Washington Law Review

Volume 98 | Number 1

3-1-2023

Fugitive Pull: Applying the Fugitive Disentitlement Doctrine to Foreign Defendants

Zachary Z. Schroeder
University of Washington School of Law

FUGITIVE PULL: APPLYING THE FUGITIVE DISENTITLEMENT DOCTRINE TO FOREIGN DEFENDANTS

Zachary Z. Schroeder*

Abstract: Defendants force courts to decide whether to use judicial time and resources to hear a case when they either flee or refuse to submit to jurisdiction. Judges in the United States possess an exceptional discretionary power to deny access to the courts in these circumstances through the fugitive disentitlement doctrine. The fugitive disentitlement doctrine developed as federal common law and permits courts to exercise discretion in declining to hear appeals or motions from defendants classified as fugitives from justice.

Historically, the fugitive disentitlement doctrine was intended to prevent courts from wasting resources adjudicating cases when a defendant has fled and remains a fugitive from justice. While traditional fugitives remain subject to the doctrine, modern courts now also apply fugitive disentitlement to foreign defendants with tenuous connections to United States jurisdiction. United States federal prosecutors can leverage the doctrine to circumvent the principle of the presumption against extraterritoriality, a legal doctrine that presumes laws do not apply outside United States borders. Consequently, as long as the government can secure an indictment, fugitive disentitlement requires that foreign defendants travel to the United States and submit to its jurisdiction.

Absent an appeals process, foreign defendants must submit to United States jurisdiction and may be forced to travel great distances to defend themselves in United States courts any time a U.S. prosecutor levels charges. Allowing foreign defendants to challenge the application of the fugitive disentitlement doctrine furthers the purposes of justice and due process. This Comment argues that the United States Supreme Court should adopt the Second Circuit's approach to fugitive disentitlement, which allows a defendant to challenge fugitivity through the collateral order doctrine as an exception to the final judgment rule.

INTRODUCTION

Muriel Bescond worked in Paris, France as a Societe Generale SA's[1] treasury desk lead during the LIBOR scandal.[2] The London Interbank Offered Rate (LIBOR) is determined through a bank self-reporting process that averages banks' bids on expected borrowing rates.[3] LIBOR

* J.D. Candidate, University of Washington School of Law, Class of 2023. Many thanks to Professor Jeff Feldman for his suggestions, advice, and guidance on this Comment. I would also like to thank *Washington Law Review*'s Editorial Staff for their thoughtful edits, hard work, and dedication.

1. Societe Generale is an international bank with practice areas, including, retail banking in France, international retail banking, insurance, and financial services, and global banking and investor solutions. *Our Identity*, SOCIETE GENERALE, https://www.societegenerale.com/en/societe-generale-group/identity/identity [https://perma.cc/J7ZV-EZKN].

2. United States v. Bescond, 24 F.4th 759, 764 (2d Cir. 2021).

3. John Kiff, *LIBOR: World Reference Point*, 49 FINANCE & DEV. 54, 54–55 (2012).

is used as a benchmark for setting numerous other interest rates around the world.[4] Although Muriel Bescond is a French citizen and resident, she was charged in the Eastern District of New York with "transmitting false, misleading, and knowingly inaccurate commodities reports, and with conspiracy to do the same, in violation of the Commodity Exchange Act."[5] When Muriel Bescond's case came before the district court, Judge Seybert applied a discretionary device known as the fugitive disentitlement doctrine.[6] Applying the fugitive disentitlement doctrine allows a court to decline to hear claims or rule on motions from a defendant who is a fugitive from justice.[7] Judge Seybert found that Ms. Bescond was a fugitive and declined to decide the merits of her motions.[8]

Cross-border business transactions are ubiquitous in the modern globalized economy. Amid the transnational economy, one seemingly mundane, yet fundamental financial interest rate—LIBOR—rose as the center of what has been called the greatest financial scandal ever recorded.[9] Controversy arose when participating banks allegedly colluded to artificially increase the rate.[10] Regulating agencies in the United States, the United Kingdom, and the European Union collectively fined the banks who participated in the LIBOR scandal over nine billion dollars for rigging the LIBOR rate.[11] The same countries and their respective financial regulatory agencies brought criminal charges against traders and banking institutions with mixed results.[12]

As was the case with numerous other traders and banking institutions, Ms. Bescond was charged with manipulating the LIBOR rate for Societe Generale to benefit from lower borrowing costs.[13] Although Ms. Bescond was indicted for criminal violations of United States financial fraud and abuse laws, she was outside United States jurisdiction when she allegedly

4. *Id.*

5. *Bescond*, 24 F.4th at 763.

6. United States v. Sindzingre, No. 17-CR-0464, 2019 WL 2290494, at *7 (E.D.N.Y. May 29, 2019).

7. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam); Nen Di Wu v. Holder, 646 F.3d 133, 135 & n.2 (2d Cir. 2011).

8. *Sindzingre*, 2019 WL 2290494, at *14.

9. *The Annual Report of the Financial Stability Oversight Council: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 15 (2012) (statement of Rep. Maxine Waters) ("[T]his LIBOR fixing scandal dwarfs by orders of magnitude any financial scam in the history of [the] markets.").

10. Kiff, *supra* note 3, at 54–55.

11. James McBride, *Understanding the Libor Scandal*, COUNCIL ON FOREIGN RELS. (Oct. 12, 2016, 8:00 AM), https://www.cfr.org/backgrounder/understanding-libor-scandal [https://perma.cc/P8SM-9F6C].

12. *Id.*

13. *Id.*

committed these crimes.[14] Ms. Bescond chose to litigate her defense from France, and her U.S. defense counsel moved to dismiss the indictment.[15] In her motion, she argued the indictment violated the Fifth Amendment right to due process by failing to "allege a sufficient nexus with the United States," and additionally, that the statute of limitations had run.[16] Ms. Bescond further argued the United States government was discriminatorily prosecuting women over similarly situated men.[17] Upon the district court's request, Ms. Bescond also filed a motion to dismiss due to impermissible extraterritorial application of the Commodity Exchange Act.[18] Finally, Ms. Bescond argued that if dismissal was not granted, the court should order discovery and additional briefing from the government on legal issues raised in her previous motions.[19]

Muriel Bescond's case reveals a divergence among the United States Federal Courts of Appeals' application of the fugitive disentitlement doctrine against foreign defendants who allegedly committed crimes outside of U.S. jurisdiction.[20] The majority's fact-specific reasoning, a powerfully worded dissent, and a clear circuit split on the issue further emphasize the need for a resolution.[21]

This Comment analyzes the unresolved question of whether an indicted defendant, located outside the United States, can appeal a trial court's application of the fugitive disentitlement doctrine through the collateral order doctrine[22] without physically traveling to the United States and submitting to its jurisdiction. This Comment proceeds in four parts. Part I begins by defining the fugitive disentitlement doctrine as well as the historical development and justifications for its existence. Part II provides an examination of the interconnections between the final judgment rule,

---

14. United States v. Bescond, 7 F.4th 127, 131 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

15. United States v. Sindzingre, No. 17-CR-0464, 2019 WL 2290494, at *3 (E.D.N.Y. May 29, 2019).

16. *Bescond*, 7 F.4th at 133.

17. *Id.*

18. *Bescond*, 7 F.4th at 133; *see* Commodity Exchange Act, 7 U.S.C. ch. 1.

19. *Bescond*, 7 F.4th at 133.

20. *Compare* United States v. Shalhoub, 855 F.3d 1255, 1258 (11th Cir. 2017) (holding that the collateral order doctrine did not permit immediate review of the trial court's refusal to hear the defendant's motion after applying fugitive disentitlement), *and* United States v. Martirossian, 917 F.3d 883 (6th Cir. 2019) (holding district court's decision to hold motion to dismiss in abeyance was not immediately appealable under the collateral order doctrine), *with Bescond*, 7 F.4th at 127 (holding that the Court of Appeals had jurisdiction under the collateral order doctrine to review non-final disentitlement order).

21. Frederick T. Davis, *The Second Circuit Opens the Door a Bit to Non-Citizen Defendants Challenging a Court's Jurisdiction in Criminal Cases*, 37 INT'L ENF'T L. REP. 334, 334 (2021).

22. *See infra* section II.B.

collateral order doctrine, and fugitive disentitlement doctrine. Part III then proceeds by considering the existing circuit split between, the Sixth and Eleventh Circuits (which prohibit interlocutory appeals of fugitive disentitlement) and the Second Circuit (which permits such appeals under the collateral order doctrine). The Comment concludes in Part IV by proposing that the Second Circuit's approach best supports the pursuit of justice in the context of an increasingly globalized business environment.

I. THE HISTORICAL DEVELOPMENT OF THE FUGITIVE DISENTITLEMENT DOCTRINE AND JUSTIFICATIONS FOR ITS APPLICATION

Criminal defendants who either flee or refuse to submit to a jurisdiction force a court to decide whether to use judicial time and resources to hear a case. Federal judges in the United States possess an exceptional discretionary power to deny access to the courts through the fugitive disentitlement doctrine.[23] The fugitive disentitlement doctrine developed as federal common law and permits courts to exercise their discretion in denying appeals or motions brought by defendants classified as fugitives from justice.[24] Appellate courts apply "[t]he equitable rule that if a criminal defendant appeals from a conviction and then absconds or flees while the appeal is pending, the appellate court should dismiss the appeal."[25] Courts applying the doctrine must first determine whether the defendant qualifies as a fugitive[26] before exercising their discretion.[27]

Historically, the fugitive disentitlement doctrine was intended to prevent courts from wasting resources adjudicating cases when a defendant flees and remains a fugitive from justice.[28] While traditional fugitives remain subject to the doctrine, modern courts now also apply fugitive disentitlement to foreign defendants with tenuous connections to United States jurisdiction.[29] United States federal prosecutors can

---

23. Brian L. Porto, *Application of Fugitive Disentitlement Doctrine in Federal Criminal Cases*, 179 A.L.R. FED. 291 (2002).

