UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. SACR 09-0077 JVS Date December 8, 2009

Present: The Honorable James V. Selna

Interpreter Not Needed

Karla J. Tunis	Not Present	Not Present
Deputy Clerk	*Court Reporter.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
1. Stuart Carson			**X**	**1. Nicole T. Hanna**			**X**
2. Hong Carson			**X**	**2. Kimberly A. Dunne**			**X**
3. Paul Cosgrove			**X**	**3. Kenneth Miller**			**X**
4. David Edmonds			**X**	**4. David W. Weichert**			**X**

Proceedings: (In Chambers) **Order Denying Defendants' Motion to Dismiss Counts 9-11**

By the present Motion, Stuart Carson *et al.* (collectively "Carson" or "defendants") move to dismiss Counts 9 through 11 of the Indictment on the ground that they are barred by the five-year statute of limitations, 18 U.S.C. § 3282(a), and cannot be saved by the tolling provisions of 18 U.S.C. § 1392(a). They make two arguments here: First, the Government's request for discovery from the Swiss government is unrelated to the conduct charged in Count 9 through 11, and second, the conduct charged in Court 11 was time-barred before the Government's tolling application was presented.

The Motion is denied.

I. Factual Background.

The present indictment, charging violations of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S. C. § 78dd-2, and the Travel Act ("TA"), 18 U.S.C. § 1952, was filed April 8, 2009. Counts 9 through 11 focus on conduct in late 2003 and early 2004:

Count 9: violation of the FCPA, as reflected by an October 21, 2003 wire transfer related to Guohua (Indictment, ¶ 33, p. 31).

Count 10: violation of the FCPA, as reflected by a January 4, 2004 wire transfer related to Petronas (Indictment, ¶ 33, p. 32).

Count 11: violation of the TA, as reflected by a January 4, 2004 wire transfer

related to Company # 1 (Indictment, ¶ 33, p. 32).

On November 5, 2008, the Government commenced the Grand Jury investigation which led to the present prosecution. As part of the investigation, the Government made an official request of the Swiss Confederation for assistance to obtain certain documents on September 8, 2008. (Opposition, Ex. A, Smith Decl., ¶ 8.)

In its application for an order tolling the statute of limitations, The Government described the basis for its request:

> In June 2000, at the request of Rose Carson, CCI [Control Components, Inc., the corporate defendant in a separate prosecution] made two $50,000 payments into a UBS AG Swiss bank account in the name of Fengxia Sun in connection CCI's sale of valves to the Tianwan nuclear power plant in China. The Tianwan nuclear plant is owned by Jaingsu Nuclear Power Corporation (JNPC), a government-owned entity. Fengxia Sun is an employee of JNPC and had influence in awarding JNPC contracts. The two $50,000 payments constituted a 2.2% "commission" payment to Fengxia Sun related to a JNPC project awarded to CCI. . . .
>
> Evidence clearly relevant to this investigation is located in Switzerland.

(Id., Ex. B, p. 4.) The request itself specifically refers to the defendants and to the FCPA. (Id., Ex. A, pp. 6-7.) The Government filed its tolling application on November 25, 2008. The application was granted on November 30, 2008. The order specifically refers to the FCPA and the TA. (Id., Ex. C, ¶ 2.)

The Swiss Confederation responded to the Government request on May 18 , 2009.

II. The Applicable Statutes.

A five-year statute of limitations is applicable to the present charges:

> In general.--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 offense shall have been committed.

(18 U.S.C. § 1382(a).) There is no dispute here that the five-year statute controls FCPA and TA

prosecutions.

The statutory framework allows for the Government to apply for tolling where a grand jury investigation hinges on foreign discovery:

> a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.
>
> . . .
>
> (b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(18 U.S.C. § 3292(a)-(b); emphasis supplied.) There is no dispute that the Government's application was made before the filing of the indictment. There is also no dispute that the Government's request to the Swiss Confederation qualifies as an "official request." (18 U.S.C. § 3292(d).)

III. Discussion.

The dispute here is whether the scope of the tolling order is sufficient to cover Counts 9 through 11, and with respect to Count 11, whether tolling can be secured after a facial running of the statute.

A. The Subject Matter Scope of the Tolling Order.

The defendants argue that the Swiss discovery request could not serve to toll the statute because it was not related to the conduct in Counts 9 through 11. Moreover, they note that the Government did not even wait for the response to the Swiss request before filing the indictment. At the heart of the dispute is whether the phrase "evidence of an offense" provides only count-specific tolling or tolling for the general subject of the grand jury investigation. The Court adopts the latter view.

