

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HYOUNG NAM SO, AKA Brian So,

Defendant - Appellant.

No. 24-5085

D.C. No.
2:22-cr-00108-
AB-1

OPINION

Appeal from the United States District Court
for the Central District of California
André Birotte, Jr., District Judge, Presiding

Argued and Submitted December 2, 2025
Pasadena, California

Filed October 5, 2026

Before: Ronald M. Gould, Bridget S. Bade, and Kenneth K.
Lee, Circuit Judges.

Opinion by Judge Bade;
Dissent by Judge Lee

SUMMARY*

Criminal Law

The panel affirmed Hyoungh Nam “Brian” So’s conviction on one count of conspiracy to commit federal funds bribery, in violation of 18 U.S.C. § 371.

The panel held that the district court did not err in denying So’s motion to dismiss the indictment as untimely.

The offense of conspiracy has a five-year statute of limitations, which begins to run on the last overt act alleged in the indictment. In this case, the date of the last overt act alleged in the indictment is December 21, 2015, meaning that, absent tolling, the limitations period expired on December 21, 2020, more than a year before the indictment was returned on March 23, 2022.

The district court issued a tolling order under 18 U.S.C. § 3292 in October 2020, finding, as relevant here, that (1) a grand jury was conducting an investigation into allegations involving bribery, in violation of 18 U.S.C. § 1952; wire fraud, in violation of 18 U.S.C. § 1343; honest services fraud, in violation of 18 U.S.C. § 1346; unlicensed money transmissions, in violation of 18 U.S.C. § 1960; and money laundering, in violation of 18 U.S.C. § 1956; (2) evidence of the offenses under investigation is located in the Republic of Korea; and (3) the Republic of Korea had not taken final action on an official United States request for assistance and documents.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

So argued that because tolling under 18 U.S.C. § 3292 is “offense-specific,” the government’s failure to include conspiracy to commit federal funds bribery in either the tolling application or its proposed order means that this offense was not tolled. The panel held that tolling under § 3292 applies to every offense that is covered by the district court’s tolling order and for which the required statutory findings have been made. Although the tolling order must identify which offenses are tolled, it need not do so by citation to the relevant statutory prohibition. The court determines the identity of the covered offenses based on their substance, not their label. Here, it is clear from context that the offense of conspiracy to commit federal funds bribery was covered by the tolling order.

The timeliness of the indictment thus depended on how long the statute of limitations was tolled by the § 3292 tolling order.

- The initial calculation depends on the length of time from “the date on which the official request is made” to “the date on which the foreign court or authority takes final action on the request.” 18 U.S.C. § 3292(b). If the foreign government took “final action” prior to the expiration of the natural limitations period, then the statute of limitations may be suspended for no more than six months; otherwise, it may be suspended for a maximum of three years. 18 U.S.C. § 3292(c).
- “Final action” on an official request only occurs when the foreign government sends “a dispositive response to each item set out in the official request.” The finality of a foreign government’s response is based on an objective assessment of both

the official request and the foreign government's responses.

- If “final action” on the official request took place prior to December 21, 2020, then the March 23, 2022, indictment was untimely. Here, South Korean officials were still making efforts to produce certificates of authenticity for certain reports in July 2021, which strongly indicates that prior responses were not dispositive as to that category of evidence. Accordingly, the district court did not err in denying So's motion to dismiss on timeliness grounds.

The panel held that the district court did not err in refusing to instruct the jury on So's statute-of-limitations defense. Factual disputes that do not concern the elements of the offense may properly be resolved by the court without violating the defendant's right to trial by jury. The actions relevant to the question of when “final action” occurred are not facts that constitute part of the commission of the offense. Thus, even though the question of when “final action” occurred is a mixed question of law and fact, it is a question a judge may decide.

Judge Lee dissented. He wrote that § 3292 requires the government to specify “the offense” for which it wants the statute of limitations tolled. He wrote that while he agreed with the majority that § 3292 does not require a specific U.S. Code citation, the government must provide sufficient information for the court to understand which offense is at issue, and nothing in the government's application or the court order suggests that “the offense” being tolled was the conspiracy to defraud the United States.

COUNSEL

David Y. Pi (argued) and Jeff P. Mitchell, Assistant United States Attorneys; Christina T. Shay, Assistant United States Attorney, Chief; Criminal Division; Bilal A. Essayli, United States Attorney; Office of the United States Attorney, United States Department of Justice, Los Angeles, California; for Plaintiff-Appellee.

