Criminal Procedure—Fugitive Disentitlement Ruling Allows Interlocutory Appeals In Second Circuit Under Collateral Order Doctrine—United States v. Bescond, 7 F.4th 127 (2d Cir. 2021)

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CRIMINAL PROCEDURE—FUGITIVE DISEN TITLEMENT RULING ALLOWS INTERLOCUTORY APPEALS IN SECOND CIRCUIT UNDER COLLATERAL ORDER DOCTRINE—UNITED STATES V. BESCOND, 7 F.4TH 127 (2D CIR. 2021).

In the United States, the “final judgment rule” mandates federal courts of appeals to refuse review of a lower court decision until a final judgment is made.1 The Supreme Court of the United States (the “Court”) presumes that “[i]n a criminal case the [final judgment] rule prohibits appellate review until conviction and imposition of sentence.”2 Still, the Court has recognized that some issues warrant immediate appellate review, and thus it formed the collateral order doctrine to permit courts to review certain matters on interlocutory appeal.3 Though the collateral order doctrine’s applicability


2 See Flanagan, 465 U.S. at 263 (citing Berman v. United States, 302 U.S. 211, 212 (1937)).

3 See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (noting some collateral issues may warrant immediate review); Flanagan, 465 U.S. at 265-66 (listing collateral order exceptions recognized by Supreme Court); Sell v. United States, 539 U.S. 166, 176-77 (2003) (creating additional collateral order exception); see also Interlocutory appeal, LEGAL INFORMATION INSTITUTE, https://perma.cc/W7TX-DWVW (last updated Oct. 12, 2021) (defining interlocutory appeal); Interlocutory order, LEGAL INFORMATION INSTITUTE, https://perma.cc/GGA9-5MRJ (last updated Oct. 12, 2021) (defining interlocutory order). An interlocutory order, such as a disentitlement order, is one issued during the course of litigation. Interlocutory order, supra. To appeal such an order, a party must show that it satisfies the conditions of the collateral order doctrine. See id.
has expanded significantly since its inception, the Court has stressed the importance of applying the doctrine narrowly.4 In United States v. Bescond,5 the United States Court of Appeals for the Second Circuit (“Second Circuit”) addressed the question of whether the collateral order doctrine should extend to fugitive disentitlement orders.6 The majority in Bescond held that a fugitive disentitlement order met the conditions of the collateral order doctrine, thereby creating a circuit split with the Sixth and Eleventh Circuit Courts of Appeals (“Sixth Circuit” and “Eleventh Circuit”).7

In 2017, Muriel Bescond (“Bescond”) was indicted on four substantive counts of transmitting false, misleading, and knowingly inaccurate commodities reports in violation of the Commodity Exchange Act, in addition to one count of conspiracy to do the same.8 The indictment charged that Bescond was involved in a scheme to manipulate the USD LIBOR — a benchmark interest rate used by banks as a baseline for determining loan interest rates between other banks.9 Bescond, a French citizen, worked in Paris as the head of the treasury desk at Société Générale, a French multinational investment bank.10 At Société Générale, Bescond supervised a team of employees responsible for calculating the estimated rate at which the bank could borrow unsecured funds, which would then be submitted to Thomson Reuters in London to help determine the USD LIBOR.11 Between 2010 and 2011, the United States government charged Bescond for instructing her

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5 7 F.4th 127 (2d Cir. 2021).

6 See id. at 132 (ascertaining whether collateral order doctrine applies to orders disentitling foreign citizen who remained home abroad).

7 See id. at 135 (holding fugitive disentitlement order is reviewable under collateral order doctrine).

8 See id. at 133 (describing indictment charging Bescond); see also Commodities Exchange Act, 7 U.S.C. § 1a(a)(2) (prohibiting transition of inaccurate information about commodities).

9 See Bescond, 7 F.4th at 132 (explaining allegations against Bescond); see also United States v. Sindzingre, 2019 WL 2290494, at *1-4 (E.D.N.Y May 29, 2019), rev’d in part, 24 F.4th 749 (2d Cir. 2021) (defining LIBOR and explaining alleged scheme). As a reaction to multiple instances of manipulation, the LIBOR has since been abandoned as the benchmark interest rate for interbank loans in the United States and abroad effective December 31, 2021. See Miranda Marquit & Benjamin Curry, What is Libor And Why Is It Being Abandoned?, FORBES, https://perma.cc/3JTT-7SBK (last updated Nov. 7, 2022, 7:38 PM) (describing trend for countries to transition away from LIBOR).