Both sides use United States v. Neill, 952 F. Supp. 831 (D. D.C. 1996), as a touchstone. (Motion, pp. 7-8; Opposition, pp. 12-13.) The Neil court held that there were two requirements to invoke the tolling statute. First, an offense must be under investigation by the grand jury–a requirement which flows from the face of the statute and is clearly met here. Neill, 952 F. Supp. at 832. Second, "the request for evidence must nevertheless be reasonably specific in order to elicit evidence of the alleged violations under investigation by the grand jury." (Id.) There can be little dispute that the two payments identified in the request to the Swiss authorities related to the grand jury investigation of corrupt payments. Indeed, the request fairly spells out a violation of the FCPA in connection with a CCI contract in China. (Opposition, Ex. A, pp. 4-5.)

Neill makes several observations which are helpful in applying these two requirements. The court clearly rejected a "offense specific" analysis, and eschewed any requirement that the request specify the specific crimes. (Id. at 832-33.) At the same time, the court noted that the statute did not give the Government a "*carte blanche.*" (Id.)

United States v. Ratti, 365 F. Supp. 2d 649 (D. Md. 2005), applied Neill's analysis to conclude that a request which focused on manufacture of adulterated drugs and introduction of those drugs into the United States was sufficient to toll the statute for wire fraud–even though wire fraud was not mentioned in the request nor the name of the defendant charged. (Id. at 653-54.)
The Court observed: "So long as the offenses designated in the request to the foreign government and in the Section 3292 application are reasonably specific to elicit evidence probative of the offenses under investigation, the application is in order." (Id. at 656.) That is true here.[1]

Defendants argue that the rule of lenity requires the Court to take a narrow view of the tolling statute. (Memorandum, pp. 6-7.) The Court does not find that the statute provides an ambiguity to invoke the rule. The legislative history makes clear that the statute was intended to cure the problems of delay when relevant evidence to a grand jury investigation must be sought abroad. H.R. Rep. No 98-907, reprinted in 1984 U.S.C.C.A.N. 3578, pp. 2-3. In essence, defendants would deny the tolling effect of a request for foreign discovery if the particular piece of the criminal puzzle sought abroad did not ultimately find its way into the

[1]In Unites States v. Afshari, 2009 WL 1033798 (C.D. Cal. Apr. 14, 2009), the court followed Neill's holding that requests need not be person specific (id. at *2), but without explanation adopted the offense specific limitation which Neill specifically rejected.

indictment.[2] There is no basis to read into the statute a limitation which Congress did not adopt and which would be contrary to the purpose of the legislation.[3]

Contrary to Carson's suggestion (Reply, p. 9), there is no basis in the legislative history to limit to tolling to requests for documents that are "essential." The House Report does posit, "If the records are essential to the bringing of charges, the delay in getting the records might prevent filing an information or returning an indictment within the time period specified by the relevant statute of limitation." (Id. at p. 2.) But in describing the purpose of the bill no such limitation is stated: "The bill also . . . permits a federal court . . . to suspend the running of the statute of limitation for such time as is necessary (up to 3 years) to obtain evidence from a foreign country." (Id. at p. 3.) Indeed, a prosecutor would have to be clairvoyant to know whether his request would produce essential documents, and hence whether he had in fact secured an effective tolling order.

B. Availability of Tolling After a Facial Expiration of the Statute.

As noted, without some form of tolling, each of Counts 9 through 11 is barred by the five-years statute. But with respect to Count 9, the Government applied for tolling more than five-years after the offense was committed on October 21, 2003. If the law only permits tolling from the date of the application, the Government's November 25, 2008 application is too late, and the count is time-barred. If the law permits tolling from the date of the Government's September 8, 2008 request to the Swiss Confederation, it is not. The Ninth Circuit takes the later view.

Unites States v. Bischel, 61 F.3d 1429 (9th Cir. 1995), is directly on point. The court was presented with the same fact pattern present here. Bischel challenged counts alleging conduct prior to October 27, 1984. Bischel, 61 F.3d at 1433. The Government made its official

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[2]This is precisely the defendants' argument: "Moreover, the government's foreign evidence request was superfluous even as to the Indictment count to which the request did apply, Count One, the broad conspiracy count . . . The government never needed the foreign evidence it sought in its Swiss application . . .." (Reply, p. 8.)

