

WHITE-COLLAR CRIME

Expert Analysis

'Continuing Crimes' and Statutes Of Limitations

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A basic tenet of statutes of limitations is that the limitations period begins to run for a crime "when the crime is complete."¹ Crimes are creatures of statute; therefore they are "complete" when a person has committed each of the elements of the crime. The rule is simple and eminently sensible. The statute of limitations measures the period during which the government must bring charges against a defendant. It is almost inevitable that the period should be measured from the completion of the crime, which is the first moment when the government could charge the defendant.

The tenet gives way, however, when the crime in question is determined to be a "continuing crime." Although such crimes may be prosecuted as soon as they are complete, the limitations period for such crimes does not begin to run until some period after the completion of the crime — in some cases, years afterward. This commentary will analyze the doctrine of continuing crimes as it is used in connection with statutes of limitation. There is much confusion about the doctrine, but by analyzing the confusion, the kernel of good sense underlying it may be uncovered.

CONTINUING CRIMES AND VENUE

The notion of a continuing crime arises in connection with venue. Defendants have a constitutional right to be prosecuted in the district in which they allegedly committed their crimes.² But some crimes, called "continuing crimes,"³ may not be committed in a single district. For example, a scheme to defraud that is prosecutable under the wire fraud statute may be devised in New York, the wire may be sent from Alaska to California, and the money or other thing of value may be sent from a victim in Florida to a bank in Nebraska. Where was the crime committed? To avoid being unable to prosecute the crime *anywhere*, Congress has expressly provided that crimes begun in one district but completed in another may be "prosecuted in any district in which such offense was begun, continued or completed."⁴

CONTINUING CRIMES AND STATUTES OF LIMITATION

The notion of a continuing crime makes sense for purposes of venue. If there were no such doctrine, a criminal could avoid prosecution by making sure that the crime was not committed in any one district. But the notion of a continuing crime in statute-

of-limitations analysis has a slightly different meaning and import than it does in the venue context.

In the context of statutes of limitation, a continuing crime is one for which the limitations period does not begin to run as soon as the crime is complete. Rather it begins to run when “the last act in furtherance of the crime” was committed.⁵ This formulation is itself problematic. How is the last act *in furtherance* of the crime different from the last act necessary to *complete* the crime? Once the crime is completed, the last element has been accomplished. There would appear to be nothing more to do in furtherance of it because it is, well, complete.

Even leaving that problem aside, there remains the question of the purpose of recognizing continuing crimes with respect to statutes of limitation. The reason for a doctrine of continuing crimes in connection with venue is clear: Absent such a doctrine, there would be crimes that could not be prosecuted anywhere. The reason underlying continuing crimes with respect to statutes of limitation is not immediately clear. It is discussed below.

THE U.S. SUPREME COURT’S GUIDANCE ON CONTINUING CRIMES: *TOUSSIE*

The U.S. Supreme Court has stated that statutes of limitation in criminal cases “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time, and to minimize the danger of official punishment because of acts in the far-distant past.”⁶ Accordingly, the Supreme Court “has indicated that criminal statutes of limitation are to be liberally interpreted in favor of repose.”⁷

Continuing crimes, which extend the limitations period, are plainly at odds with the notion of a limitations period “interpreted in favor of repose.” Thus, in the court’s leading case on continuing crimes, *Toussie v. United States*, the court admonished that “the doctrine of continuing offenses should be applied in only limited circumstances,”⁸ and it held that failure to register for the U.S. military draft (*i.e.*, the Selective Service) was not a continuing offense. It explained:

The tension between the purpose of a statute of limitations and the continuing-offense doctrine is apparent: The latter, for all practical purposes, extends the statute beyond its stated terms. These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion or the nature of the crime is such that Congress must assuredly have intended that it be treated as a continuing one.⁹

The court thus identified two circumstances in which a crime could be deemed a continuing crime: When the statute defining the crime *expressly states* that it is to be a continuing crime, and when the “nature of the crime” *requires* (Congress “must assuredly have intended”) that it be a continuing crime. The first circumstance is easily understood. Some statutes do indeed define crimes as continuing.¹⁰ The second, however, is more problematic.

THE ‘NATURE OF THE CRIME’

Courts have found that the following crimes are “continuing offenses”: conspiracy,¹¹ escape from federal custody,¹² kidnapping¹³ and crimes of possession (possession of controlled substances¹⁴ and firearms).¹⁵ More recently, some courts have found that

bank fraud,¹⁶ health care fraud,¹⁷ embezzlement¹⁸ and failure to appear for a sentencing¹⁹ are also continuing. What is it about the “nature” of these crimes that makes them continuing crimes for statute-of-limitations purposes?