24. *Id.*

25. *Fugitive-from-Justice Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

26. I use the term "fugitive" throughout this Comment because it is the legal term defined as "[s]omeone who flees or escapes; a refugee" or "[a] criminal suspect or a witness in a criminal case who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony, esp. by fleeing the jurisdiction or by hiding." *Fugitive*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* 18 U.S.C. § 1073.

27. Porto, *supra* note 23.

28. Smith v. United States, 94 U.S. 97, 97 (1876).

29. *See generally* United States v. Bescond, 7 F.4th 127 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

leverage the doctrine to circumvent the principle of the presumption against extraterritoriality.[30] Effectively, indictment of a foreign citizen, and subsequent application of the fugitive disentitlement doctrine "can be enough to coerce submission to U.S. jurisdiction wholly regardless of whether the charged statute reaches individuals outside [U.S.] territory."[31] Consequently, as long as the government can secure an indictment, "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."[32]

Courts may apply the fugitive disentitlement doctrine in other contexts. Judicial officers may deny claims brought by defendants in a civil forfeiture action[33] related to a criminal proceeding if the defendant avoids prosecution by: "(1) purposely leav[ing] the jurisdiction of the United States; (2) declin[ing] to enter or reenter the United States to submit to its jurisdiction; or (3) otherwise evad[ing] the jurisdiction of the court in which a criminal case is pending against the person."[34] This statute has particular significance for fugitives who have fled or never entered United States jurisdiction but have acquired assets related to criminal enterprises within United States borders.[35] Defendants cannot pursue claims against forfeiture of ill-gotten assets without submitting to the relevant court's jurisdiction.[36]

Part I of this Comment defines the fugitive disentitlement doctrine, outlining qualifications and attendant circumstances in which a court possesses the discretion to apply the doctrine.[37] Part I continues with specific definitions that courts use to qualify a defendant as a fugitive and

---

30. *See infra* section II.C.; Davis, *supra* note 21, at 336.

31. *Bescond*, 7 F.4th at 140.

32. *Id.* at 143.

33. *Forfeiture: Criminal Forfeiture*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A governmental proceeding brought against a person to seize property as punishment for the person's criminal behavior.").

34. 28 U.S.C. § 2466. This statute does not apply if the defendant is confined in another jurisdiction for the "commission of criminal conduct in that jurisdiction." *Id*.; Bar-Levy v. U.S. Dep't of Just., I.N.S., 990 F.2d 33, 35 (2d Cir. 1993) ("We have extended the fugitive from justice rule to civil cases in which the appellant is a fugitive in a criminal matter."); *see, e.g.*, United States v. $45,940 in U.S. Currency, 739 F.2d 792, 796–98 (2d Cir.1984) (holding that the defendant waived his right to due process in a civil forfeiture case by remaining a fugitive in related criminal proceedings).

35. 28 U.S.C. § 2466.

36. *Id.*

37. This Comment concerns the federal fugitive disentitlement doctrine. Some states have also applied a form of the doctrine. *See, e.g.*, Estelle v. Dorrough, 420 U.S. 534, 534–36 (1975) (upholding as constitutional a Texas statute that provided for automatic dismissal of pending appeals of fugitives); *see also* Henry Tashman, Jennifer Brockett & Rochelle Wilcox, *Flight or Fight*, 29 L.A. LAW. 44 (2006) (examining California's fugitive disentitlement doctrine).

what it means for the court to disentitle such a defendant. Finally, Part I concludes with a summary of the historical development of the fugitive disentitlement doctrine and justifications for its application.

A. What Is the Fugitive Disentitlement Doctrine?

In cases involving fugitives, it can be a waste of judicial resources for courts to determine an absent individual's innocence or guilt. Generally, a fugitive is "a refugee . . . [or] a criminal suspect or a witness in a criminal case who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony, esp[ecially] by fleeing the jurisdiction or by hiding."[38] More specifically, the federal criminal code 18 U.S.C. § 1073 defines a fugitive from justice as:

> [w]hoever moves or travels in interstate or foreign commerce with intent either [] to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees.[39]

The "paradigmatic" example of a fugitive is a person who was present in the jurisdiction when they allegedly committed a crime, but fled to avoid prosecution or sentencing.[40] Defendants who flee after their arrest or while released on bond are easily classified as fugitives from justice.[41] Defendants can also "constructively flee" if they commit a crime in a jurisdiction, physically leave the jurisdiction, and fail to return upon learning of their indictment.[42]

Fugitive classification becomes more difficult when a defendant was never physically present in a jurisdiction for a crime that took place outside of U.S. borders.[43] According to the fugitive disentitlement doctrine as currently interpreted by several circuit courts—except for the Second Circuit—such defendants who were never present in the jurisdiction in which they face criminal charges must submit to the

---

38. *Fugitive*, BLACK'S LAW DICTIONARY (11th ed. 2019).

39. 18 U.S.C. § 1073.

40. United States v. Hayes, 118 F. Supp. 3d 620, 624 (S.D.N.Y. 2015); *see* Gao v. Gonzales, 481 F.3d 173, 175 (2d Cir. 2007) ("the 'paradigmatic object of the doctrine is the convicted criminal who flees while his appeal is pending'" (quoting Antonio-Martinez v. I.N.S., 317 F.3d 1089, 1092 (9th Cir. 2003))).

41. *Fugitive*, BLACK'S LAW DICTIONARY (11th ed. 2019).

42. *Hayes*, 118 F. Supp. 3d at 625.

43. United States v. Bescond, 7 F.4th 127, 139 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

jurisdiction for acquittal, exoneration, or conviction.[44] The United States Supreme Court has noted that "it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution."[45] Only "foreign citizens [physically present] in the United States may enjoy certain constitutional rights" including "the right to due process in a criminal trial."[46]

Disentitlement, for purposes of the fugitive disentitlement doctrine, means that a defendant cannot access the resources and rulings of a court while a fugitive from justice.[47] This principle is grounded in the idea that defendants who refuse to accept the jurisdiction of a court implicitly seek to disclaim the court's authority.[48] Fugitive defendants only stand to benefit from a court hearing arguments and passing judgment in a criminal trial or motion to appeal. If the defendant wins, they enjoy exoneration. If the defendant loses, they can evade judgment by remaining a fugitive.

People accused of crimes physically located outside of the United States represent a unique population of defendants. Certain courts may label these defendants as "fugitives" in the event such defendants fail to physically present themselves before the court. Pervasive globalization may lead courts to increasingly apply fugitive disentitlement because foreign defendants are less likely, through their own volition or due to the burdens of international travel, to physically present themselves for trial.[49] As with any discretionary power of the judiciary, fugitive disentitlement doctrine has developed through historical precedent and requires thoughtful justification before application.[50]

B. Historical Development of the Fugitive Disentitlement Doctrine

United States federal common law traces the roots of fugitive disentitlement back to the Washington Territory in 1876. In the Supreme Court case *Smith v. United States*,[51] the petitioner's motion for appeal remained on the Supreme Court's docket for six years because the petitioner escaped after his conviction.[52] *Smith* established the precedent

44. United States v. Shalhoub, 855 F.3d 1255 (11th Cir. 2017); United States v. Martirossian, 917 F.3d 883 (6th Cir. 2019); *Bescond*, 7 F.4th at 127.

45. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., __ U.S. __, 140 S. Ct. 2082, 2086 (2020).

46. *Id.* (emphasis omitted).

47. Degen v. United States, 517 U.S. 820, 824 (1996).

48. *Id.*

49. Tashman et al., *supra* note 37, at 45.

50. *Degen*, 517 U.S. at 824.

51. 94 U.S. 97 (1876).

52. *Id.* at 97.

that courts may refuse to hear motions and dismiss cases of defendants classified as fugitives.[53] A decade later, the Supreme Court further clarified in *Bonahan v. Nebraska*[54] that defendants fall within the control of the court either through physical presence or constructively while released on bail.[55] In *Bohanan*, the plaintiff was initially convicted of murder in the second degree.[56] Bohanan then appealed the verdict, received a new trial, and was again convicted of murder, but this time in the first degree.[57] While awaiting appeal to the United States Supreme Court, Bohanan fled custody.[58] Citing *Smith*, the Supreme Court held that the lower court properly set aside Bohanan's appeal until such time as the appellant was held in physical or constructive custody of the court below.[59]

Nearly sixty years passed before the Supreme Court again faced a question of fugitive disentitlement. In a case brimming with historical intrigue, *Eisler v. United States*,[60] the petitioner fled to the United Kingdom after the Supreme Court heard his case but before the Court announced its decision.[61] In a decision that included three divisive dissenting opinions, the Supreme Court followed the rule established by *Smith* and *Bonahan* and directed the case be removed from the docket until such time as the petitioner submitted to the jurisdiction of the Court.[62] Justice Frankfurter, joined by Chief Justice Vinson, Justice Murphy, and Justice Jackson, dissented, advocating that the Court should issue its opinion regardless of the petitioner's fugitive status.[63] *Eisler* was the first criminal case to reach the Supreme Court that involved an international fugitive's refusal to submit to a jurisdiction that the Court declined to decide.[64] The Court considered it wasteful to use judicial resources to adjudicate a case when the defendant refused to accept their conviction should the court rule against them.[65] While a case may still

53. *Id.*

54. 125 U.S. 692 (1887).

55. *Id.* at 692.

56. Bohanan v. State, 24 N.W. 390, 391 (Neb. 1885), *rev'd sub nom.* Bonahan v. Nebraska, 125 U.S. 692 (1887). It appears that the Supreme Court has mistakenly identified the plaintiff as "Bonahan," rather than the correct spelling of "Bohanan."

57. *Id.*

58. *Bonahan*, 125 U.S. at 692.

59. *Id.*

60. 338 U.S. 189 (1949).

61. *Id.* at 193 (Murphy, J., dissenting).

62. *Id.* at 189.

63. *Id.* at 190–96.

64. *Id.* at 190.

65. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970).

represent a judiciable case or controversy sufficient to warrant a decision by the Court, fugitive status "disentitles the defendant to call upon the resources of the Court for determination of his claims."[66]

These foundational fugitive disentitlement cases clearly show that the Supreme Court supports judicial discretion to dismiss an appeal when the appellant is a fugitive.[67] Whether the court should refuse to rule while still retaining a case or whether a fugitive entirely forfeits their right to appeal if they flee after filing an appeal—even if they were subsequently captured—remained an open question until *Molinaro v. New Jersey*.[68] Camillo Molinaro was convicted of providing abortions and conspiracy to commit abortions in New Jersey state court.[69] While out on bail and awaiting his appeal to the Supreme Court, he failed to surrender himself to New Jersey state authorities and was labeled a fugitive by the state.[70] Unlike *Bonahan* and *Eisler*, where the Supreme Court retained the cases for future decision should the fugitive be captured, the Court immediately dismissed Molinaro's appeal because of his fugitive status.[71] The Supreme Court's holding in *Molinaro* expanded application of the fugitive disentitlement doctrine to include appellants who became fugitives after filing an appeal.[72]

After expanding the doctrine for decades, the Supreme Court began to curtail application of the fugitive disentitlement doctrine in response to the Eleventh Circuit's decision in *Ortega-Rodriguez v. United States*.[73] In *Ortega-Rodriguez*, the petitioner fled after he was convicted on drug trafficking charges, but before sentencing.[74] The Eleventh Circuit applied the fugitive disentitlement doctrine to Mr. Ortega-Rodriguez's appeal and held that a fugitive who flees between their conviction and sentencing forfeits their right to appeal, absent extraordinary justifications.[75] Justice Stevens, writing for the majority, reversed and held that defendants who flee after conviction but before sentencing do not forfeit their right to appeal because their contempt of court is directed towards the trial court, not the appellate court.[76] The Supreme Court's decision in *Ortega-*

66. *Id.*
67. Ortega-Rodriguez v. United States, 507 U.S. 234, 239–40 (1993).
68. 396 U.S. 365 (1970).
69. *Id.*
70. *Id.*
71. *Id.* at 366.
72. *Id.*
73. 507 U.S. 234 (1993).
74. *Id.* at 235.
75. *Id.*
76. *Id.* at 251.

Rodriguez expressly upheld the *Molinaro* rule, while curtailing judges' discretion to apply the fugitive disentitlement doctrine if the defendant's fugitive status does not "coincide with the pendency of the appeal."[77]

Recent Supreme Court cases demonstrate broad support for withholding judicial consideration of appeals for fugitives. In the most recent United States Supreme Court case concerning the fugitive disentitlement doctrine, *Degen v. United States*,[78] the Court held that federal courts only have the authority to dismiss an appeal or writ of certiorari "if the party seeking relief is a fugitive while the matter is pending."[79] Brian Degen, a dual citizen of the United States and Switzerland, moved to Switzerland in 1988 and refused to return to the United States to face numerous criminal charges, including, distributing marijuana, laundering money, and other related crimes.[80] Concurrently, the government brought a civil forfeiture case against Degen in an effort to seize the profits and assets derived from his drug-related crimes.[81] At issue was whether the district court could dismiss a civil forfeiture case against a defendant disentitled for being a fugitive from justice in a related criminal trial.[82] While upholding the lower courts' discretionary power of disentitlement, the Supreme Court curtailed the fugitive disentitlement doctrine in *Degen*.[83] The Court held it was unnecessary and excessive to grant summary judgment in a civil forfeiture case due to the defendant's fugitive status in a related criminal case.[84] Unlike in criminal cases, courts in civil trials do not have the same concerns for judicial inefficiency and waste when the forfeited property is already in possession of the court.[85] Degen only stood to gain by submitting to the court's jurisdiction to attempt to regain possession of his forfeited property.[86] Finding that the criminal trial could not begin until Degen submitted to United States jurisdiction, the Supreme Court refused the government's request to

77. *Id.* at 252 (Rehnquist, J., dissenting).

78. 517 U.S. 820 (1996).

79. *Id.* at 824.

80. *Id.* at 821–22.

81. All property used to facilitate criminal acts is subject to civil forfeiture and "[a]ll right, title, and interest" in such property passes to the government "upon commission of the act giving rise to forfeiture." 21 U.S.C. § 881(h). "The Government sought to forfeit properties in California, Nevada, and Hawaii, allegedly worth $5.5 million and purchased with proceeds of Degen's drug sales or used to facilitate the sales." *Degen*, 517 U.S. at 821 (citing 21 U.S.C. §§ 881(a)(6)–(7)).

82. *Degen*, 517 U.S. at 821.

83. *Id.* at 829.

84. *Id.*

85. *Id.* at 826.

86. *Id.* at 825–26.

disentitle Degen in the civil forfeiture case.[87]

Taken together, *Ortega-Rodriguez* and *Degen* reflect the Supreme Court's disinclination to expand the circumstances in which courts are justified in applying the fugitive disentitlement doctrine.[88] Nevertheless, as discussed in the next section, the Supreme Court continues to uphold application of the discretionary power afforded by the doctrine when certain fundamental justifications are present.[89]

C. Justifications for the Fugitive Disentitlement Doctrine

Disentitlement seems to run contrary to the ideals of due process and an individual's right to judicial process, but there are several persuasive justifications to support the doctrine's existence.[90] The Supreme Court has offered five justifications for the fugitive disentitlement doctrine: (1) unenforceability of the judgment; (2) risk of delay or frustration in determining the merits of the claim; (3) compromising of a criminal case by the use of civil discovery mechanisms; (4) indignity visited on the court; and (5) deterrence.[91]

Foremost among judicial justifications is the unenforceability of judicial decisions against a fugitive defendant.[92] The very establishment of the doctrine arose from the Supreme Court taking issue with expending judicial resources to adjudicate an appeal from a criminal case against an absent defendant.[93] A court hearing arguments, ruling, and issuing an opinion are all futile exercises without a party against whom to enforce the judgment.[94] Several of the other justifications for fugitive disentitlement relate to unenforceability.[95] Delay of the proceedings, compromise of the discovery process, and the perceived affront to the court all frustrate the overall judicial system.[96] The final justification is the deterrence effect of a defendant forfeiting their right to appeal through flight.[97] Presumably, defendants are less likely to flee from justice if they

87. *Id.* at 826.

88. *Id.* at 824–25; Ortega-Rodriguez v. United States, 507 U.S. 234, 251 (1993).

89. *Degen*, 517 U.S. at 824–28.

90. *Id.*

91. *Id.*

92. Bar-Levy v. U.S. Dep't of Just., I.N.S., 990 F.2d 33, 35 (2d Cir. 1993).

93. Smith v. United States, 94 U.S. 97, 97 (1876).

94. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970).

95. *See Smith*, 94 U.S. at 97.

96. Empire Blue Cross & Blue Shield v. Finkelstein, 111 F.3d 278, 282 (2d Cir. 1997).

97. "Disentitlement 'discourages the felony of escape and encourages voluntary surrenders,' and 'promotes the efficient, dignified operation' of the courts." Degen v. United States, 517 U.S. 820, 824 (1996) (quoting Estelle v. Dorrough, 420 U.S. 534, 537 (1975) (per curiam)).

consciously abandon all hope of overturning their conviction.[98] For example, in *Allen v. Georgia*,[99] after the defendant had been convicted of murder and sentenced to death, he escaped from jail.[100] At the time of his escape, the defendant's appeal was scheduled to be heard by the Georgia State Supreme Court.[101] The court ordered the case dismissed unless the defendant surrendered to custody, applying the fugitive disentitlement doctrine.[102] The Supreme Court upheld the state court's dismissal as justified for the reasons stated in this section.[103]

Part I began by defining the fugitive disentitlement doctrine and proceeded by explaining the historical development and associated justifications for the doctrine's establishment as a discretionary power of the judiciary. In Muriel Bescond's case, her refusal to physically travel to the United States and submit to U.S. jurisdiction led the trial court to conclude that she was a fugitive and her status justified application of fugitive disentitlement.[104] The court utilized several interrelated legal doctrines to reach its conclusion. Part II will explain how the fugitive disentitlement doctrine implicates four other judicial doctrines and devices: the presumption against extraterritoriality, the final judgment rule, the collateral order doctrine, and writs of mandamus.

II. OVERVIEW OF PRESUMPTION AGAINST EXTRATERRITORIALITY, FINAL JUDGMENT RULE, COLLATERAL ORDER DOCTRINE, AND WRIT OF MANDAMUS

Ms. Bescond's case required the court to apply and analyze the case's facts according to the presumption against extraterritoriality, the final judgment rule, and the collateral order doctrine. When a foreign defendant who is not physically present in the United States is charged with a crime, one potential defense is to challenge the extraterritorial application of United States law.[105] The presumption against extraterritoriality is a

98. Allen v. Georgia, 166 U.S. 138, 141 (1897).

99. 166 U.S. 138 (1897).

100. *Id.* at 138.

101. *Id.*

102. *Id.*

103. *Id.* at 140–42.

