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Whistleblower Illuminates Abuse of Process

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A recent memo filed with the Justice Department (DOJ) by a whistleblower ex-prosecutor has called into question whether some prosecutors are abusing process in cross-border cases in an effort to extend the statute of limitations governing when charges in such cases must be brought. The practice appears to focus on the use of MLAT (mutual legal assistance treaty) requests that allow prosecutors to obtain evidence or other forms of legal assistance from a foreign entity. Typically, responses to such requests can take months or years. Accordingly, in appropriate cases, prosecutors may ask for an extension of the applicable statute of limitations for up to three years to allow time to obtain evidence necessary to make charging decisions.

But recent court cases and the DOJ whistleblower's memo have strongly suggested that prosecutors may be purposefully and wrongfully using the MLAT request as a pretextual means of extending the statute of limitations rather than to obtain necessary evidence. This article explores the historical allegations of such misconduct, the potential for it to occur in the future, and what defense attorneys can do to protect their clients from it.

The Khardori Memo And 'Bogucki'

The DOJ whistleblower, former federal prosecutor Anush Khardori, reportedly submitted a memo internally at DOJ documenting his concerns regarding DOJ's abuse of MLAT requests just before resigning his post on Jan. 31, 2020. In his memo, Khardori alleges that "there was a deliberate effort to deceive relevant judges into believing that [a DOJ unit] had, in fact, made its requests for foreign evidence because of a legitimate interest in obtaining that evidence." Aruna Viswanatha and Dave Michaels, "Justice Department Accused of Abusing Process to Extend Statute of Limitations," Wall Street Journal, Feb. 2, 2020. Khardori, who was on administrative leave while being investigated for an unrelated allegedly unauthorized media leak about misconduct among senior officials, wrote that he actually witnessed such abuse in DOJ's 2016 prosecution of Robert Bogucki, the former global leader of fixed-income trading at Barclays PLC.

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Yet, even before Khardori's memo surfaced last month, there was evidence that DOJ had abused the MLAT process in Bogucki's case. Bogucki was accused of "front-running" in a purported scheme to defraud Hewlett-Packard Co. of millions of dollars through foreign exchange market manipulation, and charged with wire fraud and conspiracy, both of which have a five-year statute of limitations. Days before the statute of limitations was set to run in August 2016, prosecutors made an MLAT request to the United Kingdom for Bogucki's travel records. If the timing itself was not suspicious enough, Barclays had already extensively cooperated with DOJ's investigation and had provided a myriad of documents relevant to DOJ's MLAT inquiry. At the same time, Barclays had agreed to continue assisting DOJ as necessary due to a previous settlement. Thus, DOJ apparently already had access to the very information it sought in the MLAT request.

Due to the suspicious nature of the MLAT request, when DOJ returned an indictment against Bogucki in 2018 in the Northern District of California, Bogucki asked the court to investigate the timing and motivation for the request, arguing that the request was not valid, and therefore, the indictment was void as it was not returned before the five-year statute of limitations expired. According to court documents, Bogucki argued that the circumstantial evidence suggested that the prosecutor on the case submitted her MLAT request only to buy more time for DOJ's investigation, not to discover evidence she did not already have, and such a pretextual submission was a "clear abuse of process." Specifically, the evidence showed that the vast majority of the MLAT request was directed to Barclays, which was already providing documents to DOJ pursuant to the cooperation provisions of a plea agreement in the United States. Robert Bogucki's Reply Memorandum of Law in Support of His Motion To Dismiss, *United States v. Bogucki*, No. 3:18-cr-00021-CRB, ECF No. 36 (N.D. Cal. Feb. 27, 2018). Moreover, the records sought, which "related to one trader's travel to London[, were] in the possession of the prosecutor at the time the MLAT was submitted." Transcript of Proceedings, *Bogucki*, ECF No. 53. Notably, the MLAT request itself did not include a sworn declaration from the prosecutor that its contents were accurate, which, Bogucki argued, was required by *United States v. Trainor*, 376 F.3d 1325 (11th Cir. 2004), in order to "impress upon the witness the danger of criminal punishment," *Trainor*, 376 F.3d at 1332. See *Bogucki*, ECF No. 36. Instead, the prosecutor's declaration merely stated that the MLAT request was attached and did not attempt to incorporate the request's factual assertions regarding the location of the evidence overseas. Since it is common, and arguably required by *Trainor*, to verify the request's factual assertions in the declaration, Bogucki believed that the prosecutor had "carefully deleted [from her declaration] the sentence that said she had a reasonable belief that the evidence was overseas." See *Bogucki*, ECF Nos. 36, 53.