10 See Bescond, 7 F.4th at 132 (stating Bescond’s former employment).

11 See id. at 132-33 (stating Bescond’s authority within Société Générale).
employees to submit borrowing rates below Société Générale’s actual estimated rates to Thomson Reuters in London, which in turn lowered the final USD LIBOR once calculated.\(^1\)

The USD LIBOR influences the price of various financial instruments, including Eurodollars futures, which are derivative investment products that reflect the USD LIBOR at the end of a fixed period.\(^2\) The Chicago Mercantile Exchange facilitated trades of Eurodollars futures, and investors of those contracts were impacted as a result of Bescond’s conduct.\(^3\) Bescond remained in France upon being indicted and did not come to the United States to plead her defense in district court.\(^4\) Through counsel, Bescond filed a motion to dismiss the indictment.\(^5\) Rather than considering Bescond’s motion on the merits, the district court judge classified Bescond as a “fugitive” and exercised her discretion to disentitle Bescond, thereby barring her from mounting a defense.\(^6\)

\(^{12}\) See id. (describing specific role Bescond had in manipulating USD LIBOR); see also LIBOR, INTERCONTINENTAL EXCHANGE, https://perma.cc/EKQ5-9EL5 (last visited Oct. 2, 2022) (discussing USD LIBOR calculation); Thomson Reuters says has Libor all-clear, sees new role, THOMSON REUTERS, https://perma.cc/LJV3-U8HL (last updated Dec. 13, 2012, 7:27 AM) (stating Thomson Reuters began distributing LIBOR in 2005). On a daily basis, Thomson Reuters determined the USD LIBOR in London and received estimates from sixteen panel banks, including Société Générale, to produce the average rate “at which large, leading, internationally active banks with access to the wholesale, unsecured funding market could fund themselves in that market in USD for the relevant tenors.” LIBOR, INTERCONTINENTAL EXCHANGE, supra. The government alleged Bescond orchestrated a scheme to lower Société Générale’s estimated borrowing rates to give the impression that the bank was a sound and credible financial institution. Bescond, 7 F.4th at 133. By submitting false borrowing rates, Société Générale’s submissions “artificially lowered” the average rate of the panel banks, and thus the USD LIBOR. Id. at 133.

\(^{13}\) See Bescond, 7 F.4th at 132 (highlighting importance of USD LIBOR).

\(^{14}\) See id. at 133 (noting impact of Bescond’s conduct on American investors).

\(^{15}\) See id. at 132 (stating Bescond remained in France throughout litigation process).

\(^{16}\) See id. (describing Bescond’s motion to dismiss indictment); United States v. Sindzingre, 2019 WL 2290494, at *3-4 (E.D.N.Y. May 29, 2019) (discussing Bescond’s argument in lower court); Indictment, United States v. Sindzingre, No. CR 17-464, 2017 WL 10963578 (E.D.N.Y. Aug. 24, 2017) (outlining charges). Bescond’s motion to dismiss argued (1) the indictment impossibly charged her with extraterritorial violations of the Commodity Exchange Act, (2) her due process rights under the Fifth Amendment were violated, (3) she was selectively prosecuted because she was a woman, and (4) the statute of limitations had run. Bescond, 7 F.4th at 133. Bescond’s extraterritorial argument relied on the fact that all her alleged actions in violation of the Commodity Exchange Act were conducted while physically in France, and thus the Commodity Exchange Act should not apply. Id. at 136.

\(^{17}\) See Bescond, 7 F.4th at 136 (summarizing trial court’s decision to withhold reaching merits of Bescond’s motions); Sindzingre, 2019 WL 2290494, at *9 (declaring Bescond a fugitive and declining to reach merits of her motions); see also Gary P. Naftalis & Alan R. Friedman, NEW YORK LAW JOURNAL, Outside Counsel: Disentitlement of Criminal Fugitives in Civil Cases (Dec. 19, 2002), https://perma.cc/77CA-BNDR (explaining origins of fugitive disentitlement doctrine). The fugitive disentitlement doctrine generally provides that a fugitive from justice may not seek
Subsequently, Bescond appealed the district court order labelling her a “fugitive” and disentitling her from seeking relief. In response, the government moved to dismiss Bescond’s appeal for lack of a final judgment. Bescond contended that the Second Circuit had jurisdiction to hear her appeal under the collateral order doctrine. The Second Circuit agreed with Bescond, holding that it had jurisdiction to review the district court’s order disentitling Bescond as a fugitive.

