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Tips for Federal Criminal Defense Counsel on Statute of Limitations Challenges

Contributed by Margot Moss, Markus/Moss, and Carolyn H. Kendall, Post & Schell

As courts navigate criminal proceedings and trials the during Covid-19 pandemic, federal criminal practitioners must ensure that solutions offered by prosecutors and courts to mitigate the pandemic's public health risks do not infringe on criminal defendants' rights.

Recognizing that the current environment presents novel issues, the Women's White Collar Defense Association (WWCDA) and its members have engaged in activities to help guide the legal community and its clients through this unique situation. In this article, WWCDA member Carolyn Kendall of Post & Schell interviewed fellow member Margot Moss of Markus/Moss about her insights and recommendations for federal white-collar practitioners about statute of limitations concerns during the pandemic.

Kendall: Because of the Covid-19 pandemic, in many federal districts, grand juries have been temporarily suspended so that we are not seeing as many new cases indicted. However, the statute of limitations for continuing investigations has not been interrupted and continues to run. What happens if time is about to run out on an investigation?

Moss: In an effort to extend the statute of limitations, the government has been filing informations against individuals, without their consent, and then moving to dismiss the improper charging documents without prejudice. The government's belief is that these actions are sufficient to temporarily stop the clock. The government relies on 18 U.S.C. § 3282 and two other statutes within the same chapter for this authority.

Title 18, Section 3282 familiarly instructs that "no person shall be prosecuted … unless the indictment is found or the information is instituted within five years after the offense." 18 U.S.C. § 3282(a). Although the time restriction seems clear, two lesser-known statutes provide an opportunity for the time limitation to be stretched under certain circumstances. The statute of limitations may be tolled if an information is dismissed for any reason before (18 U.S.C. § 3288) or after (18 U.S.C. § 3289) the five-year time period has expired.

Once the information is dismissed, the government has an additional six months to obtain an indictment. And if no grand jury is in session, the government can seek an indictment within six months from when the next grand jury is convened.

Kendall: What does it mean to "institute" the information?

Moss: Defense attorneys wishing to combat this approach to extending the statute of limitations may move to dismiss the information, or the later-filed indictment, arguing that an unconsented-to information is not sufficient to institute criminal proceedings pursuant to Section 3282.

Pre-pandemic, at least one district court has agreed. In *United States v. Machado*, No. 04-cr-10232, 2005 BL 49226 (D. Mass, Nov. 3, 2005), the court reasoned that it cannot have subject matter jurisdiction over a prosecution where the government filed an information without obtaining a valid waiver of indictment and, therefore, an information filed in such a way was "virtually meaningless."

While recognizing that other courts have reached a different conclusion in cases like *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998), the *Machado* court firmly stated that it "defies logic and reason that the court may accept an information without waiver for the purpose of applying the statute of limitations, when that same document is 'meaningless' for purposes of subject matter jurisdiction and prosecution." Thus, unless a defendant consents, a filed information does not "institute" criminal proceedings and a prosecution based on a later-returned indictment is time-barred.

Kendall: Can the court deny the government's motion to dismiss without prejudice?

Moss: If the defense is unaware of the filed charge or does not take action, the government will inevitably move to dismiss the unconsented-to information without prejudice. In response, the defense can argue for a dismissal with prejudice to prevent the government bypassing the statute of limitations.

As we've all learned recently from the Michael Flynn case, the power of the prosecutor to dismiss a case is not unrestricted. Instead, Rule 48 requires "leave of court" and a statement of reasons and underlying factual basis before the government may dismiss an information. Fed. R. Crim. P. 48(a); see also *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1974). The

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additional language in the rule providing discretion to the court serves to protect a defendant's rights. *United States v. Salinas*, 693 F.2d 348 (5th Cir. 1982).

If the government's use of Rule 48(a) would effectively result in "harassment of the defendant," or if it "would otherwise be contrary to public interest" then the court can exercise its discretion to reject a dismissal without prejudice. *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977).

Thus, the key is the prosecutor's motivation for dismissal. If the government seeks to dismiss a case so that it may "commenc[e] another prosecution at a different time or place deemed more favorable to the prosecution," *Ammidown*, 497 F.2d at 620, or to "gain a position of advantage or to escape from a position of less advantage in which the Government found itself as the result of its own election," *Salinas*, 693 F.2d at 353, the court can view the reasons as harassment and may dismiss a case with prejudice.