104. United States v. Bescond, 24 F.4th 759 (2d Cir. 2021).

105. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 125 (1998); *see also* S. Nathan Williams, Note, *The Sometimes "Craven Watchdog": The Disparate Criminal-Civil Application of the Presumption Against Extraterritoriality*, 63 DUKE L.J. 1381, 1394 (2014) (explaining that the Supreme Court has historically treated challenges to extraterritorial application of U.S. criminal law more leniently).

doctrine that presumes that United States law does not apply to foreign conduct unless Congress specifically states otherwise.[106] The fugitive disentitlement doctrine precludes such a defendant from this and any other basic defense.[107] Foreign defendants cannot challenge extraterritoriality if they are labeled fugitives and disentitled by the courts.[108] Further, fugitives cannot challenge their disentitlement without submitting to the jurisdiction of the United States, in which case they are no longer fugitives.[109]

To challenge their status as fugitives, foreign defendants must surmount two other fundamental doctrines: the final judgment rule and the collateral order doctrine.[110] Generally, the final judgment rule requires that defendants wait for a court to issue a final order before appealing to a higher court.[111] A final order resolves all issues in the case and leaves nothing to be done save for the execution on the judgment.[112] For example, a ruling to exclude certain testimony is not a final judgment, while a judge's grant of summary judgment is final. Relatedly, the collateral order doctrine provides an exception to the requirement of the final judgment rule for questions ancillary to the dispositive issues in the case, which nevertheless warrant immediate resolution.[113]

Part II of this Comment introduces and explains the legal doctrines that are linked to the application of the fugitive disentitlement doctrine. First, Part II begins with a summary of the presumption against extraterritorial application of United States law. Muriel Bescond and other foreign defendants at issue in this Comment lack the fundamental ability to raise a defense under the presumption against extraterritoriality when courts

---

106. E.E.O.C. v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' . . . This 'canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained.'" (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949))).

107. United States v. Bescond, 7 F.4th 127, 143 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

108. *Id.*

109. *Id.*

110. *See infra* section II.B–C.

111. 28 U.S.C. § 1291. *See generally* 15A CHARLES ALAN WRIGHT & ARTHUR RAPHAEL MILLER, FED. PRAC. & PROC. § 3905 (2d ed. 1992) (explaining that the primary grant of jurisdiction to courts of appeal is 28 U.S.C. § 1291 which provides jurisdiction of appeals from final order except where the United States Supreme Court has direct review or the appeal meets a narrow alternative basis for jurisdiction).

112. 28 U.S.C. § 1291.

113. *Id.*; *see generally* WRIGHT & MILLER, *supra* note 111, § 3911 (explaining that the collateral order doctrine allows appeals from lower courts absent a final order as long as the lower court has made its final decision on the matter at issue).

apply the fugitive disentitlement doctrine. Next, the final judgment rule generally requires defendants to receive a final judgment before appealing to a higher court.[114] This doctrine is based on the presumption that judicial efficiency is increased by preventing piecemeal appeals and concurrent judicial proceedings at different levels of the judicial system.[115] Part II continues with a summary of the collateral order doctrine, which functions within the bounds of the final judgment rule by providing a narrow exception for appeals during lower court proceedings that are effectively unreviewable and are "collateral" to proceedings.[116] Lastly, Part II concludes by addressing the extraordinary measure of appellate courts issuing writs of mandamus to direct lower courts to take a specified action.

A. The Presumption Against Extraterritoriality

A fundamental premise of United States federal jurisdiction is that statutes only regulate conduct within sovereign national boundaries.[117] Justice Holmes famously stated in *American Banana Co. v. United Fruit Co.*,[118] "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[119] Known as the presumption against extraterritoriality, courts presume against extraterritorial application of U.S. laws unless Congress expresses clear intent to the contrary.[120] The presumption began with the *Charming Betsy*[121] canon, which states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[122] For roughly forty years the Court narrowly interpreted the doctrine, as demonstrated by Justice Holmes's famous quote in *American Banana Co.*, which came at a time when the Supreme Court was strictly construing the presumption to limit the applicability of any U.S. statute to U.S. territorial borders.[123]

Following Justice Holmes's opinion in *American Banana Co.*, a series of Supreme Court rulings provided exceptions to the presumption against

---

114. 28 U.S.C. § 1291.

115. WRIGHT & MILLER, *supra* note 111, § 3907.

116. 2 BARBARA J. VAN ARSDALE ET AL., FEDERAL PROCEDURE: LAWYERS EDITION § 3:144 (July 2022).

117. 1 JENS DAVID OHLIN, WHARTON'S CRIMINAL LAW § 3:15 (16th ed. 2022).

118. 213 U.S. 347 (1909).

119. *Id.* at 356.

120. *See* OHLIN, *supra* note 117.

121. Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804).

122. *Id.* at 118.

123. *See* Dodge, *supra* note 105, at 85.

territoriality and indicated a more flexible interpretation of the doctrine.[124] During that period of time in the middle of the twentieth century, the Supreme Court presumed no congressional intent to extraterritorial application absent explicit statutory language in areas such as antitrust and labor law.[125] Towards the end of the twentieth and beginning of the twenty-first century, the Supreme Court again changed course and adopted a strict approach to the presumption against extraterritoriality.[126]

EEOC v. Arabian American Oil Co. (*Aramco*)[127] signaled a shift in the Supreme Court's treatment of extraterritorial application of U.S. statutes.[128] *Aramco* concerned the extraterritorial application of Title VII of the Civil Rights Act of 1964,[129] which prohibits various discriminatory employment practices.[130] The petitioner in *Aramco* was a naturalized U.S. citizen who worked for a U.S. corporation in Saudi Arabia.[131] The petitioner filed suit under Title VII claiming that his employer harassed, discriminated against, and ultimately discharged him due to his race, religion, and national origin.[132] The Supreme Court held that Title VII did not apply extraterritorially because Congress did not rebut the presumption against extraterritoriality by including a clear statement expressing an intent otherwise.[133]

In the time since the *Aramco* decision, the Supreme Court has applied the presumption against extraterritoriality with increasing regularity, including applications to the Foreign Sovereign Immunities Act, the Federal Tort Claims Act, and the Immigration and Nationality Act.[134] Modern application of the presumption is based on two rationales. First, it prevents international conflicts between different sovereign legal

---

124. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (finding that extraterritorial actions that effect harm within the United States do not fall under the presumption against extraterritoriality); Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) (holding that a U.S. citizen was subject to the Lanham Act, which prohibits "deceptive and misleading use of trade-marks" even if the actions take place outside of U.S. jurisdiction).

125. Dodge, *supra* note 105, at 85–86.

126. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010); Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2013); RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325 (2016).

127. 499 U.S. 244 (1991).

128. *See* Dodge, *supra* note 105, at 86.

129. *Aramco*, 499 U.S. at 247.

130. 42 U.S.C. §§ 2000e-2–3.

131. *Aramco*, 499 U.S. at 247.

132. *Id.*

133. *Id.* at 258.

134. *See* Dodge, *supra* note 105, at 91.

systems.[135] Second, the presumption reflects Congress's focus on domestic conditions.[136]

In 2010, the Supreme Court reaffirmed the importance of the presumption against extraterritoriality and provided a two-step test to rebut the presumption.[137] In *Morrison v. National Australia Bank Ltd.*,[138] the Supreme Court applied what is now known as the "focus" test, asking: (1) whether Congress intended the relevant statute to apply extraterritorially and (2) whether there were domestic effects of the extraterritorial actions.[139] *RJR Nabisco, Inc. v. European Community*[140] emphasized the role of the presumption to "avoid the international discord that can result when U.S. law is applied to conduct in foreign countries."[141] Additionally, the Court noted this "reflects the more prosaic 'commonsense notion that Congress generally legislates with domestic concerns in mind.'"[142] Arguably, the Supreme Court's interpretation of the presumption against extraterritoriality has only strengthened in recent decisions.[143] Importantly, *Morrison* applied to civil cases, but extraterritorial application of criminal statutes receives distinctive treatment.[144]

Courts interpreting civil and criminal laws apply different analyses when faced with a question of extraterritorial application.[145] Civil cases must pass the high bar of clear congressional intent to apply extraterritorially.[146] Criminal cases follow precedent set in *United States v. Bowman*,[147] which provides that criminal statutes more easily overcome the presumption against extraterritoriality.[148] In *Bowman*, four sailors were charged with filing fraudulent invoices—with a corporation in which

---

135. *Aramco*, 499 U.S. at 248.

136. *Id.*

137. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 247 (2010).

138. 561 U.S. 247 (2010).

139. *Id.* at 266–70; *see also* William S. Dodge, Morrison's *Effects Test*, 40 SW. L. REV. 687, 691 (2011) (explaining that in *Morrison*, the Court changed its focus from the location of the conduct to the location of the effects).

140. 579 U.S. 325 (2016).

141. *Id.* at 335.

142. *Id.* at 336 (citing Smith v. United States, 507 U.S. 197, 204 (1993)).

143. David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After* Morrison *and* Kiobel, 45 LOY. U. CHI. L.J. 71, 75 (2013).

144. Williams, *supra* note 105, at 1393.

145. *Id.*

146. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115–16 (2013).

147. 260 U.S. 94 (1922).

148. *Id.* at 98; *see* Williams, *supra* note 105, at 1393.

the United States was the sole stockholder—for oil deliveries from Brazil.[149] Chief Justice Taft, writing for the majority, held that certain criminal statutes inherently included extraterritorial violations.[150] This generally includes crimes such as: obstruction and fraud offenses, crimes where the perpetration is not dependent upon a given location, and those where the strength and value of a statute would suffer from strict application of territoriality.[151]

Relatedly, extradition treaties extend the reach of U.S. criminal enforcement through international agreements made by the executive and ratified by the Senate.[152] Importantly, extradition treaties are self-executing, meaning that after Senate approval, no additional legislation is necessary to effect the terms of the respective treaty.[153] However, extradition is a formal process with several limitations that may persuade or force U.S. courts towards fugitive disentitlement, rather than the onerous extradition process.[154]

In sum, all U.S. statutes are subject to the presumption against extraterritorial application unless Congress explicitly expresses intent to the contrary. This overarching presumption against extraterritorial application of U.S. laws can run contrary to classifying foreign defendants as fugitives and disentitling them for refusing to physically travel and appear in U.S. courts. Next, this Comment will consider the role of the final judgment rule in limiting foreign defendants' ability to challenge fugitive classification.

B. The Final Judgment Rule

Defendants who are classified as disentitled fugitives and seek appeal of the lower court's classification face difficulty surpassing a canon

149. *Bowman*, 260 U.S. at 95–96.

150. *Id.* at 98; *see* Williams, *supra* note 105, at 1394.

151. *See* Williams, *supra* note 105, at 1394.

