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WHITE-COLLAR CRIME

Who Is a Fugitive? The Second Circuit Interprets the Fugitive Disentitlement Doctrine

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The practice of white-collar criminal law has become increasingly global in nature. Federal prosecutors now often prosecute individuals for acts that take place in many countries and have global effects. These cases raise a number of significant legal issues, including whether the charges rest on an improper extraterritorial application of U.S. law.

The impact of such cases is significant on individuals who live and work abroad. Historically, the "fugitive disentitlement" doctrine has foreclosed challenges to criminal charges by a defendant who does not physically submit to a U.S. court's jurisdiction. As a consequence, to make even threshold challenges to an indictment, a defendant who lives abroad must leave home, waive the right to oppose extradition, and risk pretrial detention in the United States.

In this article, we discuss the Second Circuit's recent decision in *United States v. Bescond*, 7 F.4th 127 (2d Cir. 2021), which held that the defendant, Muriel Bescond, a French citizen charged with commodities fraud, was not a "fugitive." The defendant was prosecuted in the Eastern District of New York for actions that she took in France, where she lived and worked. She sought to challenge the charges from abroad, and the district court, following established doctrine, rejected her challenge on account of fugitive disentitlement. On appeal, a divided panel of the Second Circuit held that disentitlement was an appealable "collateral order" and, further, that Bescond should not have been deemed a fugitive. Under the majority opinion, Bescond would be allowed to pursue her motion to dismiss the indictment while she remains in France.

We begin with a brief summary of the "fugitive disentitlement" doctrine and then turn to the facts and holding in Bescond. We conclude with a discussion of possible implications of the decision for white-collar practitioners.

Basic Principles

The fugitive disentitlement doctrine derives from an appellate court's authority to "dismiss an appeal or writ in a criminal matter when the party seeking relief becomes a fugitive." *Degen v. United States*, 517 U.S. 820, 823 (1996) (citing *Ortega- Rodriguez v. United States,* 507 U.S. 234, 239 (1993); *Smith v. United States*, 94 U.S. 97, 24 (1876)). Disentitlement is said to serve four purposes: "1) assuring the enforceability of any decision that may be rendered against the fugitive; 2) imposing a penalty for flouting the judicial process; 3) discouraging flights from justice and promoting the efficient operation of the courts; and 4) avoiding prejudice to the other side caused by the defendant's escape." *Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 280 (2d Cir. 1997). Application of the doctrine is not mandatory; courts exercise discretion "[b]earing these objectives in mind." Id.

The doctrine applies to either a "traditional" or a "constructive-flight" fugitive. A traditional fugitive

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is "a person who, having committed a crime, flees from the jurisdiction of the court where a crime was committed or departs from his usual place of abode and conceals himself within the district." *Finkelstein*, 111 F.3dat 281. A constructive-flight fugitive is someone who "allegedly committed crimes while in the United States but [was] outside the country—for whatever reason—when they learned that their arrests were sought and who then refused to return to the United States in order to avoid prosecution." *Collazos v. United States,* 368 F.3d 190, 199 (2d Cir. 2004); see 28 U.S.C. § 2466 (courts "may disallow" a fugitive in a criminal prosecution from challenging a related civil or criminal forfeiture action).

'Bescond'

In 2017, a grand jury returned a five-count indictment in the Eastern District of New York which charged French citizens Danielle Sindzingre and Muriel Bescond with violations of the Commodity Exchange Act (CEA) between May 2010 and October 2011. Both defendants worked for Société Générale (SG) and lived in Paris. Bescond was head of the Paris treasury desk, and Sindzingre was the global head of treasury. The government alleged that Sindzingre instructed Bescond to submit interest rate estimates that were lower than SG's actual estimated borrowing costs, and Bescond carried out Sindzingre's directive, causing SG to make false USD LIBOR submissions on numerous occasions, in violation of Section 13(a)(2) of the CEA. *United States v. Sindzingre*, No. 17-CR-0464(JS), 2019 WL 2290494, at *2-3 (E.D.N.Y. May 29, 2019).

At the time of the indictment, Bescond was still living in France and working as head of the SG's treasury desk. After the indictment she remained in France.

Although she did not appear in the United States, Bescond moved to dismiss the charges, arguing that the indictment "impermissibly charged her with extraterritorial violations of the CEA" and violated her Fifth Amendment due process rights by failing to allege a sufficient nexus with the United States. She also claimed that the statute of limitations had expired and the government was engaging in selective prosecution of female participants in the alleged scheme. U.S. District Judge Joanna Seybert ruled that Bescond was a fugitive and denied her motions on the basis of fugitive disentitlement. *Sindzingre*, 2019 WL 2290494, at *9.

In this edition of their White-Collar Crime column, Elkan Abramowitz and Jonathan S. Sack explore the Second Circuit's recent decision in 'United States v. Bescond', which held that the defendant, a French citizen charged with commodities fraud, was not a "fugitive."