Following the guidance from *Salinas* and *Ammidown*, one court concluded that dismissal without prejudice would result in harassment of the defendant where the government sought to gain a tactical advantage and evade the requirements of the Speedy Trial Act. See *United States v. Pitts*, 331 F.R.D. 199 (D.D.C. 2019). There, the court held the appropriate remedy to protect the rights of the defendant was to grant dismissal with prejudice.

If the government's motivation is to circumvent the five-year statute of limitations, is that akin to commencing another prosecution at a different time more favorable to the government? Is the government's lack of diligence in bringing charges within the statute of limitations, through no fault of the defendant, an example of the government seeking to escape from a position of less advantage? The answer should be yes.

Where the defendant has not contributed to the delay in obtaining an indictment or caused an investigation to take longer than the four plus years the government has already had, the government cannot improperly sidestep the statute of limitations. The time has run and the defendant shall be free from future harassment or misconduct from the government.

Kendall: Have any courts examined the expiration of the statute of limitations during the pandemic?

Moss: I'm aware of three courts who have issued orders during Covid-19. Two judges agreed with the reasoning and holding of *Burdix-Dana*, 149 F.3d 741, that the filing of an information was sufficient to satisfy the requirements of 18 U.S.C. § 3282.

In the Theranos case in the Northern District of California, Judge Edward Davila heard a motion to dismiss a Superseding Information filed while grand jury proceedings were suspended due to the coronavirus and within five years of the offense. *United States v. Holmes*, 2020 BL 394048 (N.D. Cal. Oct. 13, 2020). Two months later, after grand jury proceedings resumed, but beyond the five-year time limit, a second and then third superseding indictment were returned. In denying the defendants' motion to dismiss, the court found that in "an existing criminal case like this one, an information is 'established' simply by filing it with the court."

Similarly, Judge Richard Bennett in *United States v. Briscoe*, 2020 BL 325492 (D. Md. Aug. 26, 2020) denied a defendant's motion to dismiss an information filed while the convening of grand juries had been suspended, which was subsequently followed by an indictment after the statute of limitations had run. Again, the court concluded that an "information is 'instituted' when it is properly filed, regardless of the Defendant's waiver."

However, Judge Donald Middlebrooks in the Southern District of Florida reached a decidedly different result. *United States v. B.G.G.*, No. 9:20-cr-80063 (S.D. Fla. Jan. 11, 2021). In this case, the government secretly filed an information against B.G.G. three days before the statute of limitations was due to expire, during the time when grand jury proceedings were suspended due to the coronavirus. Five days later, when it moved the court to dismiss the information without prejudice, the defense learned about the information for the first time and did not consent to its filing.

Like the courts in the two cases above, Middlebrooks focused his analysis on whether the filing "instituted" the information within the meaning of section 3282. Unlike the orders in *Holmes* and *Briscoe*, however, the court in B.G.G. conducted a thorough examination of not only the "sparse case law on this issue," but it also delved deeply into the legislative and legal history of 18 U.S.C. § 3282, the role of information in the American legal system dating back to the 19th century, the legislative intent as expressed in U.S. Supreme Court case law, and the legislative history of other statutes and rules.

His thorough approach led the judge to the conclusion that Congress intended the tolling statutes of §§ 3288 and 3289 to apply to dismissed information that comported with Rule 7(b) (in which the defendant waived indictment). Thus, the court held that the unconsented-to information filed against B.G.G. was not instituted for purposes of § 3282.

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"After all, an information is a charging instrument whose primary practical purpose, aside from apprising a defendant of the charges again him, is to commence a prosecution. It would be inconsistent with the Fifth Amendment and Federal Rule of Criminal Procedure 7 to recognize an invalid charging document as a mere mechanism for extending a statute of limitations period, though the same legal instrument could not serve to initiate criminal proceedings on the charges contained therein or confer subject matter jurisdiction on the court in which those proceedings are to take place," the B.G.G. court said.

Further, the court determined that the government's tactics of strategically filing the information and moving to dismiss only to indict the defendant at a later time "would not serve the strong public interest of upholding statutory and constitutional protections." Otherwise, a criminal statute of limitation would not serve its purpose if the government could toll the period whenever it suited its strategy.

In conclusion, Middlebrooks recognized the "historical moment" that the country is enduring. "But our legal system has experienced public emergencies before, and it will experience them again. Allowing the applicability of our constitutional norms to ebb and flow with the times is not becoming of a democracy under the rule of law. Indeed, if our laws are to carry any force, they must stand despite the trials and tribulations of society." Congress was asked and had the opportunity to suspend the statute of limitations during the pandemic. Congress, however, declined to do so, the court said.

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