Daniel H. Ahn (argued), Kasey J. Curtis, Allison L. Kahn, and Charles P. Hyun, Reed Smith LLP, Los Angeles, California; Robyn C. Crowther, Steptoe & Johnson LLP, Los Angeles, California; Courtney L.C. Cefali, Cefali & Cefali, San Juan Capistrano, California; for Defendant-Appellant.

OPINION

BADE, Circuit Judge:

Defendant Hyoung Nam “Brian” So appeals his conviction on one count of conspiracy to commit federal funds bribery in violation of 18 U.S.C. § 371. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

A

In December 2015, an informant notified Special Agents with the Department of Homeland Security of an active scheme to launder \$5 million from South Korea to the United States for the purpose of bribing various General Motors (GM) executives, who in exchange would secure a lucrative

contract for the South Korean automotive supply company Woo Kyung M.I.T. The informant told the Special Agents that Hwan Duk Lee, a South Korean citizen and the sole owner and operator of Woo Kyung M.I.T., had contacted individuals living in Los Angeles about arranging the cross-border funds transfer through a network of hawala brokers.¹ Once the funds reached the United States, the bribe would be paid to a GM Director—identified by the informant as a man with the last name “Song”—who would in turn distribute the bribe to “several unidentified GM Executives.” The informant explained that \$1 million had already been transferred to “Song” the month prior, that Lee’s contacts had been able to gather an additional \$2.5 million from various hawala brokers in the time since, and that Lee was flying from South Korea to Detroit to pick up the money from his contacts and deliver the second payment to “Song” in person.

When Lee landed in Detroit, DHS officers stopped and searched him, finding just over \$10,000 in U.S. currency on his person and images of bulk U.S. currency totaling more than \$350,000 on his phone. Spooked by this incident, Lee reportedly instructed Chul Kim, one of his U.S. contacts, to deliver the money in his stead. Kim later told DHS officers that the man to whom he delivered the money was the defendant, Hyoung Nam “Brian” So. Federal officials soon thereafter notified their South Korean counterparts of the

¹ “Hawala,” or *hwanchigi* in Korean, describes a method of transferring money (typically across borders) through use of a middle-man—the hawala broker or “hawaladar”—rather than the formal banking system. See Julia Kagan, *What Is Hawala? Money Transfer Without Money Movement*, Investopedia (Aug. 5, 2026), <https://www.investopedia.com/terms/h/hawala.asp>. [<https://perma.cc/63LY-UZF8>]

potential money laundering scheme, and the two governments began cooperating on an investigation.

Shortly after the money was delivered to So, Woo Kyung M.I.T. received notice that it had been awarded a contract to supply painting, window film, and molding for GM trucks. But the bribery scheme did not bear the fruits its participants originally expected. In January 2016, Lee sent a letter to So to inform GM that Woo Kyung M.I.T. would not be able to finalize an agreement on the supply contract due to profitability concerns. Lee separately informed So that the ongoing investigation was a motivating factor in his decision to withdraw from the deal. At some point, Lee also requested that So return the bribe. In October 2016, So agreed to hand over most of the bribe money to one of Lee's employees, but kept \$250,000 "for his troubles." The remaining \$3.2 million was deposited by Lee's employee in a vault in Los Altos, California.

B

In June 2017, South Korean officials executed search warrants on Lee's business and residence and arrested Lee for violating South Korean law. Lee pleaded guilty to the offense. In exchange for a non-prosecution agreement from the United States, Lee agreed to cooperate with the U.S. investigation and to waive his property rights in the bribe money that was returned.²

On July 11, 2017, after the South Korean government had arrested Lee and executed the search warrants of his business and residence, U.S. officials submitted a formal

² In November 2017, U.S. and South Korean officials jointly seized the money and initiated forfeiture proceedings. That money was subsequently repatriated to South Korea.

request for assistance under the Mutual Legal Assistance Treaty (MLAT) between those two countries. *See* Treaty on Mutual Legal Assistance in Criminal Matters, S. Kor.-U.S., Nov. 23, 1993, T.I.A.S. 97-523. The request described the facts of the case and the prior informal cooperation between U.S. and South Korean authorities. The request then listed the offenses under investigation: wire fraud, 18 U.S.C. § 1343; honest services fraud, 18 U.S.C. § 1346; money laundering with intent to promote unlawful activity, 18 U.S.C. § 1956(a)(2)(A); conspiracy to commit money laundering, 18 U.S.C. § 1956(h); operating an unlicensed money transmitting business, 18 U.S.C. § 1960; interstate and foreign travel or transportation in aid of a racketeering enterprise, 18 U.S.C. § 1952(3)(2); conspiracy to commit an offense against the United States, 18 U.S.C. § 371; and the general indirect criminal liability statute, 18 U.S.C. § 2. The request then sought the following from the South Korean government:

