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Open Questions 3 Years After 2nd Circ.'s Fugitive Ruling

By **Gabrielle Friedman, John Siffert and Jeannie Rubin** (August 26, 2024, 3:34 PM EDT)

It is not uncommon for the U.S. Department of Justice to indict non-U.S. citizens residing abroad for crimes committed from outside the U.S.

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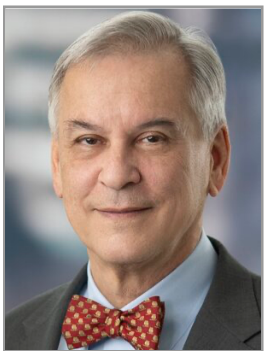
Charges have included violations of international bank and wire fraud statutes, cybercrimes, sanctions violations, money laundering, bribery, criminal antitrust laws, corruption, national security and narcotics trafficking among others.[1]

When a nonresident defendant moves to dismiss the indictment without entering the U.S., they must overcome the hurdle of the fugitive disentitlement doctrine, or FDD, an equitable doctrine that permits a court to decline to adjudicate arguments of a defendant deemed to have fled the jurisdiction.



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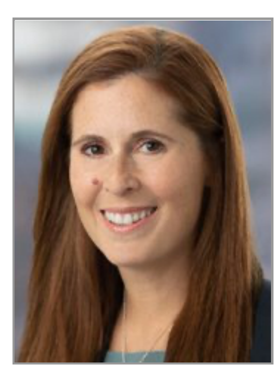
In U.S. v. Bescond,[2] the U.S. Court of Appeals for the Second Circuit in August 2021 **permitted** a foreign defendant living abroad to move to dismiss the indictment without requiring her to surrender in the U.S., finding that the FDD did not apply because she did not meet the legal definition of a "fugitive."

In so holding, the Second Circuit deepened a split with the U.S. Court of Appeals for the Sixth Circuit, among other courts, on the definition of fugitivity, and may have opened the door for more nonresident foreign defendants to test the legal adequacy of an indictment from outside the U.S.



In this article, we consider recent developments pertaining to the FDD, open questions after Bescond, and the complexities facing courts that currently are considering the reach and applicability of the FDD to foreign defendants residing abroad.

Legal Standard

There is no constitutional or statutory requirement that a defendant must surrender to contest the legal validity of an indictment.[3]

The Federal Rules of Criminal Procedure likewise have no provision requiring a defendant to submit to a court's jurisdiction to move to dismiss an indictment. Rule 12(b)(3) of the Federal Rules of Criminal Procedure provides only that certain motions to dismiss must be filed pretrial, or else the defendant is barred from raising them later.[4]

The disentitlement doctrine derives from the court's inherent authority, and initially was applied to dismiss appeals filed by criminal defendants who absconded post-conviction and then challenged their convictions in absentia.[5]

The U.S. Supreme Court has yet to address whether the FDD applies to motions to dismiss an indictment, and has cautioned that disentitlement is a harsh sanction that should be deployed narrowly.[6] Without guidance from the Supreme Court, lower courts have increasingly applied the FDD to motions to dismiss, and a split has developed among the circuits as to its application.[7]

The FDD is premised on the proposition that a fugitive may be disentitled, or denied a hearing before the court that they fled. Once a court determines that a defendant is a fugitive, it is imbued with broad discretion to hold that the defendant is not entitled to be heard on a motion to dismiss — hence the expression "disentitled."

Courts have invoked the FDD after balancing various interests, including the need to discourage and punish flights from justice, ensure the enforceability of an adverse decision against the defendant, promote the efficient operation of the courts, and prevent prejudice caused by the defendant's absence.[8]

Courts have described the rubrics underpinning the FDD as protecting the dignity[9] of the court by preventing a defendant from flouting the legal system, and promoting judicial economy by ensuring that judgments will be enforceable.[10]

The current circuit split over the definition of "fugitive" for the purposes of the FDD concerns whether an extraterritorial defendant fled a jurisdiction if they were not in the jurisdiction to begin with. Some prosecutions present fact patterns introducing unexpected complexity to the seemingly straightforward issue of what it means to be a fugitive.