152. U.S. CONST. art. II, § 2; *see* Artemio Rivera, *Interpreting Extradition Treaties*, 43 U. DAYTON L. REV. 201, 204 (2018).

153. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 119 (6th ed. 2014).

154. Potentially extraditable individuals—relators—are shielded from extradition through the following limitations: (1) dual criminality clauses require the extraditable offense be criminal in both countries; (2) many U.S. treaties limit extradition when the offense is related to political, military, or fiscal issues; (3) some treaties provide for a statute of limitations defense; (4) most U.S. extradition treaties prohibit double jeopardy; (5) remedies and recourses clauses can provide protections for challenging extradition in certain instances; (6) many U.S. extradition treaties provide an exception for countries to refuse to extradite defendants to a death penalty state; (7) often treaties limit extraterritorial jurisdiction of the requesting country; and other less common exceptions to extradition. Rivera, *supra* note 152, at 209–23.

known as the final judgment rule.[155] The final judgment rule derives from the statute that provides the courts of appeal with jurisdiction over "appeals from all final decisions of the district courts of the United States."[156] Unlike the Supreme Court, whose existence and jurisdiction is provided for in the Constitution, the U.S. district courts and courts of appeal were created by Congress and are constrained by the jurisdiction that Congress chose to confer to them.[157] Congress has statutorily conferred specific jurisdiction to courts of appeal, and those courts exercising jurisdiction have an obligation to ensure they act with proper authority.[158] Final judgment analysis includes the fundamental question of whether the lower court issued a final and appealable ruling.[159] Requiring defendants to appeal only final decisions from lower courts prevents "piecemeal" adjudication,[160] protects the role of the trial court, and promotes efficiency by avoiding unnecessary delays.[161] It also ensures that appellate courts will decide cases with the benefit of a fully developed record, and thereby ensures the issue is ripe for appeal.[162]

Generally, in criminal cases, final orders are issued by the trial court after conviction and sentencing.[163] Absent application of an exception to the final judgment rule, defendants cannot appeal their designation as a fugitive until after conviction and sentencing.[164] As a result, foreign defendants labeled fugitives and disentitled have no recourse but to submit to jurisdiction in the United States.[165] Absent submission to the trial

155. United States v. Bescond, 7 F.4th 127, 143 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

156. 28 U.S.C. § 1291.

157. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

158. Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884).

159. Brown Shoe Co. v. United States, 370 U.S. 294, 305–06 (1962) ("The requirement that a final judgment shall have been entered in a case by a lower court before a right of appeal attaches has an ancient history in federal practice, first appearing in the Judiciary Act of 1789.").

160. Abney v. United States, 431 U.S. 651, 656 (1977).

161. *See* WRIGHT & MILLER, *supra* note 111; *see also* Microsoft Corp. v. Baker, __ U.S. __, 137 S. Ct. 1702, 1712 (2017) ("This final-judgment rule, now codified in § 1291, preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice.").

162. DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 2:1 (7th ed. 2022).

163. Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989).

164. United States v. Bescond, 7 F.4th 127, 134–35 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

165. *Id.* at 140.

process within the borders of the United States, foreign defendants will remain in fugitive status.[166] Consequently, courts will not issue a final and appealable order.

Over time, the final judgment rule has been in a relative state of flux between strict and more liberal interpretations.[167] Courts continue to weigh the benefits of efficiency and respect for the trial courts against potential advantages of avoiding a subsequent reversal and reduced risk of harm from rulings later overturned.[168] The final judgment rule remains a fundamental underpinning of the entire judicial hierarchy.[169] Few judicial doctrines are enforced as strictly with limited exceptions.[170] The next section will discuss the collateral order doctrine which provides a narrow exception to the final judgment rule.

C. The Collateral Order Doctrine

Appellate courts exercising discretionary power to apply fugitive disentitlement often implicate the collateral order doctrine as an exception to the final judgment rule.[171] Certain circumstances necessitate review by the appellate court to avoid irreparable harm to the defendant.[172] To avoid irreparable harm, the Supreme Court carved out a narrow exception to the final judgment rule, recognizing that in limited situations, interlocutory appeals may better serve the judicial process.[173] In *Cohen v. Beneficial Industrial Loan Corp.*,[174] the Supreme Court established the collateral order doctrine under the justification that, for claims collateral to the rights at issue, allowing an appeal before final judgment was "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[175] The collateral order doctrine provides appellate courts with jurisdiction to consider rulings "collateral" to a defendant's case, which do not preclude

166. *See Bescond*, 24 F.4th at 769.

167. *See* WRIGHT & MILLER, *supra* note 111, § 3907.

168. *Id.*

169. 28 U.S.C. § 1291.

170. *See* 36 C.J.S. *Federal Courts* § 432 (2022) (explaining that courts apply the *Cohen* factors stringently); *see, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) ("The Court has long given this provision of the statute this practical rather than a technical construction.") (citing United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926)).

171. 36 C.J.S. *Federal Courts* § 432 (2022).

172. *See* Will v. Hallock, 546 U.S. 345, 350 (2006); United States v. Myers, 593 F.3d 338, 345 (4th Cir. 2010).

173. *See* Behrens v. Pelletier, 516 U.S. 299, 305 (1996).

174. 337 U.S. 541 (1949).

175. *Id.* at 546.

the trial court proceedings, but nonetheless warrant interlocutory appeal before final judgment.[176]

Subsequent court decisions flowing from the Supreme Court's ruling in *Cohen* established the "Cohen conditions" which must be present before applying the collateral order doctrine.[177] First, the decision must "conclusively determine the disputed question."[178] Second, the decision must "resolve an important issue completely separate from the merits of the action."[179] Third, the decision must be "effectively unreviewable on appeal from a final judgment."[180] Later, the Supreme Court clarified that the collateral order doctrine was not an exception to the final judgment but rather, an extension.[181] Between 1974 and 1988, the Supreme Court decided numerous cases concerning the collateral order doctrine—generally narrowing the exceptions permitted.[182] However, the Supreme Court did expand the collateral order doctrine to include interlocutory appeals of orders affecting a litigant's right not to stand trial and immunity defenses.[183]

Congress delegated its power to expand the collateral order doctrine to the Supreme Court for greater efficiency. In 1988, Congress authorized, and Chief Justice Rehnquist appointed, a fifteen-member Federal Courts Study Committee in response to "mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion."[184] The Supreme Court's committee arose after Congress passed the 1988 Judicial Improvements and Access to Justice Act to develop a long-range plan for the future of the federal judiciary.[185]

---

176. VAN ARSDALE ET AL., *supra* note 116, § 3:144.

177. *See Will*, 546 U.S. at 349 ("The requirements for collateral order appeal have been distilled down to three conditions: that an order '[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993))).

178. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

179. *Id.*

180. *Id.*

181. *See* Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (clarifying that the collateral order doctrine "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it"); *see also* Johnson v. Fankell, 520 U.S. 911, 916–18 (1997) (holding that *Cohen* expanded the term "final decision").

182. Michael E. Harriss, Note, *Rebutting the Roberts Court: Reinventing the Collateral Order Doctrine Through Judicial Decision-Making*, 91 WASH. U. L. REV. 721, 728 (2014).

183. *Id.* at 729.

184. U.S. FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3 (1990).

185. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4644

Congress intended the Court to expand the list of immediately appealable non-final orders.[186] Although the Supreme Court has cautioned against expanding the collateral order doctrine, appeals of fugitive classification by trial courts represent a narrow and important area worthy of inclusion. The question of what qualifies as "important" enough to merit inclusion in the doctrine remains contested.[187] In *Ashcroft v. Iqbal*,[188] the Supreme Court applied strict guidelines reiterating the limits of collateral review to orders which "are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action.'"[189] Appellate courts have sparingly applied the already narrow collateral order doctrine.[190]

Defendants seeking to appeal a trial court's decision to classify them as a fugitive or to challenge extraterritorial application of U.S. law must rely on the collateral order doctrine to prevent disentitlement.[191] District courts may decline to decide any motions made by a fugitive defendant, and appellate courts have split on whether the collateral order doctrine allows them to consider appeals regarding fugitive status.[192] Absent appellate jurisdiction to hear such motions, defendants have no recourse but to submit to the district court jurisdiction in person.[193] Muriel Bescond asserted, and the Second Circuit approved, appellate jurisdiction to appeal fugitive disentitlement under the collateral order doctrine.[194] The next section will conclude Part II by briefly summarizing writs of mandamus, as many appellants challenging their fugitive status request a writ as alternative recourse.

(1988); 5 RICHARD L. PACELLE, ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 267–69 (David S. Tanenhaus ed. 2008).

186. H.R. REP. NO. 102-1006, at 1 (1992) ("(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).").

187. *See* Kristin B. Gerdy, *"Important" and "Irreversible" but Maybe Not "Unreviewable": The Dilemma of Protecting Defendants' Rights Through the Collateral Order Doctrine*, 38 U.S.F. L. REV. 213, 234–35 (2004).

188. 556 U.S. 662 (2009).

189. *Id.* at 671 (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

190. Four categories of orders have qualified, including: the denial of a motion to dismiss based on the Double Jeopardy Clause (Abney v. United States, 431 U.S. 651, 659 (1977)); the denial of a motion to dismiss based on the Speech and Debate Clause (Helstoski v. Meanor, 442 U.S. 500, 506–07 (1979)); a court's order to forcibly medicate a mentally ill defendant (Sell v. United States, 539 U.S. 166, 176–77 (2003)); and a court's refusal to reduce bail (Stack v. Boyle, 342 U.S. 1, 6–7 (1951)).

191. United States. v. Bescond, 7 F.4th 127, 135 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

192. *Id.* at 132, 137.

193. *Id.* at 143.

194. *Id.* at 132.