Courts’ explanations of what renders a crime “continuing” are rarely helpful. For example, in *United States v. Bailey*, the Supreme Court found that escape from federal custody was a continuing offense based on the following reasoning:

We think it clear beyond peradventure that escape from federal custody ... is a continuing offense, and that an escapee can be held liable for failure to return to custody as well as for his initial departure. Given the continuing threat to society posed by an escaped prisoner, “the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.”²⁰

It is certainly not clear, much less “beyond peradventure,” that escape from federal custody is “a continuing offense.” In fact, that conclusion would seem to be contrary to *Toussie*, which held that failure to register for the draft was *not* a continuing offense. Why is escape continuing, but failure to register is not? The *Bailey* decision suggests that it is because of the “continuing threat to society posed by an escaped prisoner,” but that answer is also problematic. If the dangerousness of a person is grounds to define a crime as continuing, presumably, any violent crime would be continuing. Is a swindling stockbroker who has escaped from her minimum-security prison a greater threat to society than a person who has engaged in bank robberies, rapes or murders?²¹

Other cases have been no clearer about the nature of the crime under consideration that makes it a continuing crime. In *United States v. Smith*, the 4th U.S. Circuit Court of Appeals held that the embezzlement of funds from the Social Security Administration in violation of 18 U.S.C. § 641 was a continuing crime.²² The court explained that “embezzlement is the type of crime that, to avoid detection, often occurs over some time and in relatively small, but recurring, amounts. ... At least [in those cases in which] there is a strong temporal relationship between the [completion of the offense] and culpability, we think that Congress must have intended that such be considered a continuing offense for purposes of the statute of limitations.”²³ It is not clear what the court meant by “a strong temporal relationship” between the completion of the crime and culpability. Presumably, there is always such a relationship because unless the crime is completed, one cannot be guilty (culpable) of committing it.²⁴

REASONS FOR A CONTINUING-CRIMES EXCEPTION TO STATUTES OF LIMITATION

Reference to the “nature” of a crime is so vague as almost to defy analysis. Instead, we should focus on the problems that the continuing-crime doctrine may properly be intended to solve. It is reasonable to suppose that, just as the doctrine of continuing crimes in the venue context was developed to allow for prosecution of crimes that otherwise could not be prosecuted because there was no single district in which the crime was committed, the doctrine of continuing crimes in the statute-of-limitations context was developed to allow for the prosecution of crimes that would not otherwise be prosecutable because of problems arising from the statute of limitations. There are two such problems that the doctrine of continuing crimes might have been developed to address.

First, there are crimes that may be *complete* — that is, all the elements have been committed, but not *detected*, until much later. For example, one might defraud the Social Security Administration office or a bank by using false identification information, but the falsity might not be uncovered until long after the use of false information, and after the defendant has received payments. If difficult-to-detect crimes are deemed continuing crimes, there is less a chance that the statute of limitations will expire before they are prosecuted or discovered.

But the fact that some crimes are hard to detect does not justify extending the statute of limitations for them. Presumably, the statutorily-established limitations period was determined to take the hard-to-detect nature of the crime into account. Furthermore, almost any financial fraud could be hard to detect, so the identification of a crime as a “continuing crime” instead of as exceptional one would become commonplace — exactly what the Supreme Court has warned against.

The second and far more compelling problem arises from the fact that some crimes have elements that endure over a period, but the crime is not committed multiple times over the period; rather, it is committed only once. For such crimes, if the statute of limitations were to run from the moment the crime was completed (from the moment when elements were first satisfied) much criminal activity would go unpunished. A hypothetical example illustrates the problem:

A statute makes it a crime to hold a person for ransom. On day one, D grabs V, spirits him away and demands a ransom. None is paid. D then waits until the limitations period has run (say, day one plus five years), releases V and announces: “The statute of limitations has run because my crime was complete on day 1. You could have convicted me for my behavior on that day because I held V and demanded a ransom. Because my crime was complete then, the statute of limitations started then. It has therefore run by now, and I cannot be prosecuted.”

Plainly, D cannot be correct. D violated the statute every day that he held V, so even though he could have been prosecuted on day one, his actions on each of the days thereafter *continued* the crime. D is not guilty of holding V for ransom multiple times — he could not be charged with (365 days/year x 5 years) of crimes, but only once. To achieve a sensible result, the statute of limitations for that one crime must be extended so long as the defendant is committing the elements of the crime.

