

SECOND CIRCUIT REVIEW

Expert Analysis

## Expanding the Collateral Order Doctrine; Narrowing Fugitive Disentitlement

This past month, the U.S. Court of Appeals for the Second Circuit issued amended opinions and denied panel rehearing in *United States v. Bescond*, a case that concerns the ability of foreign defendants to seek relief from U.S. indictments. 2021 WL 6803154, at \*1. In a 2-1 decision, the panel majority held that fugitive disentitlement orders are immediately appealable under the collateral order doctrine, and that foreign defendants who remain at home abroad should not be deemed fugitives. Chief Judge Debra Livingston dissented, arguing that the collateral order doctrine was inapplicable, and expressing skepticism about the majority's fugitive analysis. The dueling opinions not only mark important development in the



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law of the circuit, but also reflect a fundamental disagreement about the role of the federal courts—and American justice—abroad.

### The District Court Decision

The appellant, a French banker named Muriel Bescond, was charged with violations of the Commodity Exchange Act (CEA) in the Eastern District of New York. A citizen and resident of France, Bescond declined to travel to the United States and submit to the court's jurisdiction. Through counsel, Bescond moved to dismiss the indictment on several grounds, including that the charges against her were based on an extraterritorial application of the CEA and violate her constitutional rights

under the Due Process Clause. *Bescond*, 2021 WL 6803154, at \*2. The district court concluded that Bescond's refusal to travel to the United States rendered her a fugitive from justice. Applying the common law doctrine of "fugitive disentitlement," which permits a court to refuse to consider the merits of a fugitive's claims, the district court dismissed Bescond's motion. Bescond appealed, and the government moved to dismiss the appeal, arguing that the Second Circuit lacked jurisdiction. *Id.* at \*3.

### The Majority Opinion

Writing for himself and Judge John Walker, Judge Dennis Jacobs began by acknowledging that the jurisdiction of courts of appeals is generally limited to "final decisions" of district courts, that this limitation is "especially compelling" in the context of criminal appeals, and that exceptions exist only "in limited circumstances." *Bescond*, 2021 WL 6803154, at \*3. Nevertheless, Judge Jacobs ruled

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that fugitive disentitlement is one of those exceptions because it meets the three requirements of the collateral order doctrine: First, an order disentitling a fugitive “conclusively determines” a disputed question. Second, the question is “completely separate” from the merits of the action because it has nothing to do with a defendant’s guilt or innocence, and it is “important” because disentitlement heavily burdens a defendant’s due process rights. Third, a disentitlement order would be “effectively unreviewable” after final judgment; if a defendant remains abroad, there will never be a final judgment to review and, if she travels to the United States to defend herself, her fugitive status would become moot. *Id.* at \*3-5.

Having decided that the collateral order doctrine applies, the majority turned to the question of fugitivity. The majority explained that a finding of fugitivity implies that a defendant took some action “to distance herself from the United States or frustrate arrest.” In other words, to be deemed a fugitive, a defendant must either actively “flee[]” the United States or “refuse[] to return” to the United States to avoid prosecution. *Bescond*, 2021 WL 6803154, at \*8. Here, *Bescond* committed her alleged crime from abroad, and remained in France primarily because that is where her family, her job, and her life are located. Because *Bescond*’s presence abroad was “unrelated

to the American prosecution,” and because there was no indication that she tried to remain “covert” or escape the reach of the law, the majority concluded that she was not a “fugitive” within the meaning of the common law doctrine. *Id.* at \*10. In holding that merely remaining abroad is insufficient to establish fugitivity, the majority expressly broke with precedent in at least one other circuit. *Id.*

### The Dissent

In her dissent, Chief Judge Livingston emphasized the narrowness of the collateral order doctrine. She pointed out that, over 70 years, the Supreme Court has

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recognized only four types of non-final orders in criminal cases that are subject to immediate review, and that the Second Circuit has recognized only a handful more. *Bescond*, 2021 WL 6803154, at \*12 (Livingston, J., dissenting). Additionally, Chief Judge Livingston critiqued the majority for effectively holding that foreigners have new and greater due process rights than American citizens: whereas

a foreigner living abroad can invoke a purported due process right to challenge her prosecution in U.S. courts, an American living abroad would enjoy no such right. *Id.* at \*13. Finally, she charged the majority with failing to give sufficient guidance for its new category of immediately appealable orders: How precisely can a court of appeals determine whether a foreign defendant is simply “remain[ing] at home” rather than refusing to return to the United States to avoid justice? Will discovery be required to resolve the issue? *Id.* at \*14.

