Professional Perspective

Defenses to Tolling Applications Under 18 U.S.C. § 3292

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Investigations by the Department of Justice and other agencies cover a wide swath of conduct, but often share one thing in common: They don't stop at the border. This investigatory breadth mirrors the transnational operations of modern corporations, and brings with it the need to collect evidence residing outside of the US.

Counterintuitively, extraterritorial evidence collection confers a significant advantage to prosecutors: 18 U.S.C. § 3292 enables prosecutors to toll the statute of limitations for federal crimes by up to three years while waiting to obtain foreign evidence. While the purpose of the statute is to account for the time needed to collect foreign evidence, there have long been concerns that prosecutors may improperly use § 3292 to buy themselves more time to bring charges, particularly given the length of time it often takes for foreign governments to respond to these requests.

A DOJ OIG memorandum leaked in February 2020 alleged precisely such abuses, finding that prosecutors have made § 3292 applications even where the need for foreign evidence was minimal. The courts have also taken note. In July 2022, Judge Kenneth M. Hoyt of the US District Court for the Southern District of Texas in *United States v. Leon-Perez* reiterated that the government could not use § 3292 "simply as a tool to extend tolling, or as a discovery stratagem." No. 4:17-CR-00514, 2022 BL 317943, at *9 (S.D. Tex. July 11, 2022).

In practice, this means that companies and individuals who may have exposure to possible criminal conduct must remain vigilant of potential charges long after the statute of limitations would typically have expired, and consider the possibility of a tolling under § 3292 when assessing any limitations period.

For example, in May 2019, a federal grand jury in D.C. returned an indictment which included charges arising from an alleged scheme to defraud the FEC related to conduct that took place between 2012-2013. See *United States v. Michel*, No. 19-148-1 (CKK), 2019 BL 427034 (D.D.C. Nov. 06, 2019). In 2018, federal prosecutors submitted two ex parte applications to suspend the statute of limitations under § 3292, enabling them to bring the charges after the limitations period would have normally expired.

This article provides an overview of § 3292 and discusses potential defenses to the tolling § 3292 permits.

Section 3292 in a Nutshell

Congress enacted § 3292 to address the delay associated with collecting evidence from foreign jurisdictions, prompted by the increasing use of offshore banks to launder the proceeds of criminal activities, and federal prosecutors' corresponding need to obtain records from those banks. See Pub. L. No. 98–473, § 1218(a), 98 Stat. 1976, 2167 (1984); *Michel*, 2019 BL 427034; *United States v. Meador*, 138 F.3d 986, 994 (5th Cir. 1998); *United States v. Torres*, 318 F.3d 1058, 1062 (11th Cir. 2003).

Triggering § 3292 is straightforward. When evidence relevant to an investigation is located in a foreign country with whom the US has a Mutual Legal Assistance Treaty (MLAT), the government may make an "official request" for that evidence to the relevant authorities in that country. 18 U.S.C. § 3292(a)(1) (2018). The government must then apply to the district court before which the grand jury investigating the offense has been impaneled, seeking to toll the statute of limitations. See *Torres*, 318 F.3d at 1062.

In practice, such requests are almost invariably made ex parte, leaving defendants unable to contest the request, and unaware that the limitations period has been tolled. If the application is granted, the statute of limitations is suspended from the date the official request was made until the date the foreign government takes "final action" on the request, for a maximum tolling period of three years. 18 U.S.C.§ 3292(b), (c)(1). However, if the foreign government takes final action before the original 5-year limitation period expires, the statute of limitations is only tolled for six months. 18 U.S.C.§ 3292(c)(2).

Defenses

Defendants retain a variety of defenses to tolling applications under § 3292, including challenges to the initial application, the "final action" by the foreign government, and due process considerations. These defenses to each stage of the § 3292 process are considered in turn.

The Ex Parte Application

The government's initial ex parte application offers the first avenue of defense. The due process clause of the Fifth and Fourteenth Amendments prohibits the deprivation of "life, liberty, or property, without the due process of law." U.S. CONST., amends. V, XIV § 1.