The district court also ruled, alternatively, that even if Bescond had appeared in the Eastern District, the indictment properly charged violations of the CEA and did not violate Bescond's due process rights. The court declined to address Bescond's selective prosecution and statute of limitations claims, finding that resolution of both issues would require additional briefing and inquiry which the court deemed unwarranted until Bescond submitted to the court's jurisdiction. Id.

The Second Circuit Decision

On appeal, Bescond argued that the district court had abused its discretion by applying the fugitive disentitlement doctrine and should have decided her claims, including that the indictment was time-barred and motivated by improper selective prosecution. A divided panel, with Senior Circuit Judge Dennis Jacobs writing for the majority, reversed the decision of the district court, holding that the district court's decision was appealable as a "collateral order," and that Bescond should not be deemed a fugitive. The majority further held that even if Bescond were a fugitive, the district court had abused its discretion in applying the disentitlement doctrine. Chief Judge Livingston, in dissent, maintained that the majority had misapplied the "collateral order" doctrine and should have dismissed Bescond's appeal for lack of appellate jurisdiction. *Bescond*, 7 F.4th at 140, 145.

In the majority's view, Bescond was not a "traditional fugitive" because she had not fled the country or attempted to conceal herself. Nor was she a "constructive-flight fugitive" because, as "a French citizen, living in France, where she supports a family, and is employed in a legitimate line of work," she should not be viewed as a defendant who remained outside the country to avoid prosecution. She simply stayed in her home country when she knew her arrest was sought; her "presence abroad [was] unrelated to the American prosecution." The outcome would likely be different "if a person's presence abroad is in any part covert or suspect: a hideout, sanctuary, or escape from the reach of law." *Bescond*, 7 F.4th at 139-41.

The majority went beyond holding that Bescond was not a fugitive; it held that even if Bescond could be deemed a fugitive, the district court had abused its discretion by applying the disentitlement doctrine. In light of the four objectives of the doctrine (stated above), the majority emphasized that the district court lacked a basis for "finding that Bescond is exhibiting disrespect for U.S. law[,]" and that disentitlement is "a disproportionately severe response[.]" The majority disagreed with the district court's concern that addressing Bescond's motion would "condone the practice of attacking indictments from abroad." The majority's view rested on the Bescond's specific circumstances, which included the novel nature of the charges against her, her employment in a legitimate line of work, and her home country's protection from extradition. The majority also rejected the trial court's finding of substantial prejudice to the government attributable to the conduct of Bescond. Finally, the majority stated that the trial court should have considered "the countervailing prejudice to Bescond[,]" which the majority described as "requiring [her] to leave home and face arrest and detention to have any hope of securing dismissal." Bescond, 7 F.4th at 142-43.

Ironically, while the majority allowed Bescond to challenge her indictment in the district court, the majority's procedural holding limited the impact of its decision. In the majority's view, the "collateral order" doctrine authorized the court to decide the applicability of the fugitive disentitlement doctrine, but not to decide the merits of the appeal. As a result, the case was simply remanded to the district court, which had already rejected Bescond's claims of improper extraterritoriality and due process violation.

In a dissenting opinion, Chief Judge Livingston maintained that the court lacked jurisdiction to consider the appeal in its entirety, including applicability of the fugitive disentitlement doctrine. Bescond's case did not present either an important issue completely separate from the merits of the case or an issue that is effectively unreviewable on appeal from a final judgment. In Chief Judge Livingston's view, the majority's decision was inconsistent with the Second Circuit's decision in *United States v. Golden*, 239 F. 877, 879-81 (2d Cir. 1956), and the district court's order did not meet the exacting requirements for application of the "collateral order" doctrine.

In October, the government petitioned the Second Circuit for rehearing en banc. The government argued that the majority's application of the collateral order and fugitive disentitlement doctrines was incorrect and in conflict with prior decisions of the Second Circuit. See, e.g., *United States v. Blanco*, 861 F.2d 773, 779 (2d Cir. 1988); *United States v. Catino,* 735 F.2d 718, 722 (2d Cir. 1984). In the government's view, the majority's holding—that disentitlement was limited to defendants who take some action "to distance [themselves] from the United States or frustrate arrest"—is at odds with Second Circuit precedent which has given "fugitive" an expansive definition.

Conclusion

The impact of the majority opinion on Bescond herself would appear to be quite limited. On remand, the defendant's extraterritoriality and due process claims will likely fail; the district court has already said that it would reject that argument if Bescond were entitled to have her motion heard. How the district court will address Bescond's additional claims—selective prosecution and untimely prosecution—is unclear.

Yet the impact of the decision may be quite significant on other individuals who live abroad but find themselves charged in federal prosecutions. The majority opinion not only declined to give the definition of "fugitive" its broadest possible meaning; the majority also indicated that discretionary application of the disentitlement doctrine would be scrutinized closely in the future. The facts of individual cases matter, and the issue would appear not so cut-and-dried as it once seemed.

In *Bescond*, the Second Circuit's holding departs from decisions in the Sixth and Eleventh Circuits, which held that appeals from application of the fugitive-disentitlement doctrine were not appealable as collateral orders. If the split on appellate jurisdiction remains, the Supreme Court may ultimately have to decide the issue.

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