28 U.S.C. § 1291, often referred to as the “final judgment” rule, generally requires a litigating party to raise all alleged errors by the district court in a single appeal after a final judgment on the merits is rendered. In Cohen v. Beneficial Indus. Loan Corp., the Supreme Court formed the collateral order doctrine, an exception to the final judgment rule, and set forth a three-
step analysis for determining its applicability to other matters. First, a litigant must show that the district court order conclusively determines the disputed question. The second condition of the collateral order doctrine articulated in Cohen is often divided into two requirements, the first being that the issue is so important that it is “weightier than the societal interests advanced by the ordinary operation of final judgment principles.” Cohen’s second condition also requires consideration of whether the issue is “completely separate” from the merits of the case. The third step in an appellate court’s analysis is consideration of whether the district court order is effectively unreviewable post-judgment such that it involved “an asserted right

24 See id. at 546 (providing rationale for collateral order exception); Flanagan, 465 U.S. at 265 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978), superseded on other grounds by Fed. R. Civ. P. 23(f)) (listing requirements of collateral order exception); see also First Wisconsin Mortg. Tr. v. First Wisconsin Corp., 571 F.2d 390, 393 (7th Cir. 1978) (articulating second Cohen condition as requiring two distinct requirements), rev’d in part by 584 F.2d 201 (7th Cir. 1978) (en banc). See generally Adam Steinman, Reinventing Appellate Jurisdiction, 48 B.C. L. Rev. 1237, 1244-72 (2007) (discussing statutory and judicially created exceptions to final judgment rule); Aaron R. Petty, The Hidden Harmony of Appellate Jurisdiction, 62 S. C. L. Rev. 353, 358-77 (2010) (providing overview of other final judgment exceptions). Despite the collateral order doctrine being limited to a “small class,” it is unique in its relatively broad application compared to other exceptions. Steinman, supra, at 1251. For example, 28 U.S.C. § 1292(b) allows a district court to certify that an order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation”; yet a certified order may still be denied at the appellate court’s discretion. Steinman, supra, at 1244-45. In comparison, upon a determination that an interlocutory order meets the three conditions set forth in Cohen, an appellate court must exercise jurisdiction. Steinman, supra, at 1250-51.


26 See Cohen, 337 U.S. at 546 (noting requirement for issue to be “too important” to allow appellate review to be deferred); see also Sell v. United States, 539 U.S. 166, 176 (2003) (acknowledging order permitting involuntary administration of antipsychotic drugs is important where constitutional questions are implicated). But see Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994) (dismissing appellant’s argument of private contract provision being “important”). To be considered “important” for purposes of Cohen’s second condition, an appealing party must show that the policy rationales served by the final judgment rule, such as a speedy trial and efficient judicial administration, are outweighed by the need to review an issue immediately. Digit. Equip. Corp., 511 U.S. at 879. While not necessarily limited to these categories, a court would likely find such importance “[w]here statutory and constitutional rights are concerned.” Id.

27 See Cohen, 337 U.S. at 546 (noting requirement for issue to be “too independent” of cause of action to allow appellate review to be deferred); see also Pagan v. United States, 353 F.3d 1343, 1345 (11th Cir. 2003) (declaring bond order is severable from merits of post-conviction relief claim); Sell v. United States, 539 U.S. 166, 176 (2003) (“At the same time, the basic issue—whether [defendant] must undergo medication against his will—is ‘completely separate from the merits of the action,’ i.e., whether [defendant] is guilty or innocent of the crimes charged.”) (citation omitted). But see Abney v. United States 431 U.S. 651, 663 (1977) (holding denial of motion to dismiss indictment is not collateral to merits of case). For an issue to be completely separate from the merits of a criminal case, it must not pertain to the defendant’s guilt or innocence. See Abney, 431 U.S. at 659.
the legal and practical value of which would be destroyed if it were not vindicated before trial.”