This problem gives rise to a proposed definition of continuing crimes: A crime is a continuing crime if it has elements that endure over time, and the crime could not be charged as separate instances of the same crime over the period that the element endures. The statute of limitations for such crimes should not begin to run until the defendant ceases to satisfy the element; Otherwise, defendants could commit a crime over a period of time and yet avoid punishment. This proposed definition is at work in most of the cases involving continuing crimes, but it is not expressly stated. Making it explicit may aid in the application of the doctrine of continuing crimes.

To illustrate how the proposed definition would work in practice, consider the crime of possession with intent to distribute a controlled substance. Its elements are knowing possession of a controlled substance with intent to distribute it.²⁵ Now, suppose D gets a delivery of cocaine on day one, and there is evidence (a recorded phone call) that he intends to distribute it. The crime is complete, and he could be arrested and prosecuted from day one and for five years (the limitations period) thereafter.

But suppose that D holds the same delivery of cocaine through day seven, always with the intent to distribute it. (The buyer needs a week to get the money needed for the buy.) D could not be prosecuted for *multiple* instances (day one, day two, day, three ... day seven) of the crime of possession with intent to distribute a controlled substance. But if he were prosecuted five years from day seven, he could argue, just like the kidnapper, that his crime was complete on day one, and so the limitations period had expired.

The only answer to D is that possession with intent to distribute a controlled substance is a continuing crime as to which the statute of limitations does not begin to run until the element ceases to exist (day seven), even though D could be prosecuted for the same crime before that day. Instead of saying the crime of possession is a continuing crime because of its "nature," one may refer to the proposed definition: The elements of the crime of possession endure over a period of time, and the defendant cannot be prosecuted for multiple instances of the crime during the period. The proposed definition thus illustrates why possession of a controlled substance (indeed, any possession offense) is a continuing crime.

The same analysis shows that the proposed definition explains why conspiracy is a continuing crime. The crime of conspiracy is complete when the agreement is reached; Therefore, the crime could be prosecuted at that point. The elements of conspiracy (most importantly, the agreement itself) endure for some period, but the defendant could not be charged with multiple conspiracies during that period, only one. Thus, conspiracy is a continuing crime. If it were not, a conspirator could argue that the limitations period ran from the beginning of the conspiracy, regardless of how long the conspiracy extended.

The proposed definition also comports with the observation by several courts that in determining whether the "nature of the crime" requires the crime be deemed "continuing," the crime whose nature must be evaluated is the crime as defined in the statute rather than the criminal activity at issue in any particular case. In other words, a defendant who commits a series of crimes in close sequence does not thereby commit a continuing crime, for there is a difference "between conduct that is deemed a 'continuing offense' ... and conduct that constitutes a continuing course of criminal activity, but which is not deemed 'continuing' for limitations purposes."²⁶ This observation illustrates the importance of the second part of the proposed definition: that the crime could not be charged as separate instances of the same crime over the period that the element endures.

CONCLUSION: EVALUATION OF THE PROPOSED DEFINITION

To say a crime is "continuing" because of its nature is to say nothing about what it means to be a continuing crime. The proposed definition attempts to give some content to the notion of "continuing" crime. It also comports with the apparent purpose underlying the continuing crime doctrine: to avoid situations in which the perpetrator of a crime that exists over an extended period — like conspiracy, possession or kidnapping — might escape prosecution.

Because the proposed definition is more meaningful than the "nature" standard, it is possible to argue meaningfully about whether certain crimes are continuous. Consideration of the proposed definition suggests that some crimes that courts have found are "continuing" should not have been so classified. In particular, fraud crimes probably should not be deemed continuing crimes. The defendant presu-

ably completes the crimes when he makes the false statement to the victim. That the defendant may enjoy the benefits of the crime (*i.e.*, receive payments) for a period does not mean the fraud itself continues, because the receipt of money is not an element of the crime, and there is no element of the crime of fraud that endures over time. For the same reason, embezzlement should not be a continuing crime. Similarly, failure to appear for sentencing should not be a continuing offense because the element of failing to appear at a particular time and place does not endure over time. **WJ**