D. Writ of Mandamus

When a defendant's requests for appeal are denied under the final judgment rule or collateral order doctrine, their next, and potentially final option is to file a writ of mandamus.[195] A writ of mandamus is a common law power codified by an act of Congress to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[196] "The All Writs Act allows a federal court of appeals to issue a writ of mandamus directing a district court to enforce a specific duty."[197] Writs of mandamus are only issued for extraordinary circumstances.[198] Petitioners must satisfy three requirements for issuance of a writ of mandamus forcing a lower court to take action or issue an order.[199] First, the petitioner must not have any other method of obtaining relief.[200] Second, the petitioner must show that they have a "clear and indisputable" legal right.[201] Third, the petitioner must convince the court that the "writ is appropriate under the circumstances."[202] Courts rarely issue writs of mandamus, especially if alternative means of recourse exist such as appearing in court for those subjected to fugitive disentitlement.[203]

Part II of this Comment began with a discussion of the history and application of the presumption against extraterritorial application of U.S. law in the context of a foreign defendant's most common path of appeal. Next, Part II continued by providing a brief history, application framework, and justification for both the final judgment rule and the collateral order doctrine. Defendants who are subject to fugitive disentitlement and seeking interlocutory appeal of their fugitive status must surmount the hurdles of both doctrines. Muriel Bescond sought interlocutory appeal of her fugitive classification through her attorney in the United States.[204] The Second Circuit Court of Appeals—deviating from the Sixth and Eleventh Circuit holdings—permitted Ms. Bescond an

195. *See Ex parte* Fahey, 332 U.S. 258, 259–60 (1947) (explaining that writs of mandamus are "drastic and extraordinary" remedies "reserved for really extraordinary causes").

196. 28 U.S.C. § 1651(a).

197. United States v. Martirossian, 917 F.3d 883, 889 (6th Cir. 2019).

198. *Ex parte* Fahey, 332 U.S. at 259–60.

199. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004).

200. *Id.*

201. *Id.* at 381.

202. *Id.*

203. *See, e.g.*, United States. v. Martirossian, 917 F.3d 883, 889 (6th Cir. 2019) (denying Martirossian's request for a writ of mandamus because he could obtain a ruling on his motion to dismiss by appearing in court).

204. United States. v. Bescond, 7 F.4th 127, 135, 138 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

interlocutory appeal of her fugitive status but not an appeal of the extraterritorial application of United States securities law.[205] Part III of this Comment will demonstrate how various U.S. courts have applied the doctrines explained in Part II to defendants disentitled according to the fugitive disentitlement doctrine.

III. CIRCUIT SPLIT BETWEEN THE ELEVENTH, SIXTH, AND SECOND CIRCUIT COURTS

Federal circuit splits in criminal law, such as the existing split between the Eleventh, Sixth, and Second Circuits concerning fugitive disentitlement, create ambiguity for defendants, prosecutors, judges, and attorneys.[206] Differences in statutory interpretation can drastically alter a defendant's case. Nevertheless, circuit courts of appeal are only bound by their own precedent and that of the Supreme Court.[207]

The Eleventh and Sixth Circuits have held that a foreign national refusing to leave their home country meets the definition of a fugitive and is therefore subject to the court's discretionary power to apply the fugitive disentitlement doctrine.[208] This precludes any challenge to the defendant's fugitive status or extraterritorial application of the charged offense.[209] The Second Circuit has taken a different approach and held that, although the defendant cannot appeal extraterritorial application of U.S. law until the trial court issues a final judgment, they may use the collateral order doctrine to challenge their classification as a fugitive.[210] The Second Circuit's approach allowed Muriel Bescond to challenge her classification as a fugitive on interlocutory appeal.[211] As a result, Ms. Bescond could proceed with pre-trial motions through her legal counsel—an entitlement she had lost due to the fugitive disentitlement doctrine.[212]

---

205. *Id.* at 137–38.

206. *See* Julian W. Smith, *Evidence of Ambiguity: The Effect of Circuit Splits on the Interpretation of Federal Criminal Law*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 79, 89 (2011).

207. *See* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 453 (2009) (presenting precedential hierarchy in federal court system).

208. *See, e.g.*, United States. v. Shalhoub, 855 F.3d 1255, 1258 (11th Cir. 2017) (holding the district court was within its discretion to use the fugitive disentitlement doctrine since Shalhoub, by refusing to appear in court, qualified as a fugitive); *see also Martirossian*, 917 F.3d at 883 (finding that the district court properly identified Martirossian, a citizen of Armenia living in China, as a fugitive for purposes of applying the fugitive disentitlement doctrine because Martirossian refused to travel to the United States to face criminal charges).

209. *See Shalhoub*, 855 F.3d at 1258; *Martirossian*, 917 F.3d at 886.

210. *See, e.g.*, *Bescond*, 7 F.4th at 132 (holding that the collateral order doctrine allowed the defendant to challenge her designation as a fugitive).

211. *Id.* at 143.

212. *Id.* at 132.

Part III of this Comment explores this circuit split concerning application of the fugitive disentitlement doctrine, with section III.C returning to Muriel Bescond's case.

A. The Eleventh Circuit Does Not Allow Defendants to Challenge Fugitive Disentitlement

Khalid Shalhoub was indicted in 1997 for parental kidnapping when he moved his daughter, whose custody he shared with his ex-wife, to Saudi Arabia.[213] Mr. Shalhoub's case raised several fundamental questions for fugitive disentitlement cases involving foreign defendants. First, Mr. Shalhoub challenged the extraterritorial application of the U.S. parental kidnapping law, which conflicts with Saudi law.[214] Second, Mr. Shalhoub asserted that he was not a fugitive because he was in his home country when he was indicted in a U.S. jurisdiction, thus he "did not flee the United States."[215] Finally, Mr. Shalhoub argued the courts violated his due process rights by labelling him a fugitive without the opportunity to be heard.[216] Specifically, Mr. Shalhoub argued that due process required the court either grant his interlocutory appeal challenging his fugitive classification or, alternatively, grant a writ of mandamus requiring the trial court to consider his motion for dismissal without being required to physically appear in court.[217]

Dismissing the case without prejudice, the district court declined to rule on Mr. Shalhoub's challenge to extraterritoriality of U.S. law because Mr. Shalhoub "constructively fle[d]"[218] by not returning to the United States after notification of his indictment.[219] Constructive flight can occur when a plaintiff is legally outside the jurisdiction and elects not to return.[220] Even though Mr. Shalhoub was a foreign citizen, living abroad at the time the alleged criminal conduct occurred, he had the ability to return to the United States to exercise his due process rights.[221]

The Eleventh Circuit decided against Mr. Shalhoub, explaining that "absent the assertion of a right not to be tried or the assertion of a right

213. *Shalhoub*, 855 F.3d at 1258.

214. *Id.* at 1258–59.

215. *Id.* at 1259.

216. *Id.*

217. *Id.* at 1258.

218. United States v. Barnette, 129 F.3d 1179, 1184 (11th Cir. 1997).

219. United States v. Shalhoub, No. 98-CR-00460, 2016 WL 8943847, at *2 (S.D. Fla. Jan. 26, 2016); *see Barnette*, 129 F.3d at 1184 ("[t]he defendant need not leave the jurisdiction, but—while legally outside the jurisdiction—may constructively flee by deciding not to return.").

220. *Barnette*, 129 F.3d at 1184.

221. *U.S. v. Shalhoub*, 2016 WL 8943847, at *2.

akin to the right against excessive bail, a defendant must accept the burdens of trial and sentencing before he obtains appellate review of an adverse ruling."[222] The Eleventh Circuit further elaborated that a defendant has "no right to avoid being labelled a fugitive."[223] Analyzing the issues separately, the Eleventh Circuit first considered whether the collateral order doctrine allowed the court to consider Mr. Shalhoub's motions, and second, whether to grant Mr. Shalhoub's request for a writ of mandamus to force the trial court to decide his motions.[224] The court ruled that Mr. Shalhoub's motions did not overcome the strict requirements of the collateral order doctrine as an exception to the final judgment rule and reemphasized that "Shalhoub has an adequate remedy: appearance in the district court."[225] Writs of mandamus are extraordinary remedies that compel a district court to exercise a specific duty.[226] Here, the court denied his request for a writ of mandamus because Mr. Shalhoub possessed adequate means to challenge his indictment by traveling to and appearing before the U.S. district court.[227]

In summary, the Eleventh Circuit does not permit interlocutory appeals under the collateral order doctrine of fugitive disentitlement or extraterritorial application of U.S. laws. Moreover, the Eleventh Circuit will not issue a writ of mandamus to compel a district court judge to decide a motion on either fugitive classification or extraterritorial application of U.S. laws.

B. The Sixth Circuit Does Not Permit Appeal of Fugitive Disentitlement

The Sixth Circuit takes a nearly identical approach to that of the Eleventh Circuit. In *United States v. Martirossian*,[228] the Sixth Circuit held that fugitive disentitlement was not immediately appealable under the collateral order doctrine and a writ of mandamus ordering the district court to rule on the defendant's motion to dismiss was inappropriate.[229] Azat Martirossian, an Armenian and Chinese citizen, was charged with money laundering relating to a scheme to bribe Kazakh state officials for

222. United States. v. Shalhoub, 855 F.3d 1255, 1261 ("[L]itigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review." (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 524 (1988))).

223. *Id.*

224. *Id.* at 1259–60.

225. *Id.* at 1265.

226. 28 U.S.C. § 1651(a); FED. R. APP. P. 21.

227. *Shalhoub*, 855 F.3d at 1263.

228. 917 F.3d 883 (6th Cir. 2019).