Once all collateral order requirements are met, an appellate court may review an interlocutory order, stopping a case in its track before the district court. The Supreme Court has thus far recognized four types of claims warranting interlocutory review under the collateral order doctrine in criminal cases: (1) motions to reduce bail; (2) motions to dismiss on double jeopardy grounds; (3) motions to dismiss under the Speech or Debate Clause; and (4) orders permitting the forced administration of antipsychotic drugs to render a defendant competent for trial. Like a number of other circuits, the Second Circuit recognizes additional claims that warrant interlocutory review in criminal cases. As its name suggests, the fugitive disentitlement

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29 See Digit. Equip. Corp., 511 U.S. at 867 (describing collateral order doctrine as a “practical construction” of 28 U.S.C. § 1291); Steinman, supra note 24, at 1248 (explaining interlocutory orders satisfying collateral order conditions are “final decisions”). The collateral order doctrine can be viewed as another avenue for a litigant to meet the standard of 28 U.S.C. § 1291, rather than an exception to the statute, and an interlocutory order satisfying the three collateral order requirements is a “final judgment” in itself. Digital Equip. Corp., 511 U.S. at 867.

30 See Stack v. Boyle, 342 U.S. 1, 4 (1951) (concluding motions to reduce bail must be reviewed with speed to be effective); Abney v. United States, 431 U.S. 651, 662 (1977) (holding motions to dismiss on double jeopardy grounds are reviewable absent final judgment); Helstoski v. Meenan, 442 U.S. 500, 508 (1979) (“We hold that if [defendant] wished to challenge the District Court’s denial of his motion to dismiss the indictment [contending it violated the Speech or Debate Clause], direct appeal to the Court of Appeals was the proper course”); Sell v. United States, 539 U.S. 166, 169, 176 (2003) (concluding Eighth Circuit had jurisdiction to decide defendant’s interlocutory appeal where court order “permit[ted] the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes.”).

31 See United States v. Pons, 607 F. App’x 64, 65-66 (2d Cir. 2015) (holding orders of commitment to determine competency to stand trial are collateral orders); United States v. Doe, 49 F.3d 859, 865 (2d Cir. 1995) (concluding order transferring a juvenile to adult status is reviewable as collateral order); United States v. Myers, 635 F.2d 932, 935 (2d Cir. 1980) (holding order adjudicating congressman’s challenge to indictment on separation of powers grounds was reviewable; see also e.g., United States v. Cianfrani, 573 F.2d 835, 845 (3d Cir. 1978) (extending collateral order doctrine to orders closing pretrial proceedings from public); United States v. Romero, 511 F.3d 1281, 1284 (10th Cir. 2008) (applying collateral order doctrine to denials of concurrent sentencing upon revocation of supervised release); United States v. Bokhari, 757 F.3d 664, 669-70 (7th Cir. 2011) (exercising appellate jurisdiction over denied motion to dismiss indictment based on comity with foreign nation). But see United States v. Robinson, 473 F.3d 487, 491-92 (2d Cir.
doctrine “allows judges to ‘disentitle[] a defendant [from] call[ing] upon the resources of the Court for determination of his claims’ while he remains a fugitive.”\(^{32}\) First, a judge bears the responsibility of determining whether a defendant is a “fugitive.”\(^{33}\) Upon a district court answering the threshold question that a defendant is indeed a fugitive, the judge may then exercise their discretion in choosing to disentitle the defendant.\(^{34}\)

Both the Sixth and Eleventh Circuit Court of Appeals recently addressed the question of whether a fugitive disentitlement ruling was

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\(^{32}\) See United States v. Miller, 166 F. Supp. 3d 346, 348 (2016) (quoting Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam)) (explaining fugitive disentitlement doctrine); see also e.g., Molinaro v. New Jersey, 396 U.S. 365, 366, (1970) ("No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction."); United States v. Puzzanghera, 820 F.2d 25, 27 (1st Cir. 1987) (dismissing appeal of prison escapee even despite returning involuntarily); United States v. Persico, 853 F.2d 134, 138 (2d Cir. 1988) (holding disentitlement doctrine precluded defendant from appeal after remaining fugitive for seven years); United States v. Bravo, 10 F.3d 79, 84-85 (2d Cir. 1993) (affirming district court decision to disentitle defendant who remained fugitive for fifteen years); see also John M. Hillebrecht et al., US v. Bescond addresses “fugitive disentitlement”: Potential game changer for foreign-based defendants facing US charges, DLA PIPER, https://perma.cc/UU29-XJM7 (Aug. 30, 2021) ("In recent years, US prosecutors have increasingly pushed the envelope in bringing criminal charges against non-US professionals who live and work abroad and who may have never set foot in the United States, including for alleged violations of the Foreign Corrupt Practices Act, trade sanctions, the antitrust laws, and other statutes and regulations with extraterritorial implications.").