Where the government's tolling request was submitted to the court ex parte, defendants may argue that the application violates due process. The majority of courts to address this issue (although not yet the Supreme Court) have permitted the use of ex parte applications. *United States v. Lyttle*, 667 F.3d 220, 225 (2d Cir. 2012); *United States v. Hoffecker*, 530 F.3d 137, 168 (3d Cir. 2008); *United Torres*, 318 F.3d at 1061; *United States v. Wilson*, 249 F.3d 366, 371 (5th Cir. 2001); *DeGeorge v. U.S. Dist. Court for Cent. Dist. Cal.*, 219 F.3d 930, 937 (9th Cir. 2000).

For instance, the US Court of Appeals for the Ninth Circuit observed that nothing in the text of § 3292 entitles the party being investigated to notice or a hearing before the suspension of the statute of limitations and that ex parte applications align with "the traditionally non-adversarial and secret nature of grand jury investigations." *DeGeorge*, 219 F.3d at 937. The US Court of Appeals for the Third Circuit noted the importance of keeping the potential target of an indictment unaware of the existence of an ongoing grand jury investigation, lest they flee or destroy evidence. *Hoffecker*, 530 F.3d at 168.

At least one district court, however, has rejected the use of ex parte applications for tolling. In *In re Grand Jury Investigation*, Judge William G. Young of the US District Court for the District of Massachusetts reasoned that the statute does not expressly allow ex parte applications, and that allowing prosecutors to "secretly extend[]" the limitations period would "implicate due process concerns." 3 F. Supp. 2d 82, 83 (D. Mass. 1998).

Although other courts have yet to endorse this view, Young's decision provides an opening to challenge ex parte applications on due process grounds. To date, five cases have cited to *In re Grand Jury Investigation*, all disagreeing with its conclusion. See *United States v. Titterington*, 354 F. Supp. 2d 778, 784 n.7 (W.D. Tenn. 2005); *United States v. Ratti*, 365 F. Supp. 2d 649, 655-56 (D. Md. 2005); *United States v. Trainor*, 277 F. Supp. 2d 1278, 1283 (S.D. Fla. 2003), *aff'd*, 376 F.3d 1325 (11th Cir. 2004); *DeGeorge*, 219 F.3d at 937; *United States v. King*, No. 98-CR-91A, 2000 WL 362026, at *21 (W.D.N.Y. Mar. 24, 2000).

The Grand Jury Requirement

Another defense available in a minority of jurisdictions is the argument that tolling applications made in the absence of a grand jury should be rejected. Section 3292(a)(1) contemplates applications for tolling being made to "the district court before which a grand jury is impaneled to investigate the offense." A number of district courts interpreted this provision to impose a "clear requirement that an offense be under investigation by a grand jury" before a tolling application can be made. *United States v. Neill*, 952 F. Supp. 831, 832 (D.D.C. 1996); see also *United States v. Benscher*, 2016 U.S. Dist. LEXIS 7688, at *10-11 (M.D. Fla. Dec. 19, 2018); *United States v. Castroneves*, No. 08-20916-CR-GRAHAM/TORRES, 2009 BL 367787, at *5 (S.D. Fla. Feb. 26, 2009); *United States v. King*, 1999 U.S. Dist. LEXIS 21530, at *63 (W.D.N.Y. Dec. 16, 1999).

The Ninth Circuit, by contrast, rejected this active grand jury investigation requirement, holding instead that the statutory provision is merely a venue requirement that specifies the particular court that may issue the tolling order. The court noted that reading an active investigation requirement into § 3292 would be at odds with the realities of grand jury investigations, since grand juries are continuously impaneled and are rarely called to investigate only specific offenses. *United States v. DeGeorge*, 380 F.3d 1203, 1213-14 (9th Cir. 2004).

Some jurisdictions have implicitly recognized a grand jury requirement. See, e.g., *United States v. Atiyeh*, 402 F.3d 354, 363 (3d. Cir. 2005); *Wilson*, 249 F.3d at 374; *United States v. Trainor*, 376 F.3d 1325, 1331 (11th Cir. 2004). These conflicting holdings leave open the possibility of defenses on these grounds in districts and circuits that have ruled in favor of a grand jury requirement, or at least have not yet addressed the issue.

Timing of the Request: The Limitations Period

In practice, prosecutors do not always submit a tolling application at the time a request for evidence to a foreign country is made. Where the government's application under § 3292 is made after the original limitations period has expired, defendants can contest the validity of the application.