1. Complete banking records obtained during the investigation of Lee;
2. An opportunity to interview Lee and any identified participants in the hawala transactions in South Korea;
3. Records and materials seized during the searches of Lee's business and residence;
4. Recorded or written statements made by Lee, Kim, and other witnesses and subjects during the course of the investigation;
5. Complete cell phone records pertaining to Lee and Kim from October 2015 to January 2016;

6. Records of forensic examinations of cell phones that were conducted during the course of the investigation;
7. Certificates of authenticity for the business records (the bank and cell phone records) filled out by the custodian of those records; and
8. Certificates of chain of custody for any materials and devices seized during the course of investigation.

The first response came in November 2017, when a line prosecutor in the Busan Prosecutor's Office notified U.S. officials that arrangements were being made to allow federal agents to interview Lee in December of that year. While the federal agents were in Busan for the interview, they were permitted to review portions of the official investigative file and request that copies of certain records in that file (the Busan Reports) be sent to the United States.

On April 16, 2019, South Korean officials made the first production of materials responsive to the MLAT request. The cover letter to the response read as follows:

With regard to the above-referenced request, we are sending the materials requested in the request. Enclosed please find four discs containing investigative and evidentiary records obtained by the Busan District Prosecutors' Office.

For any questions or concerns regarding this matter, please contact

Prosecutor [REDACTED] or Case Officer [REDACTED].

The production included the “Investigative Record,” the “Evidentiary Record,” the “Court Record,” and the “Judgment of st [sic] Instance,” as well as an attestation of authenticity filled out by the custodian of the records. This production did not, however, include the Busan Reports.

In May 2020, U.S. officials informally followed up with South Korean officials about items not included in the April 19, 2019 response, requesting:

1. Any and all reports prepared by Woo Kyung M.I.T. relating to meetings with General Motors’ official(s). This includes, but is not limited to, executive reports, meeting minutes and travel purpose summary reports.
2. Any and all interview reports prepared by Korean authorities relating to Woo Kyung M.I.T.’s employee interviews, which were not included in the first MLAT production.

The first set of items included the records that federal agents were allowed to review while in Busan.

On November 30, 2020, South Korean officials responded to that follow-up. As to the first set of items, the South Korean officials said that “[t]here is no data on the meeting between Wookyoung M.I.T and GM employees in the record of the related case.” As to the second set of items, the South Korean officials re-sent the witness statements of the two interviewed Woo Kyung M.I.T. employees and remarked that, “[a]t the time of the previous 1st judicial

assistance, [the] above 2 statements and other reports and statements have already been replied.”

In December 2020, U.S. officials followed up with their South Korean counterparts yet again, this time listing six specific documents they believed were missing. In April 2021, the South Korean officials said “[t]he Case Prosecutor [was] not able to acquire the missing documents you are referring to. It seems that [they were] not included in the case records.”³ After U.S. officials sent copies of the documents to see if they could be certified, South Korean officials responded on July 19, 2021 as follows:

We have asked the case prosecutor to look for the missing documents.

The case prosecutor searched for the missing documents numerous times but could not find such documents in their case records.

Although it is our intent that we assist you in this matter to the fullest extent, I am afraid that we cannot do so at this time.

So, I would like to propose another option.

If the U.S. authorities could tell us where or from whom they had acquired the missing 6 documents, we will check again with the source itself to verify the authenticity of the

³ The South Korean government sent a response with a form cover letter on April 29, 2021, but that response did not include any documents.

documents. This will allow us [to] certify the documents.

U.S. officials provided that information accordingly.

The final response to the MLAT request came on October 26, 2021. In that response, South Korean officials explained that the six missing documents, which “were [originally] stored in the forensic center’s server,” had been “deleted . . . in July, 2020, after consultations with the case officer in charge.” These six documents “and other documents that [were] not directly related to the ongoing case ha[d] not been archived.” “[O]nly the circumstantial materials related to the seizure of the documents” could still be obtained. The response did not include a certification of authenticity for the six documents.