\(^{33}\) See United States v. Hayes, 118 F. Supp. 3d 620, 624 (S.D.N.Y. 2015) (“When determining if the doctrine applies, the Court must consider the threshold question of whether the defendant is a ‘fugitive.’”); Gao v. Gonzales, 481 F.3d 173, 177 (2d Cir. 2007) (acknowledging defendant’s fugitive status); see also Alexandra M. Collins, Note, Fugitive Disentitlement Doctrine: A Stricter Standard For The Burden Of Proof To Label Someone A Fugitive, 51 NEW ENG. L. REV. 635, 636 (2017) (noting invocation of the disentitlement doctrine requires minimum showing of defendant’s fugitive status). “While the ‘paradigmatic object of the doctrine is the convicted criminal who flees while his appeal is pending,’ some courts have also held that ‘the doctrine applies with full force to an alien who fails to comply with a notice to surrender for deportation.’” Gao, 481 F.3d at 175-76 (quoting Antonio-Martinez v. INS, 317 F.3d 1089, 1092 (9th Cir. 2003); citing Bar-Levy v. U.S. Dep’t of Just., INS, 990 F.2d 33, 35 (2d Cir. 1993)). The standard of proof for the government showing that a defendant is a “fugitive” for purposes of disentitlement is split between circuits. Collins, supra, at 636. Common among the interpretations is that some element of avoidance from criminal prosecution is necessary for a judge to label a defendant as a “fugitive.” id.

\(^{34}\) See Hayes, 118 F. Supp. 3d at 624 (defining factors for court to consider in exercising discretion to disentitle defendant); see also Chloe Booth, Note, Doctrine on the Run: The Deepening Circuit Split Concerning Application of the Fugitive Disentitlement Doctrine to Foreign Nationals, 59 B.C. L. REV. 1153, 1155-56 (2018) (describing theories supporting doctrine). A court must consider whether disentitlement furthers the interests that the doctrine is meant to serve including: (1) assuring the enforceability of a decision against a fugitive; (2) penalizing flouting of the judicial process; (3) promoting efficient operation of the courts by discouraging flights from justice; and (4) avoiding prejudice to the other side engendered by a defendant’s flight. See Hayes, 118 F. Supp. 3d at 624.
reviewable on appeal absent a final judgment, with each court holding that they lacked appellate jurisdiction. In United States v. Bescond, the government acquiesced to Bescond’s argument that the fugitive disentitlement order was a conclusive determination of the question, but argued that the collateral order doctrine’s second and third requirements were not met. Bescond argued that the second requirement of the collateral order doctrine was met because the fugitive disentitlement doctrine was “important” where it implicated both her constitutional right to access the courts, as well as her fundamental right to mount a defense. Additionally, Bescond contended that the fugitive disentitlement order was completely separate from the merits of the case where it was unrelated to the issue of her guilt or innocence. Lastly, Bescond argued that the third requirement was satisfied because final judgment on her case could only occur if she appeared in court, a condition that, if met, would negate her purported fugitive status and moot the issue.

In United States v. Bescond, the Second Circuit held that the fugitive disentitlement order issued by a district court was reviewable on interlocutory appeal. Addressing the second collateral order condition, the majority considered the disentitlement order to be “important” as it “heavily burden[ed] Bescond’s exercise of the due process right to defend herself in court.” Despite never setting foot on U.S. soil, the majority stated that Bescond enjoyed a right to due process because it was the government that initiated proceedings to bring her as a defendant in U.S. court. Furthermore, the majority explained that disentitlement was an issue separate to that of Bescond’s guilt or innocence, as a question that bore “not on whether she violated the [Commodity Exchange Act], but rather on her ability to defend

35 See United States v. Martirossian, 917 F.3d 883, 887 (6th Cir. 2019) (concluding fugitive disentitlement does not meet any collateral order requirements); United States v. Shalhoub, 855 F.3d 1255, 1261-62 (11th Cir. 2017) (denying argument fugitive disentitlement ruling was immediately appealable); see also United States v. Golden, 239 F.2d 877, 878 (2d Cir. 1956) (holding appellate jurisdiction did not exist where defendant sought dismissal of indictment while overseas).