Courts are divided on whether such post-limitations period applications are permissible. The Ninth Circuit interpreted § 3292 to permit the district court's order for tolling to revive or extend an expired period of limitations, provided that prosecutors' official request to foreign authorities for evidence is made before expiration of the limitations period. *United States v. Bischel*, 61 F.3d 1429, 1434 (9th Cir. 1995); see also *United States v. Jenkins*, 633 F.3d 788, 799 (9th Cir. 2011). In a footnote in a subsequent case that the court acknowledged as dicta, two Third Circuit judges agreed, suggesting that § 3292 allows retrospective tolling provided that the application for tolling is made before prosecutors have received all of the foreign evidence they requested. *Hoffecker*, 530 F.3d at 163 n.4.

By contrast, the US Court of Appeals for the Second Circuit has held that applications for tolling made after the original statute of limitations has expired are invalid. The court relied on § 3292's plain language; an application to "suspend the running" of the statute of limitations implies that the limitations period has not already run. The court also recognized that permitting retrospective tolling would raise constitutional concerns under the Ex Post Facto Clause and the Due Process Clause. Hence, as a matter of constitutional avoidance, an interpretation of § 3292 that bars retrospective tolling is preferred. *United States v. Kozeny*, 541 F.3d 166, 172, 175-76 (2d Cir. 2008).

While this defense faces challenges in the Ninth and Third circuits, defendants have a strong basis for this defense in the Second Circuit, and have the opportunity to favorably shape the law in circuits that have not yet addressed the issue.

Timing of the Request: Receipt of the Evidence

The timing of the government's receipt of the requested evidence poses yet another circuit split on available defenses. Courts are divided as to whether applications for tolling can be made after prosecutors have already received the information they requested from foreign authorities. On the one hand, the Ninth Circuit has rejected the contention that an application for tolling must be made while the requested evidence is still abroad. *United States v. Miller*, 830 F.2d 1073 (9th Cir. 1987); see also *DeGeorge*, 380 F.3d at 1213. The court explained that § 3292 expressly specifies only one timing requirement for applications for tolling, namely that an application must be made "before return of an indictment," with no mention of a requirement that the foreign evidence sought must still be overseas. The court also observed that its interpretation of the statute would give the government time to first "sift[] the foreign evidence sought." *Miller*, 830 F.2d at 1076.

On the other hand, the Third Circuit held that the government may not apply to suspend the statute of limitations after it has received all requested foreign evidence. The court first relied on the provision in the statutory text that the government must indicate in its application for tolling that "evidence of an offense *is in* a foreign country." Second, the court looked to the legislative history, which confirmed that Congress was concerned only with delays associated with obtaining foreign evidence, not delays associated with sifting through such evidence. *Atiyeh*, 402 F.3d at 363, 365. As above, while defendants' arguments on this issue are likely to be challenging in the Ninth Circuit, defendants retain a strong legal basis for this argument in the Second Circuit and others that have not yet addressed this issue.

The Official Request

In deciding whether to grant the government's application to suspend the statute of limitations for an offense, § 3292 provides that the district court must find by a preponderance of the evidence that an official request has been made to a foreign country for evidence of the offense and it reasonably appears or appeared at the time the request was made that the evidence is, or was, in the foreign country. § 3292(a)(1). In addition to these express statutory requirements, the Eleventh Circuit has also recognized implicit requirements of reasonableness and relevance. *United States v. Broughton*, 689 F.3d 1260, 1274 (11th Cir. 2012).

Notably, courts are divided as to whether §3292 imposes a further implicit requirement that the foreign evidence sought by the request be necessary for the prosecutors' case. The Second Circuit has explained that § 3292 requires the district court to suspend the statute of limitations upon proper application by the government, "regardless [of] whether [the government] might have been able to obtain the foreign evidence by other means."

Equally, in the Second Circuit it is no bar to a valid application for tolling that the government has, independently of the foreign evidence sought, sufficient evidence to present an indictment to the grand jury: The statute "does not demand that the foreign evidence sought be pivotal to the indictment." *Lyttle*, 667 F.3d at 225. Similarly, the Eleventh Circuit has explained that requiring a showing by the government that the foreign evidence is necessary would be an undue intrusion into prosecutorial discretion. *Broughton*, 689 F.3d at 1275.