Tellingly, during oral argument on the motion, DOJ did not attempt to rebut the proposition that the MLAT request was pretextual. Instead, DOJ argued, defensively, that the court had "no basis going beyond the four corners" of the request, and that DOJ's motivations or strategy behind an MLAT request should not be scrutinized. See *Bogucki*, ECF No. 53. The court strongly rejected this argument, stating that an analysis of an MLAT's pretext or motivation is no different than the analysis undertaken by courts regularly during *Franks* hearings, in which search warrant affidavits from law enforcement officers are reviewed for potential false statements. See id. Mr. Bogucki's attorney added that he was "absolutely raising questions about what they're calling strategy, but what we think would be abuse of a process," and that "there is plenty of authority in the Ninth Circuit to suggest that [§] 3292 does not exist to allow the government to extend the statute of limitations any time

they're willing to make a frivolous application for information … overseas." See id.

Because the court believed Bogucki had raised serious concerns regarding the validity of DOJ's MLAT request, it ordered an evidentiary hearing. See *Bogucki*, ECF No. 56. A mere four days following this order, DOJ filed a superseding indictment on different charges with a ten-year statute of limitations, mooting the necessity of the evidentiary hearing. Regardless, Bogucki was later acquitted after trial on the new charges.

Khardori's memo suggests that DOJ may have had reason to want to avoid discovery from an evidentiary hearing. Khardori apparently wrote that, once he was assigned to the *Bogucki* case, he reviewed the already-drafted MLAT request and determined it was pretextual. But Khardori claims that when he shared his concerns with other prosecutors, including an article by a former national-security prosecutor about how the MLAT statute was vulnerable to abuse, they responded by joking about the subject. According to reports of Khardori's memo, one responded in email, "HAHAHAHAHHAAH!" Another wrote, "The National Security Division wouldn't recognize a statute of limitations if it punched them in the face. I give this guy no credit." Despite this response, according to Khardori, he then shared his concerns with his superiors, explaining that because Barclays had been cooperating in order ensure a quick resolution to the case, reliance on the MLAT "made no sense." Khardori apparently alleges that his superiors ignored his concerns, and instead, prosecutors assigned to the case "dragged their feet" when responding to questions about the MLAT. Khardori seemingly suggests that his superiors began to pay attention to the MLAT only when it was challenged by Bogucki's attorney.

'Bogucki' shows that defense attorneys are not without recourse or a means to challenge potential misuse.

According to Khardori, the MLAT request was unnecessary because the prosecutor making the request already had the travel records she sought. Moreover, even if she did not, she could have obtained them in the United States, where the airline and hotel companies at issue had a significant presence, or from Barclays' U.S. counsel, which was cooperating in DOJ's investigation. See Jack Crowe, "Former Justice Department Attorney Warns That Prosecutorial Abuses Go Beyond FISA Process," National Review, Feb. 13, 2020.