36 See Answering Brief for United States at 17-24, United States v. Bescond, 7 F.4th 127 (2d Cir. 2021) (No. 19-1698) (articulating reasons why collateral order doctrine should not apply).


38 See id. at 26 (explaining how fugitive disentitlement is separate from issue of defendant’s guilt or innocence).

39 See id. at 27 (arguing fugitive disentitlement issue becomes moot after final judgment).

40 See Bescond, 7 F.4th at 138 (concluding disentitlement order was reviewable as collateral order).

41 See id. at 135 (declaring disentitlement to be important for purposes of appellate jurisdiction). The court noted that neither party disputed the finality of the disentitlement order, and thus the first condition of the collateral order doctrine was not at issue. Id.

42 See id. at 136 (rejecting district court’s conclusion constitutional issues were not at issue in disentitling defendant).
Regarding the third collateral order condition, the majority explained that “Bescond’s right to mount a defense [could] be vindicated now or never.” If the Second Circuit elected not to extend the collateral order doctrine in Bescond’s case, Bescond would have had to decide between remaining in France, foregoing any opportunity to appeal, or succumbing to the pressure of disentitlement and making an appearance in U.S. court.

The majority went on to explain why out-of-circuit views, specifically the Sixth Circuit and Eleventh Circuit, were incorrect to hold that they lacked jurisdiction when faced with the same question. First, the majority countered the reasoning of the Eleventh Circuit by asserting that a fugitive disentitlement order implicates a constitutional right – the right to defend one’s self in court. Next, the majority acknowledged the “considerable overlap” between fugitivity and the extraterritoriality of the Commodity Exchange Act; a separate issue raised by Bescond where her location abroad was relevant in both analyses. Nonetheless, the majority held the issues to be “separate” where the extraterritoriality issue focused on the statutory language of the Commodity Exchange Act, whereas the fugitivity issue required a consideration of whether Bescond was actually a fugitive and whether disentitlement served the purposes of the doctrine. Lastly, the majority recognized the concession of the Sixth Circuit that fugitivity would be unreviewable on appeal from a final judgment because it “become[s] moot” once a defendant “submits to the jurisdiction of the federal courts.

The majority in Bescond was incorrect to hold that fugitive disentitlement meets the conditions of the collateral order doctrine set forth in Cohen. As stated by the United States Supreme Court in Cohen, the collateral order doctrine was constructed for a “small class” of orders. The final

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43 See id.
44 See id. at 137 (explaining disentitlement would be unreviewable after final judgment).
45 See Bescond, 7 F.4th at 137 (discussing predicament Bescond would face if disentitlement order were not lifted).
46 See id. at 137-38 (dismissing decisions of out-of-circuit courts).
47 See id. (noting issue with 11th Circuit’s analysis of “important” requirement). In justifying its conclusion that Bescond’s disentitlement issue was “important”, the Second Circuit analogized Bescond’s situation to instances of double jeopardy and excessive bail, constitutional issues that are universally recognized exceptions to the final judgment rule. Id. at 137.
48 See id. at 138 (stating 6th Circuit’s reasoning in determining “separate” requirement was not met).
49 See id. (explaining why fugitive disentitlement is separate from merits in case).
50 See Bescond, 7 F.4th at 138 (critiquing Martirosian court’s analysis of third collateral order condition).
51 See id. (holding disentitlement order may be reviewed as collateral order); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (noting conditions required for collateral order doctrine to apply).
52 See Cohen, 337 U.S. at 546 (applying practical construction to final judgment rule).
judgment rule is premised on the understanding that prompt resolution of criminal matters benefits both the prosecution and the defendant. The Court has expressly rejected to extend the collateral order doctrine on numerous occasions, and the Second Circuit neglected to consider the reasoning of the Court when it decided to extend the doctrine to disentitlement orders. Additionally, the majority went against its own circuit precedent in addressing the issue.