The Second Circuit has also recognized a difference between the evidentiary standard applicable to the determination of whether the US has made an official request, and to whether evidence of the offense in question is in the foreign country to which the official request was addressed. In the Second Circuit's view, while a preponderance-of-the-evidence standard applies to the former determination, a lower standard applies to the latter: the district court need only find "by a preponderance of the evidence … that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in a foreign country." This lower standard is satisfied if a reasonable factfinder—even if not the court itself—could find it more probable than not that the foreign evidence appears to exist. *Lyttle*, 667 F.3d at 224 (emphasis added).

Despite this low bar, the government must still provide more than mere "unsupported assertions." *Jenkins*, 633 F.3d at 798. A rare denial of a government request recently occurred in *In re Extradition of Wallace*, where Magistrate Judge Sean Flynn of the US District Court for the Middle District of Florida found that the US offered only "vague descriptions" in its request. With that mere showing, the government's argument that the statute of limitations "may have been tolled" failed. 543 F. Supp. 3d 1296, 1307 (M.D. Fla. 2021). As the Eleventh Circuit held, the government must present "something of evidentiary value," "bearing some indicia of reliability," that tends to prove it is reasonably likely that evidence of the charged offenses is located in the foreign country to which the official request has been made. This evidentiary burden can be met by a "sworn or verified application containing the necessary factual information." *Trainor*, 376 F.3d at 1332-33.

In our experience, these standards for an acceptable "official request" make challenges to this requirement difficult, particularly because they require in part the court to assess prosecutors' motivations in submitting a request for evidence. In fact, some courts have expressly rejected challenges to prosecutorial motivation as a defense. See, e.g., *United States v. Bases*, 18 CR 48, 2020 BL 386262 (N.D. Ill. Oct. 6, 2020); *United States v. Kachkar*, No. 16-20595-CR-GAYLES (GRAHAM)/OTAZO-REYES, 2018 BL 484824, at *4 (S.D. Fla. Dec. 19, 2018); *United States v. Chen*, No. 1-12-CR-350-03-SCJ, 2014 BL 288028 (N.D. Ga. Oct. 15, 2014). Nonetheless, as *Wallace*, *Leon-Perez*, and revelations like the leaked DOJ OIG memorandum make clear, there is discomfort with pretextual tolling applications under § 3292, and thus such applications may remain susceptible to challenge.

The Final Action

Under § 3292(b), the tolling period concludes when the foreign government takes "final action" on the request for evidence. Because the statute does not specify what constitutes "final action," however, the definition of this term has resulted in additional fragmentation between the circuits who have addressed the issue. For example, the Third Circuit has not yet definitively defined "final action," leaving its lower courts to interpret cases addressing the issue. *United States v. Weiss*, 588 F. Supp. 3d 622, 626 (E.D. Pa. 2022) (citing *Atiyeh*, 402 F.3d 354; *United States v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008)).

The Ninth Circuit has articulated the most widely followed interpretation: Final action occurs when the foreign government provides "a dispositive response to each item set out in the official request." *Jenkins*, 633 F.3d at 800; see also *United States v. Hagege*, 437 F.3d 943, 955-56 (9th Cir. 2006); *DeGeorge*, 380 F.3d at 1215; *Bischel*, 61 F.3d at 1434.

This dispositive response could be "up or down"—a refusal to supply certain requested evidence could constitute the foreign government's "final action." See, e.g., *Bischel*, 61 F.3d at 1434; *Hoffecker*, 530 F.3d at 161 n.3. The Ninth Circuit's pegging of the final action to a dispositive response by the foreign government has been adopted by the Fifth Circuit and the Eleventh Circuit. *Torres*, 318 F.3d at 1065; *Meador*, 138 F.3d at 992.

The circuits are divided, however, on the further question of when the "dispositive response" test has been met. The Fifth Circuit held in *United States v. Meador* that a foreign government's response is dispositive if it has "objectively met" the request for evidence and is thus "facially complete." However, when the response is "not facially complete," it is dispositive only if the foreign government communicates a "clear statement" that it "believes it has completed its engagement." *Meador*, 138 F.3d at 993, 992.

The Fifth Circuit further complicated the "final action" issue in *United States v. Pursley*, 22 F.4th 586 (5th Cir. 2022), where the court noted that the definitions of "final action" and "dispositive response" adopted in *Meador* are in tension with the Ninth Circuit's definitions provided in *United States v. Bischel*, upon which the *Meador* court relied in part. The *Pursley* court cited the Eleventh Circuit in its finding that although *Meador* and *Bischel* are consistent in form, *Meador* is "substantively more narrow," as it requires only that the foreign government think it provided a complete response.