While Chief Judge Livingston did not directly dissent from the majority’s ruling on the scope of fugitive disentitlement (which she believes the court should not have reached), she expressed skepticism about that issue too. Noting that she does not find the majority’s reasoning “sound,” Chief Judge Livingston wondered about the logic of a regime that would allow terrorists and cyber-criminals to escape classification as fugitives simply by remaining in their home countries. *Bescond*, 2021 WL 6803154, at \*11, \*14 (Livingston, J., dissenting).

### Conclusion

The debate in *Bescond* highlights several important developments. First, the dueling opinions reveal fundamentally divergent views regarding the collateral order doctrine. For Chief Judge Livingston,

the Supreme Court's and Second Circuit's repeated refusals to expand the collateral order doctrine amount to a strong presumption against permitting appeals from non-final orders other than those that fall within a handful of clearly defined "exceptions." *Bescond*, 2021 WL 6803154, at \*12 (Livingston, J., dissenting). By contrast, the majority's view of the doctrine appears to be more flexible and expansive. As described by the majority, the collateral order doctrine is not a specific "list" of narrow exceptions, but a general category defined by criteria—and courts are free to recognize when additional classes of non-final orders meet those criteria. *Bescond*, 2021 WL 6803154, at \*5, n.4.

Second, the majority's ruling regarding the definition of fugitivity represents a novel limitation on the fugitive disentitlement doctrine. Indeed, the majority itself noted that its decision likely resulted in a split with the Sixth Circuit (and possibly the Seventh Circuit as well). *Bescond*, 2021 WL 6803154, at \*10. The decision may well impact the use of criminal indictments against foreign defendants. And as noted by Chief Judge Livingston, the majority's definition of fugitivity leaves open several conceptual and practical questions that the Second Circuit may need to resolve in the future. *Bescond*, 2021 WL 6803154, at \*14-15 (Livingston, J., dissenting).

Finally, the divide between the majority and dissent reflects a fundamental disagreement regarding the reach of federal jurisdiction abroad. In 2015, the en banc court divided evenly when denying rehearing concerning the application of the Racketeer Influenced Corrupt Organizations Act to foreign conduct. See *Eur. Cmty. v. RJR Nabisco*, 783 F.3d 123 (2d Cir. 2015). Two years later, the en banc court divided again when denying rehearing regarding the govern-

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ment's power to issue warrants for data stored extraterritorially. See *Matter of Warrant To Search a Certain E-Mail Acct. Controlled & Maintained by Microsoft*, 855 F.3d 53 (2d Cir. 2017). And in the past decade, the court has vigorously debated the reach of the Alien Tort Statute (compare Pierre N. Leval, *The Long Arm of International Law; Giving Victims of Human Rights Abuses Their Day in Court*, Foreign Affairs, March/April 2013, at 16-21, with José A. Cabranes, *Withholding Judgment, Why U.S. Courts Shouldn't Make Foreign Policy*, For-

ign Affairs, September/October 2015, at 125-27), and twice drawn review by the U.S. Supreme Court. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

Here, the majority's limitation on fugitivity, its recognition of a due process right to contest fugitive status from afar, and its blessing of interlocutory appeals to protect foreign defendants operate together as a check on attempts to exercise criminal jurisdiction abroad. As Chief Judge Livingston noted, the majority's decision may well represent an effort to remedy "prosecutorial overreach," *Bescond*, 2021 WL 6803154, at \*11 (Livingston, J., dissenting), or alternatively, "will greatly disserve the interests of justice when applied to the substantial number of cases in which foreign-based defendants are charged with violating our laws and harming our people," *id.*