Most courts that have addressed the question concluded that a defendant can be a fugitive even if they were not ever present in the U.S.[11] The Second Circuit and the U.S. Court of Appeals for the Seventh Circuit, on the other hand, have held that there are circumstances where a foreign citizen resident abroad who did not flee the U.S. is not a fugitive.[12]

Bescond and the Circuit Split Over Fugitivity

In 2021, the Second Circuit considered the situation of a French citizen openly residing in France; employed by Societe Generale SA, a French bank; and charged for conduct allegedly committed in France with effects in the U.S. The DOJ **charged** Muriel Bescond with violating the Commodity Exchange Act by participating in a scheme to manipulate Libor rates.[13]

Bescond's physical presence in France protected her from extradition under French law. While she remained in France, Bescond **moved to dismiss** the indictment, arguing, among other reasons, that "it impermissibly charged her with extraterritorial violations of the CEA ... [and] violated her Fifth Amendment due process rights."

The U.S. District Court for the Eastern District of New York **concluded** in 2019 that Bescond was a fugitive because she failed to appear. The court disentitled her and denied her motion.[14]

A divided panel of the Second Circuit reversed the fugitivity finding, focusing on the fact that Bescond had never been present in the U.S. The majority concluded Bescond was not a "traditional fugitive" because she had not fled the U.S. or concealed herself, nor was she a "constructive-flight fugitive" because she did not commit the alleged crimes while in the U.S., or refuse to return to the U.S. to avoid prosecution.

Rather, "she simply remains at home, as her home country permits her to do."[15] The court also indicated, while not deciding the merits, that Bescond had a "nonfrivolous extraterritoriality claim."[16]

Ultimately, the DOJ ended the prosecution before Bescond's renewed motion to dismiss was decided.

The Second Circuit's holding is notable for several reasons. It challenges the traditional U.S. view that a defendant who fails to appear should not get consideration from the court. Bescond also deepened a split[17] about the definition of fugitivity with the Sixth Circuit, which holds that a fugitive is any defendant who fails to surrender in the U.S. for whatever reason.[18]

Bescond seems to represent an evolution in how the Second Circuit views the applicability of the FDD to nonresident foreign defendants. The Second Circuit had declined **the opportunity** to address this exact issue in 2015 in a case similar to Bescond, involving Swiss banker Roger Darin.[19]

Whether Bescond heralds a sea change will depend on how courts interpret factors relevant to the fugitivity analysis.

Questions After Bescond

The outcome in Bescond is consistent with the related notion that certain conduct, even if criminal in nature, is beyond the reach of the U.S.[20]

Bescond suggests that unless the foreign defendant had been in the U.S. in connection with the crime, the defendant cannot be determined to be a fugitive in the Second Circuit.

However, it is far from clear that lack of presence in, or ties to, the U.S. is the sole factor in determining a defendant's fugitive status. In fact, Bescond suggests that other factors may be relevant in certain situations, as we discuss below.

Is a non-U.S. defendant a fugitive if their presence abroad is covert or evasive?

The Bescond decision's conclusion that the absent defendant was not a fugitive for FDD

purposes because she was neither a traditional fugitive nor a constructive-flight fugitive included the important caveat that a court might reach a "different result [where] a person's presence abroad is in any part covert or suspect: a hideout, sanctuary, or escape from the reach of law."[21]

A case now pending in the Eastern District of New York may present precisely that situation. The defendants in U.S. v. Napolsky are Russian nationals **charged** with disseminating pirated literary works on websites they controlled from outside the U.S.[22] The defendants argue that the case is an impermissible extraterritorial application of U.S. law.[23]

Unlike Bescond, who remained protected from extradition in her country of citizenship, the Napolsky defendants were arrested while traveling in a third country, Argentina, and contested extradition.