The majority incorrectly concluded that the fugitive disentitlement order was “important” where it implicated Bescond’s due process rights, as no such right exists where a defendant insists on favorable rulings while concurrently making it clear they will refuse to comply with an unfavorable result. Courts have long held that the scope of due process extends no further than notice and an opportunity to be heard, both of which are provided when a defendant is disentitled as a fugitive. To compare Bescond’s situation to other constitutional rights such as excessive bail and double jeopardy protection was unreasonable where Bescond was not detained. Furthermore,
the majority dismissed the plain language of Supreme Court precedent when it admitted that considerable overlap existed between her extraterritoriality argument and her status as a fugitive, yet still concluded that the matters were “completely separate.” While Bescond’s status as a fugitive would become moot if she ever did appear in court, the same could be said of any defendant “unwilling to answer an indictment or arrest warrant,” which alone “has never warranted an interlocutory appeal.” Bescond has every right to mount a defense by appearing in court, and the disentitlement order merely prevents her from making her defense “from a convenient locale.”

The Eleventh Circuit addressed the same issue in 2017, dismissing the defendant’s appeal for lack of jurisdiction on the basis that the defendant had no constitutional right to avoid being labelled a fugitive. When the same issue was presented before the Sixth Circuit in 2019, the court followed the reasoning of the Eleventh Circuit, but took their reasoning one step further.

59 See id. at 150 (Livingston, J., dissenting) (emphasis added) (critiquing majority’s analysis of separateness requirement); United States v. Martirossian, 917 F.3d 883, 888 (6th Cir. 2019) (recognizing overlap between issues of fugitivitiy and merits of action to justify deny mid-case review). But see Bescond, 7 F.4th at 136 (reasoning Bescond met separateness requirement where disentitlement was irrelevant to guilt or innocence). In Martirossian, the defendant asserted that he could not be a fugitive because he had never been to the United States and his charged conduct occurred while abroad. 917 F.3d at 888. These facts were facts raised in support of his argument that the money laundering statute he was accused of violating did not apply to him. Id. Although extraterritoriality and fugitive disentitlement issues in Bescond are in some ways distinct, where there is any overlap, the issues are not “completely separate” as required to fall within the collateral order doctrine. See id. To avoid the plain language of “completely separate”, the majority in Bescond framed the issue as being whether disentitlement was “collateral” to the question of Bescond’s guilt or innocence. Bescond, 7 F.4th at 136.

60 See Martirossian, 917 F.3d at 888 (concluding fugitive status is insufficient to be meet third collateral order condition); see also Shalhoub, 855 F.3d at 1261 (citing Van Cauwenberge v. Biard, 486 U.S. 517, 524 (1988)) (“In other words, absent the assertion of a [constitutional right], . . . a defendant must accept the burdens of trial and sentencing before he obtains appellate review of an adverse ruling.”); Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872 (1994) (describing flaws of appellate court system). The judicial system is imperfect, and vindicated defendants will never be made completely whole where reversal on appeal does not erase court records or give back lost time. Digit. Equip. Corp., 511 U.S. at 872. Like a defendant arguing that the statute they are allegedly in violation of is in fact unconstitutional, a defendant arguing that their status as a fugitive is improper must await final judgment before an appeal is heard. Martirossian, 917 F.3d at 888.

61 See Shalhoub, 855 F.3d at 1262 (“Although the determination that [a defendant] is a fugitive is likely unreviewable after final judgment, [that defendant] enjoys a right to appear in court, to defend himself against the indictment, and to clear his name if he prevails.”) (alteration in original); Bescond, 7 F.4th at 151 (Livingston, J., dissenting) (diminishing importance of fugitive disentitlement order).

62 See Shalhoub, 855 F.3d at 1260-61 (acknowledging fugitive disentitlement as important, but insufficient to warrant interlocutory review). Unlike other collateral order exceptions, fugitive disentitlement orders do not “rest[] upon an explicit statutory or constitutional guarantee.” Id. at 1260-61 (quoting Midland Asphalt Corp. v. United States, 289 U.S. 794, 801 (1989)) (alteration in original).
further by concluding that none of the three collateral order conditions were met. As a result of the Second Circuit’s decision to sway from the instruction of the Supreme Court, district courts in Connecticut, New York, and Vermont can anticipate a heavy burden to be placed on the judicial system by way of piecemeal disposition. The Second Circuit has inadvertently encouraged foreign defendants to insist on favorable rulings even if they have no intention of abiding by such orders that do not fall in their favor. More troubling is the possibility that federal prosecutors with limited resources will choose not to charge foreign national defendants whose alleged wrongdoing occurs entirely abroad knowing that such actions will not be resolved promptly. The Second Circuit has now placed a barrier for holding foreign nationals accountable which will cause significant delays and frustrate the adjudicative process.

