

STATUTES OF LIMITATIONS
IN
FEDERAL
CRIMINAL
CASES

By John S. McLindon

“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such an offense shall have been committed.” 18 U.S.C. § 3282 (a).

When asked, “How long does the federal government have to prosecute me?” most defense lawyers cite the above statute and give an answer of five years. However, there are several statutes which provide for longer and shorter periods during which the government can bring charges against citizens.

A criminal statute of limitations is a law which sets forth time limits for instituting charges against a citizen. It forbids prosecutors from charging someone with a crime that was committed more than a specified number of years ago.

The main purpose of a statute of limitations is to keep citizens from having to defend themselves from charges that occurred so far in the past that it is difficult, if not impossible, to defend oneself. In many cases, evidence may no longer be available and memories have faded.

The statute of limitations is an affirmative defense. It should be filed pretrial pursuant to F.R.Cr.P. 12(b). This defense can be waived explicitly. A knowing and intelligent waiver of the statute of limitations is valid.¹ A plea of guilty without expressly reserving the statute of limitations has been held to waive later assertions of the defense.² Failure to raise the

defense before trial will be considered a waiver of the defense.³

In *Musacchio v. United States*, 136 S.Ct. 709 (2016), the Supreme Court held that a defendant cannot raise the statute of limitation defense for the first time on appeal. The Court noted that statutes of limitations and other deadlines “ordinarily are not jurisdictional.” The Court held that it would treat a time bar as jurisdictional “only if Congress has ‘clearly stated’ that it is.”⁴ As to 18 U.S.C. § 3282 (a), the Court held that Congress had not made such a clear statement.

No Limitations

There is no time limit to bring an indictment for an offense “punishable by death[.]” Under 18 U.S.C. § 3281, such an indictment “may be brought at any time, without limitation.”

There are 91 federal crimes which call for the death penalty.⁵ All of these crimes involve situations where a victim is killed.

In addition to these capital crimes, there is no statute of limitations for crimes which Congress has associated with terrorism, if they result in death or serious injury, or create a foreseeable risk of death or serious injury. *See*, 18 U.S.C. § 3286 (b). This statute references 18 U.S.C. § 2332b (g)(5)(B), which lists all of the terrorism offenses; there are 49 in all.

The last category of crimes that may be prosecuted at any time are various child abduction and sex offenses. *See*, 18 U.S.C. § 3299. This statute cross-references to other statutes; there are 19 such statutes.

In sum, there are 159 crimes for which there is no time limitation for the federal government to institute prosecution. These crimes can be broken down into three separate categories: (1) capital offenses — crimes in which a person’s life has been taken; (2) crimes associated with terrorism, if they result in death or serious injury, or create a foreseeable risk of death or serious injury; and (3) various designated federal crimes dealing with child abduction and sex of-

fenses.

Finally, no statute of limitations shall extend to any person fleeing from justice. 18 U.S.C. § 3290.

20 Years

There is only one law which has a 20-year statute of limitations. 18 U.S.C. § 3294 provides that no person shall be prosecuted for a violation of theft of major artwork (18 U.S.C. § 668) unless the indictment is returned within 20 years after the commission of the offense.


10 Years

Crimes which have a 10-year statute of limitations are identified in 18 U.S.C. §§ 3291, 3293, 3295, 3298 and 3300. These statutes cover (1) nationality, citizenship and passports, (2) crimes against financial institutions, (3) arson offenses, (4) crimes relating to trafficking and forced labor, and (5) recruitment of child soldiers. There are 38 total crimes subject to a 10-year statute of limitations.

18 U.S.C. § 3283 provides that for offenses involving the sexual or physical abuse or kidnapping of a child under the age of 18, the statute of limitations does not run during the life of the child, or for 10 years after the offense, whichever is longer.