It remains to be seen whether the court will accept the government's argument that contesting extradition from a third country constitutes an "escape from the reach of the law" carved out by Bescond, or whether seeking protection from extradition in a third country is functionally the same as Bescond enjoying the protection of her home country's law.

Do a foreign defendant's prior ties to the U.S. affect the fugitivity analysis?

In U.S. v. Lopez Bello, the Second Circuit may have the opportunity to address how prior contacts with the U.S. may affect the fugitivity determination.

Samark Jose Lopez Bello is a Venezuelan national who resided with his family in the U.S. on temporary visas for years. Less than a week after Lopez Bello left the U.S in early February 2017, the Office of Foreign Assets Control **announced** he was a specially designated narcotics trafficker under the Foreign Narcotics Kingpin Designation Act, effectively preventing his return to the U.S. He subsequently resided in his home country of Venezuela.

Two years later, Lopez Bello was indicted for sanctions violations and conspiracy to defraud the U.S. based on alleged conduct he engaged in after he left the U.S. in 2017.

Lopez Bello moved to dismiss from Venezuela, and the U.S. District Court for the Southern District of New York disentitled him. The court concluded that Lopez Bello was a constructive-flight fugitive because the "luxurious life" he had led in the U.S. prior to leaving demonstrated that he had intended to make the U.S. his permanent home.[24]

The indictment only alleges conduct after Lopez Bello left the U.S., at a time when he was prevented from returning to the U.S. The case thus presents an opportunity for the Second Circuit to clarify the role of prior contacts to the U.S. by a foreign defendant whose alleged crimes were committed after leaving the U.S.

There are other considerations that may create a gloss on how the court perceives the motivation for Lopez Bello's conduct and, therefore, the outcome. Lopez Bello is alleged to have played a significant role in international narcotics trafficking to benefit the regime of Venezuelan President Nicholás Maduro Moros and others, and he has relied on the U.S. court system in civil matters.[25]

To the extent Lopez Bello could be viewed as a less sympathetic defendant than Bescond, the matter puts in high relief whether other factors — such as conduct alleged — would change the fugitivity finding.

Put more simply: Would the Second Circuit have reached a different result if Bescond had been an alleged arms dealer to rogue states, rather than an otherwise ordinary banker accused of financial fraud?

Does it matter to the fugitivity determination if the defendant has a nonfrivolous challenge on the merits?

The fugitivity determination may also turn on whether the court deems the defendant's challenge to be nonfrivolous.

For example, if a court determines that the conduct likely falls outside the scope of U.S. law, the court may be more likely to determine that application of the FDD is inappropriate, as in Bescond and the Seventh Circuit's 2009 ruling in In re: Hijazi.

On the other hand, courts that have disentitled a foreign defendant have found that the motion to dismiss lacks merit anyway, as in Lopez Bello.

Conclusions

In Bescond, the Second Circuit refrained from applying the FDD and did not disentitle the defendant from moving to dismiss, finding that she was not a traditional or constructive-flight fugitive at least in part because she has not been present in the U.S. and thus did not flee or fail to return after being charged.

If other circuits adopted this narrower application of the FDD, courts would hear more merits-based motions to dismiss filed by absent foreign defendants.

There are legitimate reasons to think that all stakeholders in the criminal justice process could benefit were courts to hear more such merits-based motions.

First, it would be helpful for courts to clarify whether an indictment stated a crime, especially if there is a claim of overreach.[26]

Second, limiting the application of the FDD to traditional or constructive fugitivity would not create immunity for those who commit crimes abroad that cause harm in the U.S. A narrow application of the FDD does nothing to undermine the existing legal paradigm for prosecutors to extradite extraterritorial defendants who commit crimes that have consequences in the U.S.

