defendant with a penal summons. The court-issued document ordered
11 Defendant to appear before the Superior Court for the Northern Mariana Islands on August 6,
12 2012 at 9:00 a.m., with respect to the attached filed information. (Penal Summons at 1.) The
13 penal summons advised Defendant that "[i]f he do[es] not appear, an application may be made
14 for the issuance of a Warrant for [his] arrest." (*Id.*)

15 After Defendant was served with the penal summons, he boarded his scheduled flight to
16 the United States. Defendant failed to personally appear in court on August 6, 2012 at 9:00
17 a.m. as ordered by the penal summons. Assistant Attorney General, Gilbert Birnbrich, made a
18 limited appearance on behalf of Defendant, and the Court questioned Mr. Birnbrich's authority
19 to represent Defendant. The Court issued a bench warrant against Defendant and set bail at
20 \$50,000.00. On the same day, August 6, 2012, the OPA filed an amended information that
21 added two more counts to the five counts contained in the original information, charging
22 Defendant with crimes relating to his official acts as the attorney general.

23 Besides the limited appearance, Mr. Birnbrich provided no other legal services for
24 Defendant. Defendant hired private counsel, Michael N. Evangelista, who moved the Court to
25 quash or, in the alternative, hold the bench warrant in abeyance. Mr. Hasselback opposed the
26 motion, arguing it would be inequitable for the Court to entertain the motion based on
27 Defendant's fugitive status. The Court set a hearing on Defendant's motion for August 29,
28 2012, and instructed the parties to address the fugitive disentitlement doctrine. Mr. Hasselback

1 appeared telephonically and Defendant's substituted counsel, Brien Sers Nicholas, appeared on
2 behalf of Defendant. The Court took the matter under advisement.

3 **III. DISCUSSION**

4 The fugitive disentitlement doctrine "does not strip the case of its character as an
5 adjudicable case or controversy," but it "disentitles the defendant to call upon the resources of
6 the Court for determination of his claims" while he remains outside the court's jurisdiction.
7 *Ortega-Rodriguez v. United States*, 507 U.S. 234, 240 (1993) (quoting *Molinaro v. New Jersey*,
8 396 U.S. 365, 366 (1970)).² The U.S. Supreme Court discussed two justifications for this rule.
9 First, any judgment or order would be unenforceable against an absent defendant.³ *Id.* at 242
10 (citing *Smith v. United States*, 94 U.S. 97 (1876)); *Polanski v. People*, 180 Cal. App. 4th 507,
11 532 (Cal. Ct. App. 2009) ("Defendant's flight from the court's jurisdiction makes a mockery of
12 the justice system because it places the misdemeanant, rather than the courts, in the position of
13 determining whether to submit to the court's judgment."). Second, disentitlement "serves an
14 important deterrent function." *Ortega-Rodriguez*, 507 U.S. at 242; *United States v. Awadalla*,
15 357 F.3d 243, 246 (2d Cir. 2004) ("[T]he fugitive disentitlement doctrine is intended to
16 sanction fugitives for affronting the dignity of the court and to deter other [defendants] from
17 absconding.").

18 The Court has discretion to apply the doctrine if doing so would be equitable under the
19 circumstances. *Smith*, 94 U.S. at 97; Brian L. Porto, Annotation, *Application of Fugitive*
20 *Disentitlement Doctrine in Federal Criminal Cases*, 179, A.L.R. Fed. 291 (2011). "Although
21 traditionally applied by the courts of appeal to dismiss the appeals of fugitives, the district
22 courts may sanction . . . parties on the basis of their fugitive status." *Magluta v. Samples*, 162

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24 ² The CNMI has never analyzed the fugitive disentitlement doctrine. When there is no dispositive
25 Commonwealth authority on an issue, the court may look to persuasive authority from other jurisdictions. 7 CMC
§ 3401; *see also, e.g., Hee v. Oh*, 2011 MP 18 ¶ 11.