63 See Martirossian, 917 F.3d at 887-88 (concluding defendant’s fugitive status met none of three collateral order conditions). In its holding, the Martirossian court reasoned that one’s status as a fugitive did not (1) finally resolve the question at hand, (2) involve a significant issue separate from the merits, or (3) become unreviewable on appeal from a final judgment. See id. (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

64 See United States v. Hollywood Motor Car Co., 458 U.S. 263, 270 (1982) (warning courts collateral order exceptions must remain limited to avoid piecemeal disposition); Bescond, 7 F.4th at 147 (Livingston, J., dissenting) (arguing majority holding sets stage for result warned of by Supreme Court); Steinman, supra note 24, at 1256 (explaining cost-benefit analysis employed by some courts to determine interlocutory review). “More generally, some appellate courts have explicitly incorporated a discretionary cost-benefit analysis into their collateral order doctrine analysis.” Steinman, supra note 24, at 1256. This analysis involves a consideration of whether the costs of piecemeal review are outweighed by the benefits of premature review. See First Wisconsin Mortg. Tr. v. First Wisconsin Corp., 571 F.2d 390, 393 (7th Cir. 1978) rev’d in part by, 584 F.2d 201 (7th Cir. 1978) (en banc).

65 See Bescond, 7 F.4th at 148 (Livingston, J., dissenting) (“The fugitive disentitlement doctrine itself exists to prevent this manner of nonmutual litigation.”) Defendants now labelled as fugitives and subsequently disentitled can file an appeal to try and overturn the order, but if unsuccessful, they can easily remain in the same position they were in prior to the appeal—safe from the authority of the United States judiciary. See id. Defendants whose actions are brought in the Second Circuit do not have to submit to a United States jurisdiction to clear their name. See Booth, supra note 33, at 1167-70 (describing predicament often faced by fugitive defendants).

The fugitive disentitlement doctrine offers foreign defendants two undesirable options. If the defendant chooses not to travel to the United States, he will not be able to maintain any defenses against the charge(s) . . . If the defendant chooses to travel to the United States and is subsequently arrested, there is a strong likelihood that he would be denied bail because he poses a legitimate flight risk.

See id. at 1169.

66 See Hillebrecht et al., supra note 31 (speculating consequences of Second Circuit decision). “It remains to be seen . . . whether federal prosecutors may ultimately, in some cases, refrain from charging foreign defendants whose conduct occurred entirely outside of the United States and who remain citizens and residents of their home countries during the relevant periods.” Id.

67 See Bescond, 7 F.4th at 151 (Livingston, J., dissenting) (stressing concern over majority decision). “But as Judge Sutton recognized in Martirossian, this ‘is true for anyone unwilling to
In *United States v. Bescond*, the Second Circuit Court of Appeals addresses the issue of whether a disentitlement order ruling a defendant to be a fugitive constitutes an issue reviewable by collateral order. The majority was incorrect to hold that a fugitive disentitlement order met the conditions of the collateral order doctrine. Rather, the Second Circuit should have followed the reasoning of Chief Judge Livingston’s dissent and its sister circuits to hold it did not have appellate jurisdiction to address the issue. The Supreme Court has emphasized the importance of the final judgment rule, particularly in the context of criminal cases. As a result of this decision, the government will not only face an uphill battle in charging foreign defendants that elect to remain abroad, but can also anticipate an influx of appeals where no final judgment is rendered, causing the judicial system further strain.

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answer an indictment or arrest warrant. And yet that claim alone has never warranted an interlocutory appeal.” See id. (Livingston, J., dissenting) (quoting *Martirossian*, 917 F.3d at 888); see also *Shahhoub*, 855 F.3d at 1261-62 (rejecting interlocutory appeal for fugitive defendants).