Third, requiring a defendant's presence to adjudicate a motion to dismiss places an extreme burden on a foreign defendant with no ties to the U.S., possibly involving pretrial detention, attendant loss of employment, and distance from family and other support.[27]

The Bescond ruling seeks to limit disentitlement precisely because it recognizes that "[d]isentitlement enables the government to coerce [a defendant's] presence in court by

imposing financial, reputational, and family hardship regardless of her guilt or innocence, and regardless of whether the indictment charges violations of a statute that applies extraterritorially."[28]

Fourth, it would not be an unfair windfall to permit a nonresident to be heard in such circumstances. After all, if an indictment cannot survive a motion to dismiss, surely it is not unjust to dismiss it even if the defendant does not appear.

And, if an absent foreign defendant's motion to dismiss fails on the merits, the defendant has gained nothing. They are subject to the same rules as any other defendant, requiring the defendant's physical presence for arraignment and subsequent proceedings.[29]

Fifth, the Second Circuit in Bescond appears sensitive to how the FDD may excessively benefit prosecutors if deployed too widely. The court pointed out the risk of prosecutorial overreach if the FDD is used to disentitle any defendant who remains outside the U.S. for whatever reason:

> So long as the government surmounts the low threshold of securing an indictment, any soul on the planet may be deemed a fugitive, and disentitlement would then bar a challenge to extraterritoriality from abroad, requiring the foreigner to leave home and face arrest and detention to have any hope of securing dismissal.[30]

Sixth, a narrow reading of the FDD could enhance the rigor of charging decisions by increasing the possibility of judicial review of indictments even where the defendant is outside the U.S. and is protected from extradition.

Many such indictments will likely involve extraterritorial application of U.S. law, and there is no constitutional reason such indictments should be exempt from a court's scrutiny in the absence of the defendant.

On the other hand, prosecutors may perceive the increased review of the extraterritorial application of U.S. law as a strategic disadvantage, precisely because courts may limit the reach of indictments abroad.

Seventh, prosecutors may find a silver lining in terms of extradition proceedings if judicial review results in more opinions supporting the legal validity of indictments of extraterritorial defendants.

Extradition proceedings initiated by a U.S. request are undertaken in the legal system of the foreign country where the defendant is located and are governed by treaty and the legal rules of the requested country. In fact, the existence of a U.S. judicial opinion upholding the validity of the U.S. charging instrument may prove to be a persuasive factor to the foreign authority deciding an extradition petition.[31]

In sum, the number of international cross-border criminal investigations suggests that courts, prosecutors and defense counsel should be sensitive to the rights of defendants to be heard when they are not in the U.S. at the time of charging and remain abroad.

As courts continue to modify the applicability of the FDD, defense counsel in particular should scrutinize judicial decisions for factors that could enhance the chance that their clients will be able to challenge the indictment while remaining abroad.

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[1] See, e.g., United States v. Napolsky et al., 1:22-cr-00525 (NRM) (E.D.N.Y.) (two Russian citizens resident abroad charged with criminal copyright violations, wire fraud and money laundering in connection with operating a website from outside the U.S.); United States v. Carvajal-Barrios et al., 1:11-cr-00205 (AKH) (S.D.N.Y.) (four Venezuelan citizens and two Colombian citizens all resident abroad charged with narco-terrorism and cocaine importation conspiracies and machine gun possession for conduct outside the U.S.); United States v. Stimler, 1:21-cr-00471 (PKL) (S.D.N.Y.) (UK citizen and resident charged with FCPA and money laundering conspiracies for conduct in UK in connection with Glencore prosecution); United States v. Coro et al., 1:19-cr-00144 (AKH) (S.D.N.Y) (Venezuelan citizen and resident charged with foreign narcotics kingpin sanctions violations for conduct outside the U.S.); United States v. Liang et.al., 2:16-cr-20394 (SFC) (APP) (E.D. Mich.) (German citizens and residents charged with conduct in Germany in connection with Volkswagen diesel fraud prosecution); United States v Eun Soo Kim, 3:15-cr-00002 (TCB) (N.D. Ga.) (Korean citizen and resident charged for auto parts bid-rigging); United States v. Hoskins, 3:12-cr-238 (JBA) (D. Conn) (UK national resident in France charged with FCPA and money laundering for conduct outside the U.S. in connection with Alstom prosecution).