26 ³ The Court may of course rule in favor of Defendant, which would give Defendant the unfair advantage of being
27 able to accept a favorable outcome and ignore an unfavorable outcome. *Polanski v. People*, 180 Cal. App. 4th
28 507, 538 (Cal. Ct. App. 2009) (noting that the defendant's absence allowed him to "seek[] relief from the courts
while 'insulating himself from the consequences of an unfavorable result,'" which the fugitive disentitlement
doctrine is designed to combat); *United States v. Nabepanha*, 200 F.R.D. 480, 483 (S.D. Fla. 2001) ("The
rationales for this doctrine include . . . the inequity of allowing a fugitive to use court resources only if the
outcome is in aid to him.").

1 F.3d 662, 664 (11th Cir. 1998); *see also Ortega-Rodriguez*, 507 U.S. at 246 (“[I]t is the District
2 Court that has the authority to defend its own dignity, by sanctioning an act of defiance [i.e.,
3 flight by a defendant] that occurred solely within its domain.”). Courts have applied the
4 doctrine to pretrial motions in criminal cases. *See, e.g., United States v. Kashamu*, 656 F.
5 Supp. 2d 863, 867 (N.D. Ill. 2009) (citing cases); *see also United States v. Nabepanha*, 200
6 F.R.D. 480, 482-84 (S.D. Fla. 2001).

7 Defendant argues that the doctrine does not apply because he is not a fugitive.
8 Defendant reasons that the Court never acquired personal jurisdiction over Defendant or, in the
9 alternative, personal jurisdiction was lost when the OPA filed an amended information without
10 serving Defendant an amended summons.⁴ This argument is without merit. *See United States*
11 *v. Van Cauwenberghe*, 934 F.2d 1048, 1054 (9th Cir. 1991) (“The disentitlement doctrine [] is
12 not one of jurisdictional dimensions, but rather one based on equitable considerations.”).

13 A defendant is a fugitive from justice if he “absented himself from the jurisdiction with
14 the intent to avoid prosecution.” *Nabepanha*, 200 F.R.D. at 482 (quoting *United States v.*
15 *Fonseca-Machado*, 53 F.3d 1242, 1244 (11th Cir. 1995) (collecting cases)). “The defendant’s
16 intent can be inferred from his failure to surrender to authorities once he learns of the charges
17 while outside of the jurisdiction.” *Id.* (citation omitted). It makes no difference whether the
18 defendant learns of the charges before leaving the jurisdiction or while he is already absent; if
19 he fails to return to the jurisdiction and appear before the prosecuting tribunal to answer the
20 charges, he is a fugitive.⁵

22 ⁴ If Defendant became a fugitive upon departing the CNMI to the United States, the filing of the amended
23 information would not shed Defendant’s fugitive status. *Cf. United States v. Zedner*, 555 F.3d 68, 78 (2d Cir.
24 2008) (holding that the defendant became a fugitive when he failed to return to the United States for his court-
ordered appearance, and “[h]e did not shed his fugitive status by being accused of new criminal conduct”).

25 ⁵ *Id.* at 482-83 (“Defendant is a fugitive [because] he knows of charges against him and actively absents himself
26 from this jurisdiction.”) (citing *United States v. Schuster*, 765 F.2d 1047, 1050 (11th Cir. 1985)); *see also United*
27 *States v. Reed*, 636 F.3d 966, 970 (8th Cir. 2011); *United States v. Ballentine*, 4 F.3d 504, 506 (7th Cir. 1993); *In*
28 *re Assets of Martin*, 1 F.3d 1351, 1356 (3d Cir. 1993); *United States v. Spillane*, 913 F.2d 1079, 1081-82 (4th Cir.
1990) (“Any person who, knowing that charges are pending, purposely (1) leaves the jurisdiction of prosecution
and (2) refuses to answer those charges by way of appearance before the prosecuting tribunal, is a fugitive from
justice.”); *United States v. Catino*, 735 F.2d 718, 722 (2d Cir. 1984) (citations omitted); *United States v.*
Ballesteros-Cordova, 586 F.2d 1321, 1324 (9th Cir. 1978); *United States v. Oliveri*, 190 F. Supp. 2d 933, 936
(S.D. Tex. 2001).