[3]The result would necessarily be different if the Government attempted to cover conduct obviously outside the scope of the investigation, for example, a charge of illegal possession of American bald eagle feathers, 16 U.S.C. § 668(a). Counts 9 through 11 deal with the FCPA as fully reflected in the Government request to the Swiss authorities, its application to the Court, and the Court's order. (Opposition, Exs. A, B, C.)

request on July 27, 1989, but did not receive a tolling order until November 20, 1989. (Id. at 1434.) The Ninth Circuit rejected Bischel's argument:

> Section 3292(b) itself states that the suspension period "shall begin on the date on which the official request is made." An "official request" includes a letter rogatory. 18 U.S.C. § 3292(d). In addition, § 3292(a)(1) requires the court to find that an official request "has been made" before entering an order suspending the statute of limitations. Thus, the statute plainly contemplates that the starting point for tolling the limitations period is the official request for evidence, not the date the § 3292 motion is made or granted. See United States v. Miller, 830 F.2d 1073, 1076 (9th Cir.1987), cert. denied, 485 U.S. 1033, 108 S.Ct. 1592, 99 L.Ed.2d 907 (1988) ("The statute itself specifies the only relevant time the application must be made: 'before return of an indictment.' ").

(Id. at 1434; emphasis supplied.)

At oral argument, Carson argued that the date sequence in Bischel was unclear. While not precise, the facts of the case make plain that the Government could go back more than 5 years from the filing of the indictment based on the date of its request for foreign discovery. Bischel's operations took place between 1983 when he set up La Jolla Trading Group and July 1985 when he sold his interest. Bischel, 61 F.3d at 1432. Conduct between July 27 and November 20, 1984 would have been time barred by limiting tolling to the date of the Government's application. The Ninth Circuit rejected that view, and the fact pattern here is identical. (Id. at 1434.)

Carson points to a contrary position taken by the Second Circuit in United States v. Kozeny, 541 F.3d 166, 170-71 (2d Cir. 2008), and the District of Utah in United States v. Brody, 621 F. Supp. 2d 1196 (D. Utah 2009). (Motion, pp. 10-11.) Whatever the merit of those courts' analyses, the Court is constrained to follow the law of the Ninth Circuit. United States v. Easterday, 564 F.3d 1004, 1010 (9th Cir. 2009).

However, the Ninth Circuit has also recognized that subsequent Supreme Court rulings may allow a panel, and by extension a district court, to decline to follow existing Ninth Circuit law:

> We hold that the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.

(Id. at 1011.) Carson suggests that the Supreme Court's decision in Stogner v. California, 539 U.S. 607 (2003), provides such a basis. (Motion, pp. 12-13.) The Supreme Court rejected California's effort to rewrite a criminal statute of limitations to make conduct criminal after the original statute of limitations had passed because of Ex Post Facto concerns. (539 U.S. at 632-33.) However, as the Government points out (Opposition, p. 18), Section 3292 has been on the books for more than 25 years. If the tolling statute works to extend the five-year statute, it was already in effect before conduct here commenced. Thus, the conduct was already criminal in nature.[4]

In Bischel, the Ninth Circuit dealt explicitly with the Ex Post Facto argument, and held that application to the present fact pattern did not violate the Ex Post Facto Clause. Bischel, 61 F.3d at 1434-35.[5] Particularly sitting as a district court, the Court cannot say that Stogner "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." Easterday, 564 F.3d. at 1010. Thus, the Court follows Bischel.

III. Conclusion.

For the reasons stated above, the Motion is denied.

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[4]This is a point which the court in Unites States v. Afshari, 2009 WL 1033798 at *3 (C.D. Cal. Apr. 14, 2009), did not consider in its one-paragraph analysis, and thus the Court declines to follow Afshari. The application of Section 3292 here does not result in "resurrection of the limitations period after the original statute of limitations has expired" for the simple reason that Section 3292 was already on the book when the conduct here took place. (Id.) Such a "resurrection" of a lapsed statute clearly did occur in Stogner.

[5]Bischel actually had a better argument than the present defendants, because Section 1392 was enacted in the middle of the criminal conduct there. Bischel, 61 F.3d at 1435; see Pub. L. 98-473, Title II, § 1218(a), Oct. 12, 1984, 98 Stat. 2167. The Ninth Circuit nevertheless rejected the argument. (Id.)