Potential for Future Abuse

Although the credibility of the allegations in Khardori's memo has yet to be tested, when they are viewed together with the court records from the *Bogucki* case, the inference that a DOJ prosecutor abused the MLAT process is strong. Although the purpose of this article is not to suggest that such practices are rampant at DOJ, it is certainly concerning that Bogucki's case is not the only one in which prosecutors allegedly relied on pretextual or deceptive MLAT requests to circumvent statutes of limitations. See, e.g., Motion To Dismiss Count 1 of the Indictment, *United States v. Kachkar*, No. 16-20595, 2018 WL 8192187, ECF No. 263 (S.D. Fla. July 30, 2018) (arguing that an MLAT request for UK documents was pretextual because the prosecutors already had the information sought); Motion of Defendant Jennifer Chen To Dismiss the Indictment, *United States v. Apego*, No. 1:12-CR-350-scj-ajb, 2013 WL 9963999, ECF No. 58-1 (N.D. Ga. Sept. 23, 2013) (arguing that an MLAT request for Taiwanese documents was pretextual because the government had failed to translate the documents over a year after receiving them). According to Khardori, after *Bogucki*, one senior official at DOJ held a meeting with several other prosecutors in which he suggested that, going forward, the strategic reasons for requesting MLATs should not be "memorialized in writing." See Crowe, National Review. Khardori also apparently wrote that, when assigned to another case in 2018

involving bank traders accused of spoofing, he discovered that the MLAT request that extended the statute of limitations for that case was also pretextual. See id. Specifically, Khardori claims that he reviewed emails in which the prosecutor on the case had urged the filing of the MLAT request because the statute of limitations was about to expire. See id. Just last week, defendants in that case filed motions alleging prosecutorial misconduct in connection with the MLAT request and seeking to compel discovery of circumstances leading to the request. See Memorandum of Law in Support of Defendants' Motion To Compel Brady and Rule 16 Discovery, *United States v. Vorley*, No. 1:18-cr-00035, ECF No. 171 (N.D. Ill. February 25, 2020); Memorandum of Law in Support of Defendants' Motion To Compel Production of Evidence Relating to Government Misconduct, *United States v. Bases*, No. 1:18-cr-00048, ECF No. 241 (N.D. Ill. Feb. 25, 2020).

The allegations in the Khardori memo cannot be easily dismissed when considered in light of DOJ's defensive position in *Bogucki* that the court should not go beyond the four corners of a government MLAT request to consider DOJ's "strategy." See *Bogucki*, ECF No. 56. If that truly were the law, DOJ could file an MLAT request for whatever reason or "strategy" it desired, including solely to extend the statute of limitations. As Khardori purportedly wrote, "[t]he participation in and tolerance of" the conduct by senior DOJ officials as alleged in *Bogucki* and other cases certainly could suggest that those officials engaged in such conduct themselves and/or advised others to do so. See Crowe, National Review. Statistics show that DOJ has come to rely more heavily on MLAT requests over time, with 1,178 such requests filed in 2016, compared to only 497 in 2014. See id. This suggests that the opportunities for abuse are available and increasing.

Key Takeaways

Hopefully, the abuses of the MLAT process that appear to have occurred in *Bogucki* and other cases were isolated incidents. But if such abuses are more systematic and as prevalent as Khardori suggests, *Bogucki* shows that defense attorneys are not without recourse or a means to challenge potential misuse.

To prevent abuse of the MLAT request process, defense counsel would be wise to take the following precautions:

- Stay in touch with potential recipients of MLAT requests. To the extent defense counsel can predict who might receive an MLAT request, counsel should obtain as much information as possible about the MLAT request to screen for potential abuse. Because DOJ may file §3292 requests with the court ex parte, putative criminal defendants often are not aware that the limitations period has been tolled and that they still are subject to prosecution for conduct seemingly beyond the statute of limitations;
- Ask the court to consider the validity and necessity of the MLAT request as a basis for dismissing a case brought past the limitations period if you believe that the request was pretextual (such as in *Bogucki*);
- Ask the court to conduct an evidentiary hearing to determine whether the MLAT request was pretextual; and
- If the court is resistant to an evidentiary hearing, argue that the court should look beyond the four corners of the MLAT request to determine whether the representations in it were true and accurate (like a *Franks* hearing).