1 In *United States v. Oliveri*, 190 F. Supp. 2d 933, 934 (S.D. Tex. 2001), a Texas district
2 court denied the defendant's motion to dismiss an indictment under similar circumstances as in
3 the case at bar. There, the defendant, an Italian citizen, was on a business trip in Houston when
4 he was served with a subpoena to appear and testify before a grand jury on June 2, 1998. *Id.*
5 Defendant notified the Department of Justice, through counsel, of his intent not to appear based
6 on the court's lack of jurisdiction, fairness and other issues. *Id.* Upon failing to appear, the
7 defendant was indicted on criminal contempt charges. *Id.* Without being arraigned or present
8 in the jurisdiction, he filed a motion to dismiss the indictment, claiming it was defective in part
9 because it was based on an invalid subpoena. *Id.* at 934-35. The court denied the motion
10 without prejudice pursuant to the fugitive disentitlement doctrine because "[the defendant] is
11 aware of the charges pending against him in this district and is purposely absenting himself
12 from the United States to avoid arrest and arraignment on the charges." *Id.* at 936. Disentitling
13 the defendant was equitable because the defendant was "attempting to obtain the benefit of a
14 favorable ruling from this court without risking the burdens that may flow from an adverse
15 ruling." *Id.*

16 Here, the circumstances surrounding Defendant's absence from the Court's jurisdiction
17 provides even stronger evidence of intent to avoid prosecution than in *Oliveri*. Not only did
18 Defendant learn of the pending charges while still in the Court's jurisdiction, he also
19 surrounded himself with police officers on his way to, and through, the Saipan International
20 Airport in an apparent attempt to avoid service of penal summons. In any case, it is undisputed
21 that Defendant left the CNMI with knowledge that he had a court-ordered appearance
22 scheduled three days later to face the criminal charges filed against him. His departure infers
23 intent to avoid prosecution and "operates as an affront to the dignity of the court's
24 proceedings." *Ortega-Rodriguez*, 507 U.S. at 246.

25 Defendant is a fugitive of justice, and his argument that his absence is not willful and he
26 has not attempted to conceal his whereabouts does not shed his fugitive status. *See United*
27 *States v. Zedner*, 555 F.3d 68, 77-78 (2d Cir. 2008). The fact that Defendant was served,
28 properly or improperly, while carrying out his publicly announced plans to leave the CNMI

1 does not affect the application of the fugitive disentitlement doctrine. *See People v. Buffalo*, 49
2 Cal. App. 3d 838, 839 (Cal. Ct. App. 1975) (“[H]ow the person came to be at large is not
3 important. The crucial fact is [the defendant] is not in either actual or constructive custody and
4 is a fugitive.”). The court in *Buffalo* declared the defendant a fugitive even though his absence
5 was the result of the federal authorities’ error rather than any willful act committed by the
6 defendant. *Id.* (“Released by error, he is now a fugitive from both state and federal
7 authorities.”).

8 Also, in *Polansky*, the defendant argued it would be inequitable for the court to apply
9 the fugitive disentitlement doctrine because his flight was warranted based on certain judicial
10 misconduct. 180 Cal. App. 4th at 539. The court dismissed this argument, noting that the
11 defendant “could have availed himself of mechanisms for raising his allegations of judicial
12 misconduct short of being disrespectful of the entire judicial process by fleeing.” Similarly
13 here, Defendant could have remained in the CNMI and sought sanctions or other legal relief
14 against the OPA for its alleged improper service of penal summons. Because Defendant chose
15 to disobey a court order and flee the jurisdiction with knowledge of the pending charges, he has
16 forfeited his right to challenge the validity of the service of penal summons and the amended
17 information.

