



KRIEGER KIM & LEWIN LLP

New Options for Foreign Defendants Facing U.S. Charges

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It has long been the case that individuals living outside of the United States who have been charged by the U.S. Department of Justice confront a terrible choice: continue living abroad under the constant threat of arrest and extradition or face the charges against them by surrendering to the U.S.

DOJ prosecutors have increasingly made this choice even more difficult, by unsealing what are known as “name and shame” indictments, which are released to the public and often contain extensive details about the charged offenses. Even those who live in countries that have no extradition treaties with the U.S. still must live with the specter of arrest if they ever travel beyond the borders of their home countries. Those who decide that being labeled international fugitives by the U.S. government is untenable must then physically surrender to the U.S. in order to challenge the charges against them. Defendants who make the decision to surrender then face the risk of being held in pre-trial detention, as U.S. courts are less likely to grant bail to foreign nationals with limited ties to the U.S.

However, a recent decision by an appeals court in the U.S. suggests that another alternative may exist. In *United States v. Bescond*, 7 F. 4th 127 (2d Cir. 2021), the Court of Appeals for the Second Circuit held that foreign defendants who live and work outside of the United States when they are charged may be able to challenge the charges against them without



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having to physically come to the U.S. The DOJ has already moved for rehearing, but if the Second Circuit's decision stands, it may provide foreign defendants with a new and powerful tool to aggressively challenge criminal charges in the United States without having to surrender to U.S. authorities.

Background

In 2007, the DOJ charged several Societe Generale SA ("SocGen") executives, including Muriel Bescond, the bank's former head of the Paris treasury desk, with allegedly participating in a scheme to manipulate the U.S. Dollar London Interbank Offered Rate ("USD LIBOR"). Bescond did not commit any of the alleged criminal conduct in the U.S. Moreover, Bescond was in France—where she lives and works—when she was charged. As a French citizen, Bescond cannot be extradited to the U.S. Instead of surrendering to U.S. custody to fight the charges against her, Bescond moved through her lawyers to dismiss the indictment, arguing in part that the statute under which she was charged did not allow for extraterritorial prosecution.

The Court's Decision

The district court declined to rule on the legal merits of Bescond's motion. In doing so, the court relied upon a longstanding doctrine known as "fugitive disentitlement," which allows courts to disregard legal challenges brought by defendants who are fugitives from justice. Noting that Bescond had not come to the U.S. to challenge the case, the district court held that Bescond was a fugitive who was not entitled to challenge the charges against her from abroad, and ultimately denied her motion.

Bescond appealed to the Second Circuit Court of Appeals. After rejecting the DOJ's argument that the district court's decision to disentitle Bescond was unreviewable, the Second Circuit found that Bescond had improperly been disentitled because she was not a "fugitive." The U.S. common law definition of fugitive principally includes two categories: (1) defendants who flee the country after committing a crime, and (2) defendants who commit a crime within the U.S. and, after learning of the charges against them while outside the country, refuse to return to the U.S. in order to avoid prosecution. The Second Circuit found that Bescond did not qualify as a fugitive under either definition.

The Second Circuit also rejected the DOJ's argument that Bescond nonetheless was a fugitive because she fell within a separate category that has been adopted in forfeiture cases. In such cases, fugitive status has been extended to anyone who "declines to enter or reenter the United States to submit to its jurisdiction" or "otherwise evades the

jurisdiction of the court in which a criminal case is pending against [them.]" 28 U.S.C. § 2466.

Noting that Bescond's case was not a forfeiture case, the Second Circuit declined to apply that definition to her and concluded that Bescond was not a fugitive. In reaching that conclusion, the Second Circuit noted that Bescond's presence abroad is unrelated to the case being brought by the DOJ. The Second Circuit observed that Bescond "is a French citizen, living in France, where she supports a family, and is employed in a legitimate line of work." *Bescond* at 141. She lives in her home country "without concealment or evasion." *Id.*

After finding that the district court should not have classified Bescond as a fugitive, the Second Circuit concluded that the district court abused its discretion by deciding to bar Bescond's motion to dismiss: "In Bescond's case, given her innocent residence as a foreign citizen abroad, given the nature of the charged offense and her remoteness from the alleged harm it caused, given her line of work, and given her nonfrivolous challenge to the extraterritoriality of the criminal statute, the exercise of discretion to disentitle her was an abuse." *Id.* at 143. The Second Circuit ultimately reversed the district court's decision, and returned Bescond's case to the district court to reconsider Bescond's motion to dismiss.

Considerations for Foreign Nationals

The Second Circuit's decision in *Bescond* potentially creates new opportunities for individuals who, while residing abroad, learn of criminal charges against them in the United States. Such individuals may now have the option of challenging the charges against them without first having to turn themselves in to the custody of U.S. authorities. Counsel representing clients outside the United States therefore should seriously consider whether any potential legal challenges may successfully be raised while clients are abroad.

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