229. *Id.* at 886.

the benefit of Rolls-Royce Energy Systems.[230] Federal prosecutors in the Southern District of Ohio brought U.S. federal criminal charges against Martirossian because Rolls-Royce Energy Systems was an Ohio subsidiary of the British parent company.[231] Martirossian moved for dismissal by challenging the extraterritorial application of the statute he was charged with violating.[232]

The Sixth Circuit cited and closely followed the lead of the Eleventh Circuit in *Martirossian*. The court held that the "[c]onsiderable overlap" between the defendant's classification as a fugitive and extraterritorial application of the relevant criminal statute advised against collateral order review.[233] Like *Martirossian*, in many cases involving an appeal of fugitive disentitlement, defendants argue that their fugitive status is unappealable after final judgment because, in order to have a final judgment, the defendant must first physically submit to the court's jurisdiction.[234] Having submitted to the court's jurisdiction, they are no longer a fugitive from justice. The Sixth Circuit decision leads to a quagmire in which a defendant must either accept fugitive disentitlement or submit to the jurisdiction, thus mooting the fugitive status issue.[235] Recognizing this inherent short-coming of the fugitive disentitlement doctrine, the Sixth Circuit offers the justification that "the chief remedy available on appeal—a reversal—always delays justice, always cannot rewrite history, and thus always falls short of making the wronged party entirely whole."[236] As in the Eleventh Circuit, the Sixth Circuit precedent prevents defendants from either appealing their classification as a fugitive or challenging extraterritorial application of U.S. law absent a final order from the trial court.[237]

Both the Sixth and Eleventh Circuits require a final order for appeals due to the Supreme Court's strict limit on expanding beyond existing exceptions of the collateral order doctrine.[238] The next section examines

---

230. *Id.*

231. *Id.*

232. *Id.* at 889.

233. *Id.* at 888.

234. *See* United States v. Bescond, 7 F.4th 127, 138 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021) (This "third prong of the [collateral order] test is satisfied only where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" (quoting Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989))).

235. *Martirossian*, 917 F.3d at 888.

236. *Id.* (citing Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872 (1994)).

237. *Id.* at 891.

238. *See generally Martirossian*, 917 F.3d 883; United States v. Shalhoub, 855 F.3d 1255, 1258 (11th Cir. 2017).

the Second Circuit's drastically different approach which allows interlocutory appeals of fugitive status.

C. The Second Circuit Permits Appeals of Fugitive Disentitlement for Foreign Defendants

The Second Circuit has demonstrated a willingness to permit a defendant to challenge fugitive disentitlement according to the collateral order doctrine. In a clear departure from the application of the fugitive disentitlement doctrine in the Sixth and Eleventh Circuits, the Second Circuit accepted an appeal under the collateral order doctrine to hear Muriel Bescond challenge her fugitive classification in *United States v. Bescond*.[239] Further, the Second Circuit held that the district court abused its discretion by disentitling the defendant because Ms. Bescond was not a "fugitive" as required for application of the fugitive disentitlement doctrine.[240] With its decision, the Second Circuit further widened an existing split between its case law and that of the Eleventh and Sixth Circuits concerning the fugitive disentitlement doctrine and the implication of the collateral order doctrine in appeals.[241]

In 2004, the Second Circuit issued an opinion in *Motorola Credit Corp. v. Uzan*,[242] a case similar to *Bescond*, which involved foreign defendants with only a slight connection to U.S. jurisdiction.[243] In *Uzan*, a U.S.-based telecom manufacturer sued several Turkish corporations, asserting Racketeer Influenced and Corrupt Organizations Act (RICO)[244] claims.[245] In the plaintiffs' appeal to the initial judgment in the district court, the Second Circuit ruled that fugitive disentitlement was inappropriate for two reasons.[246] First, foreign defendants should be treated differently than defendants physically present in the jurisdiction and avoiding judgment.[247] Second, the appeal involved challenges to the district court's subject matter jurisdiction that could be adjudicated without the defendants present.[248]

Unlike the other circuits, the Second Circuit ruled that classification as

239. *Bescond*, 7 F.4th at 132.

240. *Id.* at 135.

241. Davis, *supra* note 21, at 335.

242. 115 F. App'x 473 (2d Cir. 2004).

243. *Id.*

244. 18 U.S.C.A. §§ 1961–1968 (West).

245. *Uzan*, 115 F. App'x. at 474–75.

246. *Id.*

247. *Id.*

248. *Id.*

a fugitive falls under the collateral order doctrine.[249] In *Bescond*, the Second Circuit held that the court has "jurisdiction under the collateral order doctrine to review an order disentitling a foreign citizen who has remained at home abroad—in this case, without evasion, stealth, or concealment."[250] The dissent in *Bescond* argued that Supreme Court precedent only entitles foreign defendants to due process rights if they travel to and defend themselves in the respective U.S. jurisdiction.[251] Some scholars argue that allowing foreign defendants to challenge fugitive disentitlement will result in courts developing more extensive precedents regarding the extraterritorial application of numerous federal statutes.[252] Although beyond the scope of this Comment, stronger precedents could result in tougher enforcement in important subject areas such as fraud, antitrust, and securities regulation.[253]

In summary, the Second Circuit's decision in *Bescond* expanded the collateral order doctrine to include interlocutory appeals of fugitive status.[254] The Second Circuit refused to expand the collateral order doctrine to include challenges to extraterritorial application of U.S. law.[255] Nevertheless, allowing challenges to fugitive status provides foreign defendants greater due process rights without traveling from abroad to submit to U.S. jurisdiction.[256] Part IV proposes that the U.S. Supreme Court adopt the Second Circuit's approach.

IV. ALL UNITED STATES CIRCUIT COURTS SHOULD ADOPT THE SECOND CIRCUIT'S APPROACH ON THE ISSUE OF FUGITIVE DISENTITLEMENT

Bescond's fact-specific reasoning, the presence of a strong dissent, and the existing circuit split on the issue of fugitive disentitlement all suggest an issue ripe for Supreme Court consideration.[257] Part IV of this Comment proposes that the Supreme Court accept review to resolve the circuit split and should adopt the Second Circuit's approach of allowing challenges to fugitivity through the collateral order doctrine as an exception to the final

249. United States v. Bescond, 7 F.4th 127, 135 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

250. *Id.*

251. *Id.* at 148 n.4 (Livingston, J., dissenting).

252. Chloe S. Booth, *Doctrine on the Run: The Deepening Circuit Split Concerning Application of the Fugitive Disentitlement Doctrine to Foreign Nationals*, 59 B.C. L. REV. 1153, 1185 (2018).

253. *Id.*

254. *Bescond*, 7 F.4th at 143.

255. United States v. Bescond, 24 F.4th 759, 771 (2d Cir. 2021).

256. *Bescond*, 7 F.4th at 143.

257. Davis, *supra* note 21, at 334.

judgment rule under certain circumstances. Allowing foreign defendants to challenge application of the fugitive disentitlement doctrine furthers the purposes of justice and due process. Forcing international business professionals to physically submit to jurisdiction in the United States to challenge extraterritorial application of United States laws is unjust and inefficient in an increasingly globalized economy. Adopting the Second Circuit's approach will result in greater judicial efficiency through the dismissal of cases without merit, while preserving a fair and equitable judicial process. Absent an appeals process, foreign defendants must submit to United States jurisdiction and may be forced to travel great distances to defend themselves in United States courts any time a U.S. prosecutor levels charges.

If the Supreme Court were to accept the Second Circuit's application of the collateral order doctrine to hear appeals of fugitivity, foreign defendants could challenge criminal indictments without submitting to U.S. jurisdiction. The Supreme Court has yet to grant certiorari for a case concerning fugitive disentitlement and the application of the collateral order doctrine. However, a circuit court split and an increasingly globalized economy make the issue suitable for attention.

Courts should allow a narrow exception to the final judgment rule to provide for appellate jurisdiction under the collateral order doctrine, but an exception allowing defendants to challenge exterritoriality would be too expansive. Limiting discretionary power of the fugitive disentitlement doctrine implicates several other entrenched and strictly enforced doctrines.[258] While the most direct approach would be to allow foreign defendants to challenge extraterritorial application of U.S. law, such an approach would unnecessarily expand appellate jurisdiction. Challenges to extraterritorial application of U.S. law do not satisfy the strict requirements of the collateral order doctrine.[259] Interlocutory appeals of extraterritorial application of U.S. law fail to meet the second requirement of the collateral order doctrine that appeals be effectively unreviewable after trial.[260] Allowing defendants to appeal issues outside the narrow scope of the collateral order doctrine facilitates circumvention of the judicial process. If challenges to extraterritoriality were included in the collateral order doctrine, then any defendant could bypass the trial courts'

258. *See supra* Part II.

259. *See supra* section II.C.

260. *See, e.g.*, Will v. Hallock, 546 U.S. 345, 351(2006) (finding that only some orders denying an asserted right to avoid the burdens of trial qualify as orders that cannot be reviewed "effectively" after a conventional final judgment); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988) (finding that a district court order granting a stay satisfies the conclusiveness prong of the collateral order doctrine and is appealable under section 1291).

judicial process. Even defendants not disentitled under the fugitive disentitlement doctrine could leverage such an expansion, unnecessarily expanding appellate jurisdiction beyond the scope of the current issue.

Foreign defendants are not fugitives in any sense of the definition and should not face an undue burden from a foreign country applying laws extraterritorially. As defined previously in Part I, to meet the definition of a fugitive, an individual must flee from or purposely evade justice.[261] Foreign defendants within the scope of this proposed solution were labeled as fugitives under the current approaches in the Sixth and Eleventh Circuits but did not flee from justice. Furthermore, these foreign defendants did not commit crimes within U.S. jurisdiction and later flee to avoid prosecution. Defendants simply remained at home in a foreign country and as a result, forfeited any right to judicial process in the U.S. Labeling foreigners as fugitives could dramatically affect their freedom of movement abroad to any countries that have signed an extradition treaty with the United States.[262] Allowing foreign defendants to appeal their classification as fugitives in U.S. courts would better uphold the American belief in the right to due process.

A. The Supreme Court Should Allow Foreign Defendants to Challenge Classification as Fugitives

The collateral order doctrine should be expanded to allow foreign defendants to challenge their fugitive status if they satisfy the following elements: (1) they do not live in the United States, (2) they were not present in the United States when the alleged crimes were committed, and (3) they have not acted to avail or benefit from U.S. jurisdiction. Disentitling such defendants unreasonably expands U.S. jurisdiction beyond its borders. Cross-border criminal procedure should necessarily involve communication with and coordination of the relevant enforcement entities.