NOTES

- ¹ *Pendergast v. United States*, 317 U.S. 412, 418 (1943). See also *Toussie v. United States*, 397 U.S. 112, 115 (1970).
- ² See U.S. CONST. ART. III, § 2, cl. 3 (“Trial of all crimes ... shall be held in the state where the said crimes shall have been committed); U.S. CONST. AMEND. VI (requiring trial by an impartial jury of the state and district wherein the crime shall have been committed); Fed. R. Crim. P. 18 (prosecution shall be had in a district in which the offense was committed). See generally *United States v. Cabrales*, 524 U.S. 1 (1998).
- ³ See, *e.g.*, *United States v. Muhammed*, 502 F.3d 646, 653 (7th Cir. 2007).
- ⁴ 18 U.S.C. § 3237(a).
- ⁵ See, *e.g.*, *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999); *United States v. Jones*, 676 F. Supp. 2d 500, 518 (W.D. Tex. 2009).
- ⁶ *Toussie*, 397 U.S. at 114-115.
- ⁷ *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (citing *United States v. Habig*, 390 U.S. 222, 227 (1968)).
- ⁸ *Toussie*, 397 U.S. at 115.
- ⁹ *Id.* (internal quotation marks and citation omitted).
- ¹⁰ See, *e.g.*, 18 U.S.C. § 3284 (“The concealment of assets of a debtor in a case under Title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied.”).
- ¹¹ See, *e.g.*, *Yashar*, 166 F.3d at 877 (“Conspiracy is a continuing offense.”). *United States v. Jaynes*, 75 F.3d 1493, 1505 (10th Cir. 1996) (“Conspiracy ... is the prototypical continuing offense.”).
- ¹² *United States v. Bailey*, 444 U.S. 394, 413 (1980) (interpreting 18 U.S.C. § 751(a)).
- ¹³ *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) (noting that 18 U.S.C. § 1201 “is a unitary crime”); *United States v. Denny-Shaffer*, 2 F.3d 999, 1018 (10th Cir. 1993) (“The broad language of § 1201(a) defines a continuing offense”); *cf. United States v. Garcia*, 854 F.2d 340, 344 (9th Cir. 1988) (federal kidnapping is continuing offense and therefore statute of limitations does not begin with transport of victim across state lines).
- ¹⁴ *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1190 (2d Cir. 1989) (noting that possession of drugs with intent to distribute is a continuing crime, whereas receipt of stolen goods is a non-continuing crime).
- ¹⁵ *United States v. Waters*, 23 F.3d 29, 36 (2d Cir. 1996) (interpreting 18 U.S.C. § 924(g)(4)).
- ¹⁶ *United States v. Nash*, 115 F.3d 1431, 1436 (9th Cir. 1997) (interpreting 18 U.S.C. § 1344).
- ¹⁷ *United States v. Refert*, No. CR 05-30090, at *6 (D.S.D. Jan. 3, 2007) (interpreting 18 U.S.C. § 1347).
- ¹⁸ *United States v. Smith*, 373 F.3d 561, 568-69 (4th Cir. 2004) (interpreting 18 U.S.C. § 641).
- ¹⁹ *United States v. Lopez*, 961 F.2d 1058, 1059 (2d Cir. 1992) (interpreting 18 U.S.C. §§ 3146(a)(1), 3146(b)(1)(A)(i); see also *United States v. Gray*, 876 F.2d 1411, 1418-19 (9th Cir. 1989) (failure to appear is a continuing offense) (interpreting 18 U.S.C. § 3146(a)).
- ²⁰ *Bailey*, 444 U.S. 394, 413 (1980) (quoting *Toussie*).
- ²¹ What is especially odd about *Bailey* is that it did not need to reach the issue. As the court pointed out, title 18 U.S.C. § 3290 provides that “no statute of limitations shall extend to any person fleeing from justice.” 18 U.S.C. § 3290 (quoted in *Bailey*, 444 U.S. at 414n. 10). Regard-

less whether escape from federal custody was a continuing crime, the statute of limitations could not have run against the defendants in *Bailey* because they were fleeing from justice. *Bailey*, 444 U.S. at 414.

²² *Smith*, 373 F.3d 561.

²³ *Id.* at 567-68 (internal quotation marks and citations omitted).

²⁴ One might be guilty of attempt or conspiracy, depending upon the circumstances, even before the final criminal act.

²⁵ See 3 SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL) 56-2 (2010).

²⁶ *United States v. Rivlin*, No. 07-CR-524, 2007 WL 4276712, at *2 (S.D.N.Y. Dec. 5, 2007). See also *Yashar*, 166 F.3d at 879-80; *Jaynes*, 75 F.3d at 1506 n.12 (“separate offenses may be part of a common scheme without being ‘continuing’ for limitations purposes”); *United States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991) (“The analysis turns on the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue.”) (*per curiam*) (overruled in part on other grounds, *United States v. Scarano*, 76 F.3d 1471 (9th Cir. 1996)); *United States v. Motz*, 652 F. Supp. 2d 284, 293 (E.D.N.Y. 2009) (“Although *Motz* did allegedly engage in a course of repeated criminal conduct in violation of 18 U.S.C. § 1348, it does not necessarily follow that 18 U.S.C. § 1348 is a continuing offense.”).

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