18 As long as Defendant remains outside the CNMI and this Court’s jurisdiction, he may
19 not “call upon the resources of the Court for determination of his claims.” *Molinero*, 396 U.S.
20 at 366; *See Ortega-Rodriguez*, 507 U.S. at 246 (“[T]he fugitive from justice has demonstrated
21 such disrespect for the legal process that he has no right to call upon the court to adjudicate his
22 claim.”) (quotation and citation omitted). Regardless of the reason for Defendant’s departure
23 from the CNMI and his failure to return, the fugitive disentitlement doctrine still applies
24 because he is well aware of the pending charges. *See, e.g., Wood v. Hall*, 130 F.3d 373, 375-
25 76, 379 (9th Cir. 1997); *see also United States v. One 1988 Chevrolet Cheyenne Half-Ton*
26 *Pickup Truck*, 357 F. Supp. 2d 1321, 1328-30 (S.D. Ala. 2005). The Court finds that applying
27 the doctrine to Defendant is equitable because Defendant showed a clear intent to avoid
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1 prosecution, and application of the doctrine would serve many of its valuable purposes under
2 the circumstances.⁶

3 In applying the fugitive disentitlement doctrine, the Court dismisses Defendant's
4 motion to quash the bench warrant without prejudice, and declines to entertain any other issues
5 Defendant has raised. However, the Court will evaluate Defendant's motion on its merits and
6 consider any other concerns regarding the service of penal summons and filed amended
7 information if and when Defendant returns to the CNMI. Another rationale for the doctrine not
8 previously mentioned is to encourage fugitives to submit to the court's jurisdiction so the case
9 can proceed in an efficient, dignified manner, as described in *Polanski*:

10 One intent of the doctrine is to encourage voluntary surrenders (citation
11 omitted) by dangling the carrot of review before runaway litigants, to be
12 delivered when the litigant returns to the jurisdiction. A trial court
13 possesses few options for inducing a fugitive who has left the jurisdiction
14 to voluntarily return, and denying Polanski relief until he returned to
15 California by denying the request without prejudice to a future request
struck a balance between punishing Polanski for leaving and offering him
the opportunity to seek relief as soon as he honored the court's order to
appear.

16 *Id.* at 538. Before the Court will use judicial resources in weighing any of Defendant's claims
17 or arguments, Defendant must be present in the CNMI so that any order or judgment rendered
18 by the Court may be enforced. *Cf. Oliveri*, 190 F. Supp. 2d at 936 ("Accordingly, Oliveri's
19 Motion to Dismiss Indictment (Docket Entry No. 4) is DENIED without prejudice. Oliveri
20 may reurge his motion after he has submitted to the jurisdiction of the court.").

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25 ⁶ The fugitive disentitlement doctrine serves the following purposes:

- 26 (1) it assures the enforceability of a decision against a fugitive; (2) it imposes a penalty for
27 flouting the judicial process; (3) it discourages flights from justice to promote efficient
28 operation of the courts; and (4) it avoids prejudice to the other side engendered by a
defendant's flight.

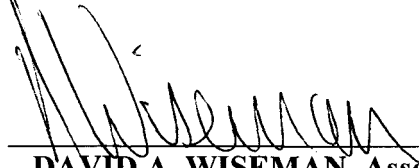
5 Am. Jur. 2d *Appellate Review* § 812 (2012); *Hanson v. Phillips*, 442 F.3d 789, 795 (2d Cir. 2006).

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IV. CONCLUSION

For the foregoing reasons, the Court hereby **DENIES** Defendant's motion to quash the bench warrant without prejudice.

IT IS SO ORDERED this 11 day of September, 2012.



DAVID A. WISEMAN, Associate Judge