[2] 24 F.4th 759 (2d Cir. 2021).

[3] In contrast, there is a fugitive disentitlement statute with respect to forfeiture actions. 28 U.S.C. § 2466.

[4] Rule 12(b)(3) Fed. R. Crim. P. provides that "[t]he following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits: (A) a motion alleging a defect in instituting the prosecution, including: (i) improper venue; (ii) preindictment delay; (iii) a violation of the constitutional right to a speedy trial; (iv) selective or vindictive prosecution; and (v) an error in the grand-jury proceeding or preliminary hearing; (B) a defect in the indictment or information; including: (i) joining two or more offenses in the same count (duplicity); (ii) charging the same offense in more than one count (multiplicity); (iii) lack of specificity; (iv) improper joinder; and (v) failure to state an offense; (C) suppression of evidence; (D) severance of charges or defendants underRule 14; and (E) discovery underRule 16."

[5] See Ortega-Rodriguez v. United States , 507 U.S. 234, 239 (1993) ("It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal.").

[6] See Degen v. United States , 517 U.S. 820, 828 (1996).

[7] Courts have yet to address whether the FDD reaches to all Rule 12(b)(3) motions, or only to motions to dismiss.

[8] See Empire Blue Cross & Blue Shield v. Finkelstein , 111 F.3d 278, 280-82 (2d Cir. 1997).

[9] The Supreme Court has held that disentitlement "redress[es] the indignity visited upon the [] Court by [a fugitive's] absence from the criminal proceeding." Degen, 517 U.S. at 828.

[10] See, e.g., United States v. Martirossian , 917 F.3d 883, 885 (6th Cir. 2019) ("Federal courts do not play 'catch me if you can.'").

[11] See Martirossian, 917 F.3d at 890 ("[A] defendant need not be present in and leave a jurisdiction to become a fugitive; the mere refusal to report for prosecution can constitute constructive flight."); United States v. Itriago , No. 13-20050-CR, 2019 WL 1232128, at *2 (S.D. Fla. Feb. 8, 2019), report and recommendation adopted, No. 13-20050-CR, 2019 WL 1228000 (S.D. Fla. Mar. 15, 2019) (applying FDD to preclude review of motion to dismiss filed by foreign defendant who never entered the US); United States v. Chung Cheng Yeh , No. CR 10-00231 WHA, 2013 WL 2146572, at *3 (N.D. Cal. May 15, 2013) (same); but see In re Hijazi, 589 F.3d 401 (7th Cir. 2009) (concluding that defendant whose only visit to the U.S. was unrelated to the case could had not "fled"); In re Han Yong Kim , 571 F. App'x 556, 557 (9th Cir. 2014) (noting split of authority and declining to decide whether the FDD applies to a foreign national residing abroad refuses to voluntarily travel to the U.S. for trial in the absence of an extradition order).

[12] See, e.g., Bescond, 24 F.4th 759 (2d Cir. 2021); In re Hijazi, 589 F.3d at 413; but see In re Kashamu , 769 F.3d 490, 493 (7th Cir. 2014) (in denying defendant's motion to dismiss under speedy-trial clause, describing defendant who "didn't literally flee the United States, since he was never in the United States" as "functionally a fugitive" who deliberately forewent the opportunity for a speedy trial because "he knew he was under indictment in this country" and successfully fought extradition).

[13] 24 F.4th at 763.

[14] Id. at 764.

[15] Id. at 772.

[16] Id.