Regardless of whether criminal defendants are U.S. citizens, they enjoy the same due process protections that the U.S. Constitution provides when defendants are physically present in the United States.[263] Those subject to the U.S. legal system's laws and penalties should also receive the benefits and protections the system provides.[264] This is especially true in cases of

---

261. *Fugitive*, BLACK'S LAW DICTIONARY (11th ed. 2019).

262. *See supra* section II.A.

263. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 371 (2003).

264. James Madison argued for Constitutional rights for foreign and U.S. citizens alike:

U.S. criminal law's extraterritorial application abroad. Absent due process protections for foreign criminal defendants, U.S. prosecutors can effectively exploit a systemic imbalance where U.S. criminal statutes expand jurisdiction to charge and sentence foreign defendants without extending them the rights afforded by due process in U.S. courts. Prosecutorial discretion provides a low bar to level criminal charges,[265] but the final judgment rule and fugitive disentitlement create a disproportionately high bar for a defendant seeking appeal.

Fugitive disentitlement remains an important discretionary power for judges to ensure efficient and just adjudication of criminal prosecutions. Nevertheless, an increasingly global business environment necessitates an avenue for foreign citizens to challenge criminal prosecutions in the United States without physically submitting themselves to the courts. Businesses are increasingly transnational in nature which means that workers' actions inherently have effects in multiple jurisdictions.[266] U.S. courts cannot broadly effectuate justice across the entire globe.

B. The Second Circuit's Approach Encourages Global Trade Without Sacrificing Justice and Due Process

Foreign business entities and individuals operating either within the United States or whose conduct impacts U.S. jurisdiction are more pervasive than ever. Allowing extraterritorial application of U.S. law to global business operations will invariably have a chilling effect on cross-border trade with the United States.[267] Any business with potential cross-

---

> it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.

Madison's Report on the Virginia Resolutions, *in* 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 556 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 1881) (1827).

265. *See* Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 597 (2019) ("Both the range of prosecutors' discretionary decisions and the breadth of their discretion in making those decisions are vast.").

266. *See* Catherine Cote, *What Is Globalization in Business?* HARV. BUS. SCH. ONLINE (June 22, 2021), https://online.hbs.edu/blog/post/what-is-globalization-in-business [https://perma.cc/6JQ4-YKZR] (quoting Harvard Business School Professor Forest Reinhardt, "We live in an age of globalization, . . . [t]hat is, national economies are ever more tightly connected with one another than ever before").

267. A combination of globalization of business and increasing regulation of commerce has resulted in a growing trend towards extraterritorial application of sovereign state laws. Businesses participating in international trade are forced to navigate a complex and often contradictory system of regulations and laws that increases risk and fosters unpredictability. The result is a depression of

border transactions must accept the burden of investing time and resources to learn an entire foreign legal system. In the modern era nearly all internet businesses, or those with an internet presence, entail cross-border transactions. Banking, technology, healthcare, consumer goods, and many more sectors of business would be forced to not only abide by their own sovereign laws, but also those in the United States. The presumption against extraterritoriality is premised on the fact that such a system is incompatible with global diplomatic and commercial operations.[268] Furthermore, in the inverse situation of a foreign plaintiff accusing a U.S. citizen of violating foreign trade or securities laws, the U.S. Supreme Court has held that foreign jurisdiction does not apply to activities of American citizens that affect international exchanges.[269]

In addition to the realities of a globalized economy, one of the foundational concepts of international law is the presumption against extraterritoriality.[270] Linking fugitivity to foreign citizenship circumvents both the presumption against extraterritoriality and due process by applying U.S. law abroad while refusing to hear challenges to jurisdiction. As the Second Circuit logically framed its assessment of whether Ms. Bescond qualified as a fugitive, "if our law does not reach Bescond or her conduct, can it be said that she is in flight from it?"[271]

Recent Supreme Court cases addressing the extraterritorial application of laws concerning securities fraud, antitrust, racketeering, drug trafficking, mail fraud, and weapons possession, further emphasize the limits of U.S. jurisdiction.[272] Lower courts should interpret these developments as discouraging the application of fugitive disentitlement to foreign defendants because the result runs contrary to the Supreme

---

international trade and economic growth. INT'L CHAMBER OF COM., POLICY STATEMENT: EXTRATERRITORIALITY AND BUSINESS 1–2 (2006), https://iccwbo.org/content/uploads/sites/3/2006/07/Extraterritoriality-and-business.pdf [https://perma.cc/7UF6-APF4].

268. *See supra* section II.A.

269. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 265 (2010) ("Its explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges—and its limitation of that application to securities of domestic issuers would be inoperative. Even if that were not true, when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.").

270. *See supra* section II.A; *see also* Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007) ("United States law governs domestically but does not rule the world . . . .").

271. United States v. Bescond, 7 F.4th 127, 140–41 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021).

272. Keenan & Shroff, *supra* note 143, at 74 ("[I]n light of *Morrison* and *Kiobel*, a host of criminal statutes that prosecutors routinely applied extraterritorially in the past, but whose geographic scope is facially ambiguous, ought to be reinterpreted as reaching domestic conduct only.").

Court's intention. Fugitive disentitlement effectively nullifies the presumption against extraterritoriality by refusing to hear motions challenging extraterritoriality because the court considers the defendants to be fugitives. It is unfair and inequitable to force foreign defendants to abandon their personal and professional lives to travel to the United States to defend themselves. Similarly, it is unfair to summarily limit a foreign defendant's freedom of movement extraterritorially because they can no longer travel to any country which possesses an extradition treaty with United States.[273]

C. Method of Execution: Expansion of the Collateral Order Doctrine as an Exception to Final Judgment Rule

Fugitive classification in the context of fugitive disentitlement for foreign citizens is of paramount importance. Foreign defendants stripped of their right to file motions challenging the essential merits of the case against them is exactly the type of issue the collateral order doctrine was established to solve.[274] Although expanding the collateral order doctrine will not require a Supreme Court judgment expressly authorizing defendants to challenge fugitive classification, lower courts are unlikely to alter their current interpretations absent clear guidance from the Supreme Court. The United States Supreme Court is loath to expand the collateral order doctrine beyond the existing categories[275] explicitly authorized by court precedent.[276] Nevertheless, allowing challenges to fugitive disentitlement fits squarely within the prescribed bounds of the collateral order doctrine.[277]

In the *Bescond* case, the Second Circuit succinctly analyzed whether appeals concerning fugitive disentitlement satisfies the three requirements of a permissible collateral order. First, fugitive disentitlement "conclusively determine[s] the disputed question" by preventing the defendant from raising any challenge whatsoever.[278] Second,

---

273. *See supra* section II.A.

274. *See supra* section II.C.

275. The Supreme Court has cautioned us time, time, and time again not to expand the collateral order club's "selective . . . membership." Will v. Hallock, 546 U.S. 345, 350 (2006).

276. Examples in the criminal arena of collateral order doctrine authorized exceptions to the final judgment rule: "A defendant can[not] collaterally appeal a counsel's disqualification, a violation of grand jury secrecy, [] a vindictive prosecution . . . a speedy trial claim, a challenge to the sufficiency of an indictment, and a motion to suppress evidence." United States v. Martirossian, 917 F.3d 883, 887 (6th Cir. 2019) (citations omitted).

277. *See supra* section II.C.

278. United States v. Bescond, 7 F.4th 127, 135 (2d Cir.), *amended and superseded on denial of reh'g*, 24 F.4th 759 (2d Cir. 2021) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

disentitlement "has nothing to do with her guilt or innocence," it is entirely separate from the charges against Ms. Bescond.[279] Finally, Ms. Bescond's right to defend herself is dependent upon overcoming fugitive disentitlement on appeal for there remains no alternate remedies.[280] The existing circuit split demonstrates that reasonable judges interpret the three-part test for collateral order exceptions differently. To alleviate such ambiguity, the Supreme Court should express clear guidance permitting challenges to fugitive disentitlement under the collateral order doctrine.

Part IV argued that the Supreme Court and United States circuit courts of appeal should all adopt the Second Circuit's approach of allowing foreign criminal defendants to challenge fugitive classification under the collateral order doctrine. Allowing foreign defendants to challenge fugitive classification will support justice and due process without burdening the efficiency of the overall judicial system. Allowing such exceptions to the final judgment rule through collateral orders supports international comity, trade, business, and justice. The Supreme Court has expanded the collateral order doctrine in the past and has the power to include challenges to fugitive classification in limited and narrow circumstances. Finally, increasing globalization and regulation of cross-border trade will only increase the prevalence of this issue, necessitating a clear decision by the U.S. Supreme Court.

CONCLUSION

Foreign defendants who live abroad and are accused of a crime involving actions outside of U.S. jurisdiction are not fugitives. As such, these foreign defendants should possess the right to challenge classification as a fugitive for purposes of applying the fugitive disentitlement doctrine. The collateral order doctrine allows appellate courts to hear challenges to lower court rulings as an exception to the final judgment rule. Foreign defendants that seek to challenge a trial court's decision to apply the fugitive disentitlement doctrine rely upon the collateral order doctrine for purposes of due process. To achieve this, the United States Supreme Court should adopt the interpretation from the Second Circuit's recent split from the Sixth and Eleventh Circuits. The Second Circuit's approach would allow a foreign defendant to challenge their classification as a fugitive and subsequent application of the fugitive disentitlement doctrine. Expanding the collateral order doctrine to include

279. *Id.* at 136.

280. *Id.* at 137 ("Bescond's right to mount a defense can be vindicated now or never. If she remains in France—as France entitles her to do—she will never stand trial; naturally, she will have no opportunity to appeal and alleviate the damage to her life and reputation.").

challenges to fugitivity will both support the goal of an efficient and just judicial system and recognize reasonable limits to U.S. jurisdiction. Increasing globalization and internet-based economics mean actions in violation of U.S. laws will only become more pervasive, necessitating clear delineation of limits on U.S. jurisdictional power.