By contrast, in *Bischel*, the Ninth Circuit required an actual complete response to the government's original request. The *Pursley* court remanded the case for the district court to "consider the record and the applicable law" to determine whether a specific letter constituted "final action." Although the Fifth Circuit in *Pursley* recognized the tension between *Meador* and *Bischel*, it did not reconsider its holding in *Meador*. *Pursley*, 22 F.4th at 590-91 (citing *Torres*, 318 F.3d at 1063 n.7).

The recent *Leon-Perez* decision adds additional color, noting that "confusion concerning the nature or scope of the MLAT" may constitute evidence that the final action has not yet occurred. In *Leon-Perez*, the government attempted to construe a post-indictment § 3292 filing as a clarification to a prior, pre-indictment tolling application. Although the court rejected the Government's contention and held that the post-indictment application had no tolling effect, the court contemplated a scenario in which the foreign country "misunderstood the request, necessitating a supplementation." *Leon-Perez*, 2022 BL 317943, at *9.

The Eleventh Circuit declined to follow *Meador* to the extent that it makes the "subjective opinion" of foreign governments the test of final action. Rather, the court held that whether the foreign government had given a dispositive response turns on an "objective assessment of whether the responding country's submissions were, in fact, complete."

While the Eleventh Circuit recognized that if prosecutors have "unlimited discretion" to determine the completeness of the foreign government's response then defendants would be unduly deprived of the benefits of the statute of limitations, it emphasized that the purpose of § 3292 to facilitate the obtaining of foreign evidence would be frustrated if "final action" were made dependent on the "customs and bureaucratic language of foreign cultures." *Torres*, 318 F.3d at 1063-64. For defendants, these conflicting approaches require a jurisdiction-specific legal strategy in which the historical approach of responding to MLAT requests by the foreign government at issue might become be relevant.

Practice Tips

Companies and individuals facing potential criminal charges do not have to be caught off-guard by unanticipated indictments for years-old conduct, and have a variety of defenses available if prosecutors have already deployed § 3292:

- In cross-border investigations and litigation, request that the government alert you to any § 3292 tolling requests. Also, utilize local counsel in the foreign jurisdiction at issue to inquire into the receipt of such a request.
- Once made aware of a § 3292 request, ask for the details of the request, including the specific language used, the date it was made, whether the foreign country has responded, and the content of any response.
- Determine whether a grand jury was empaneled at the time the government made its request. If not, counsel may argue that the government has not met the grand jury requirement under § 3292 recognized in some jurisdictions.
- If the original limitations period had already run before the government's submission of the tolling request, counsel may argue that the tolling request is invalid, both as an erroneous interpretation of the plain language of the statute as well on due process grounds..
- Emphasize the government's burdens in proving both that it made an official request to a foreign country, as well as that it was reasonable at the time of the request to believe that the information sought existed in that country.
- Inquire into what information is specifically being sought by prosecutors and whether their request has already been fulfilled. Where the government has already received all requested foreign evidence, defense counsel may argue that tolling does not advance Congress' purpose of remedying delay.
- Where the foreign government has already responded to the government's request for evidence, defense counsel should request to see the contents of that response to determine whether the foreign government subjectively believes that it fully responded to the request. If so, counsel may argue that the response was a final action that

terminated the tolling period. Alternatively, defense counsel may argue that the foreign government objectively answered the prosecution's request, thus ending the tolling period.

- Seek discovery under Rule 16 relating to the government's MLAT request, and the identification of specific evidence received by the government in response to that request.
- Finally, consider an as-applied due process challenge that § 3292 is unconstitutional as applied to the specific facts of the case. As the Fifth Circuit has cautioned, Congress did not intend for § 3292 to be an "affirmative benefit to prosecutors" that authorizes them to extend the limitations period "at [their] option," whenever evidence is located abroad. *Meador*, 138 F.3d at 994.

Conclusion

As the number of transnational investigations and prosecutions increases, so too will global companies' and individuals' exposure to liability as a result of the tolling of statutes of limitations under § 3292. The first step to mitigation for defendants is to be proactive about identifying the possibility of a foreign evidence request and efforts to gather intelligence as to whether such a request has been made. Where a § 3292 application has already been granted, however, retention of experienced counsel, and a vigorous defense that takes advantage of the definitional ambiguities present at each phase of the § 3292 process, is essential.