Eight Years

18 U.S.C. § 3286 sets forth an eight-year statute of limitations for a variety of crimes, mostly terrorism-related offenses which are listed in 18 U.S.C. 2332b (g)(5)(B), when the commission of the offense did *not* result in, or create a foreseeable risk of, death or serious bodily injury to another person. Other crimes listed in § 3286 include 18 U.S.C. § 112 (protection of foreign officials and guests), 18 U.S.C. § 351 (assault on congressional, cabinet and Supreme Court members), 18 U.S.C. § 1361 (willful injury of government property or property being manufactured for the government), 18 U.S.C. § 1751 (assault on the President or presidential



staff), and 49 U.S.C. §§ 46504, 46505 and 46506 (certain crimes committed on airlines).

Seven Years

18 U.S.C. § 1031 is a statute that defines and criminalizes fraud against the United States. Section 1031 (f) provides that a prosecution under this section may be commenced at any time not later than seven years after the offense is committed, plus any additional time allowed by law. Other crimes with a seven-year statute of limitations include 18 U.S.C. § 247 (damage to religious property) and 18 U.S.C. § 249 (hate crime acts that do not result in death).

Six Years

18 U.S.C. § 3301 sets forth six securities fraud offenses which are subject to a six-year statute of limitations.

One Year

Criminal contempt actions brought under 18 U.S.C. § 402 are subject to a one-year statute of limitations. *See*, 18 U.S.C. § 3285.

Tax Offenses

Tax offenses have unique rules regarding the statute of limitations. Tax offenses have either a three- or six-year statute of limitations, depending on the type of offense charged.

Continuing Offenses

Generally, the statute of limitations begins to run when the offense is completed.⁶ However, courts have held that some offenses are “continuing” in nature. For example, possession of contraband offenses are continuing offenses.⁷ Most importantly, conspiracy offenses are usually continuing in nature. The general conspiracy statute consists of two

elements: (1) an agreement to commit a federal crime or to defraud the United States, and (2) an overt act committed in furtherance of the agreement.⁸ For a conspiracy, the limitations begin to run when the last overt act is committed.⁹ If an individual withdraws from a conspiracy, the statute of limitations will start at the time of withdrawal.¹⁰

The statute of limitations under conspiracy statutes that have no overt act requirement runs from the accomplishment of the objectives of the conspiracy, or from its abandonment.¹¹

Other continuing offenses include escape from federal custody,¹² flight to avoid prosecution,¹³ failure to appear for sentencing,¹⁴ possession of the skin and skull of an endangered species,¹⁵ possession of counterfeit currency¹⁶ and kidnapping.¹⁷

According to the *U.S. Attorneys' Manual*, the finding that an offense is a continuing offense is disfavored. It must

be found that “the explicit language of the substantive criminal statute compels such a conclusion, or that the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.”¹⁸

Suspension of Limitations

Congress has authorized the suspension of the statute of limitations in certain situations. For example, 18 U.S.C. § 3287 is known as wartime suspension. This law provides that when the United States is at war or Congress has enacted a specific authorization for the use of the armed forces, the running of any statute of limitations for certain crimes shall be suspended until five years after the termination of hostilities as proclaimed by presidential proclamation or by concurrent resolution of Congress. The crimes contemplated by this statute (though not specifically defined by cross-referencing other statutes) generally deal with fraud in the acquisition or negotiation of contracts connected with or related to the prosecution of the war.

The government can also suspend the statute of limitations for an offense in order to secure evidence held in foreign countries (18 U.S.C. § 3292), for cases involving child abuse (18 U.S.C. § 3283), for concealment of assets of an estate in bankruptcy (18 U.S.C. § 3284), for any fugitive (18 U.S.C. § 3290), or for cases involving the use of DNA evidence (18 U.S.C. §§ 3282 (b) and 3297).

Tolling Agreements

The running of a statute of limitations is tolled during periods when the defendant is a fugitive. *See*, 18 U.S.C. § 3290. Physical absence from the jurisdiction is not required to trigger this tolling provision.¹⁹

The running of a statute of limitations may also be tolled on application of the United States during the pendency of an official request to a foreign court or authority to obtain the evidence located in a foreign country. *See*, 18 U.S.C. § 3292.

RICO Violations

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.