[17] Bescond, 24 F.4th at 772 (citing with approval the Seventh Circuit's opinion in In re Hijazi , which declined to define as fugitive a Lebanese citizen resident in Kuwait charged with military procurement fraud.) The Seventh Circuit concluded that Hijazi had not fled the jurisdiction because his alleged conduct was committed abroad, he had been in the U.S. on only one occasion many years earlier and had never been physically present in the jurisdiction of the court, and he did not own property in the jurisdiction. In re Hijazi, 589 F.3d at 413.

[18] See Martirossian, 917 F.3d at 890 ("[A] defendant need not be present in and leave

a jurisdiction to become a fugitive; the mere refusal to report for prosecution can constitute constructive flight.").

[19] In 2015, the Second Circuit dismissed an appeal from the district court's disentitlement of Roger Darin, a non-resident foreign defendant, who moved to dismiss an indictment from abroad. United States v. Hayes, No. 15-2597 (2d Cir. Mar. 15, 2016), Dkt. 24. The lower court had disentitled Darin, a Swiss national residing in Switzerland, who was charged with wire fraud for allegedly manipulating LIBOR rates for his Swiss bank employer. U.S. v. Hayes, 118 F.Supp.3d 620 (S.D.N.Y. 2015). As in Bescond, the charged conduct occurred entirely outside the U.S.; Darin was living openly in his home country, which protected him from extradition; and he had moved to dismiss for impermissible extraterritorial application of U.S. law. The indictment ultimately was withdrawn for other reasons.

[20] See, e.g., Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454-56 (2007) (noting that "United States law . . . does not rule the world" and that "[a]ny doubt" about whether conduct falls within the statute must be resolved by the presumption against extraterritoriality); RJR Nabisco, Inc. v. Eur. Cmty, 579 U.S. 325, 335 (2016) (explaining that presumption against extraterritoriality is grounded in the "basic premise of our legal system that ... 'United States law governs domestically but does not rule the world.'") (quoting Microsoft Corp., 550 U.S. at 454); United States v. Hoskins, 902 F.3d 69, 97 (2d Cir. 2018) (concluding that foreign defendant who acted entirely outside the US could not be prosecuted for conspiracy to violate the FCPA based on domestic conduct by his alleged co-conspirators).

[21] 24 F.4th at 773.

[22] No. 22 Cr. 525 (E.D.N.Y.) (NRM)

[23] Defendants rely on cases including RJR Nabisco, Inc., 579 U.S. 325 (2016), and Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

[24] United States v. Lopez Bello, No. 19 CR. 144 (AKH), 2023 WL 3199968, at *1 (S.D.N.Y. May 2, 2023).

[25] On appeal, Lopez Bello argues that Bescond precludes a ruling of fugitivity because, notwithstanding his prior U.S. residence and ownership of U.S. property, the alleged conduct occurred outside the U.S.after he left it, and like Bescond, he simply remains in his home country. Opening Brief of Defendant-Appellant, U.S. v. Lopez Bello, No. 23-6456 (2d Cir. Aug. 21, 2023), Dkt. 26.1.

[26] See, e.g., Ciminelli v. United States, 598 U.S. 306 (2023); Percoco v. United States, 598 U.S. 319 (2023); Kelly v. United States, 590 U.S. 391 (2020); McDonnell v. United States, 579 U.S. 550 (2016); Skilling v. United States, 561 U.S. 358 (2010); Cleveland v. United States, 531 U.S. 12 (2000); McNally v. United States, 483 U.S. 350 (1987).

[27] The burden is particularly acute where a foreign defendant can rely on their home or another nation's protection against extradition to the U.S.

[28] 24 F.4th at 775.

[29] The Federal Rules of Criminal Procedure require the defendant's presence at arraignment unless the court accepts a knowing and voluntary waiver. See Fed. R. Crim. P. 10; see also Fed. R. Crim. P. 43.

[30] 24 F.4th at 775.

[31] The Seventh Circuit recognized this possibility when it noted that a U.S. court decision upholding the indictment against a defendant may make the foreign defendant's country of residence more likely to approve extradition to the U.S. See In re Hijazi, 589 F.3d 401, 413 (7th Cir. 2009).

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