§§ 1961-1968, requires that state crimes used as predicate offenses be “chargeable under State law.” The federal courts have uniformly held that regardless of the running of the state statute of limitations, a defendant is still “chargeable” with the state offense within the meaning of 18 U.S.C. 1961 (1)(A).²⁰ The reference to state law in the statute is simply to define the conduct and is not meant to incorporate state procedural law.

Superseding or Defective Indictments

If an indictment is dismissed because of a legal defect or grand jury irregularity, the government may return a new indictment within six months of the date of dismissal or within the original limitations, whichever is later.²¹ After the original limitations period has expired, a superseding indictment may narrow, but may not broaden, the charges made in the original indictment. *See*, 18 U.S.C. §§ 3288-3289.²²

Concealing Bankruptcy Assets

The statute of limitations on offenses which involve concealing bankruptcy assets does not begin to run until a final decision discharging or refusing the discharge of the debtor. *See*, 18 U.S.C. § 3284, which specifically deems the concealment of assets of a debtor in a case under Title 11 “a continuing offense until the debtor shall have been finally discharged or a discharge denied,” at which point the period of limitations shall begin to run.

Conclusion

For the majority of crimes listed in the United States Code, there is a five-year statute of limitations. However, there are many other crimes that have longer, and some shorter, periods in which the government can institute prosecution. These statutes are spread throughout the United States Code and are occasionally amended. When representing a client charged under any statute, defense counsel should always check the applicable statute of limitations.

FOOTNOTES

1. *United States v. Levine*, 658 F.2d 113 (3 Cir. 1981).
2. *See*, U.S. Attorneys’ Manual, 9-18.000; *United States v. Doyle*, 348 F.2d 715 (2 Cir. 1965), *writ denied*, 382 U.S. 843, 86 S.Ct. 89 (1965).
3. *United States v. Wilbur*, 674 F.3d 1160 (9 Cir. 2012); *United States v. Hsu*, 669 F.3d 112 (9 Cir. 2012); *United States v. Flood*, 635 F.3d 1255 (10 Cir. 2011).
4. 136 S.Ct. at 717.
5. Charles Doyle, “Statutes of Limitation in Federal Criminal Cases: An Overview,” Congressional Research Serv. Report for Congress, Oct. 1, 2012.
6. *Toussie v. United States*, 397 U.S. 112, 90 S.Ct. 858 (1970).
7. *Von Eichelberger v. United States*, 252 F.2d 184 (9 Cir. 1958).
8. 18 U.S.C. § 371.
9. *Fiswick v. United States*, 329 U.S. 211, 67 S.Ct. 224 (1946).
10. *United States v. Gonzalez*, 797 F.2d 915 (10 Cir. 1986).
11. *United States v. Nunez*, 673 F.3d 661 (7 Cir. 2012); *United States v. Therm-All, Inc.*, 373 F.3d 625 (5 Cir. 2004), *cert. denied*, 543 U.S. 1004, 125 S.Ct. 632 (2004).
12. *United States v. Bailey*, 444 U.S. 394, 100 S.Ct. 624 (1980).
13. *United States v. Merino*, 44 F.3d 749 (9 Cir. 1994), *cert. denied*, 514 U.S. 1086, 115 S.Ct. 1802 (1995).
14. *United States v. Gray*, 876 F.2d 1411 (9 Cir. 1989), *cert. denied*, 495 U.S. 930, 110 S.Ct. 2168 (1990).
15. *United States v. Winnie*, 97 F.3d 975 (7 Cir. 1996).
16. *United States v. Kayfez*, 957 F.2d 677 (9 Cir. 1992).
17. *United States v. Denny-Shaffer*, 2 F.3d 999 (10 Cir. 1993).
18. U.S. Attorneys’ Manual 9-18.000.
19. U.S. Attorneys’ Manual 9-18.000; *United States v. Singleton*, 702 F.2d 1159 (DC Cir. 1983).
20. U.S. Attorneys’ Manual 9-18.000; *United States v. Licavoli*, 725 F.2d 1040 (6 Cir. 1984), *cert. denied*, 467 U.S. 1252, 104 S.Ct. 3535 (1984).
21. U.S. Attorneys’ Manual 9-18.000.
22. *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811 (1985).

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