C

In September 2020, while waiting for South Korea’s second response to the MLAT request, the government filed an *ex parte* application to toll the statute of limitations under 18 U.S.C. § 3292. The application explained that a grand jury was “investigating Hyoung Nam SO, . . . and others, for receiving a bribe from Hwan Duk LEE [], in exchange for awarding a contract to LEE,” that “[o]n July 11, 2017, the United States made an official request for assistance and documents from the Republic of Korea,” and that this request was “still open, and the United States continues to wait for documents.” The government therefore requested that the district court “suspend the running of the statute of limitations for offenses arising out of the grand jury’s investigation of SO, . . . and others”—namely, “for bribery, in violation of 18 U.S.C. § 1952; wire fraud, in violation of 18 U.S.C. § 1343; honest services fraud, in violation of 18

U.S.C. § 1346; unlicensed money transmissions, in violation of 18 U.S.C. § 1960; and money laundering, in violation of 18 U.S.C. § 1956.” The declaration of Special Agent Andy Yoo, who personally reviewed the Busan Reports while in South Korea to interview Lee, was attached as an exhibit to the application.⁴

In October 2020, the district court adopted and issued the government’s proposed order. As is relevant to this case, the district court made the following findings:

1. A Grand Jury impaneled in the Central District of California has been conducting an investigation into allegations involving bribery, in violation of 18 U.S.C. § 1952; wire fraud, in violation of 18 U.S.C. § 1343; honest services fraud, in violation of 18 U.S.C. § 1346; unlicensed money transmissions, in violation of 18 U.S.C. § 1960; and money laundering, in violation of 18 U.S.C. § 1956. No indictment has been returned.

* * *

4. It reasonably appears, based on a preponderance of evidence presented to the Court, that evidence of the offenses under investigation is located in the Republic of Korea.

5. It further appears, based on a preponderance of evidence presented to the

⁴ The record does not definitively disclose whether the July 2017 MLAT request was also attached.

Court, that the Republic of Korea has not taken final action on the above-referenced request.

The district court therefore granted the government's application and ordered "that the running of the statute of limitations for the offenses set forth in the government's ex parte application is hereby suspended for the period authorized by 18 U.S.C. [§] 3292(c)."

D

On March 23, 2022, a grand jury originally impaneled in June 2021 returned an indictment against So for one count of conspiracy to commit federal funds bribery, in violation of 18 U.S.C. § 371. The indictment described the "object of the conspiracy" as "bribery concerning programs receiving federal funds in violation of [18 U.S.C.] § 666(a)(1)(B)."

In January 2023, So moved to dismiss the indictment as time-barred. The district court denied the motion from the bench in February 2023. The district court first ruled that the crime charged—conspiracy to commit federal funds bribery—was within the scope of the tolling order, even though that offense was not specifically listed in the tolling application. In the district court's view, it was sufficient that the application mentioned bribery; "it would be too formulaic or formalistic to require the application to list every possible crime." And from the mention of bribery in the application, "particularly given the facts in this case that [were] articulated [in the application]," the district court found that "[one] could contemplate conspiracy to commit bribery, among other things." The district court then ruled that the order tolled the applicable statute of limitations for a sufficient period to make the indictment against So timely

because neither the April 2019 letter nor the November 2020 letter counted as “final action” for purposes of § 3292(b).

In September 2023, So filed a motion requesting a modified jury instruction and a special verdict form based on his “final action” statute-of-limitations defense theory. The district court denied the motion, ruling that the question of “final action” under § 3292 “is a question of law . . . not a question of fact” and therefore outside the province of the jury.

Trial was held in November 2023. When instructing the jury on conspiracy, the district court based the instruction on the Ninth Circuit’s Model Jury Instructions, which do not include any language about the timing of “final action” for purposes of § 3292. Consistent with its prior ruling on So’s motion, the district court did not instruct the jury on “final action” or issue the requested special verdict form.

On November 15, 2023, the jury found So guilty of one count of conspiracy to commit federal funds bribery. On August 14, 2024, the court sentenced So to two years’ imprisonment, three years of supervised release, and a fine of \$250,000. On August 19, 2024, So filed a timely notice of appeal.

II

The offense of conspiracy has a five-year statute of limitations. *See* 18 U.S.C. §§ 371, 3282(a). The limitations period for conspiracy “starts to run on the date of the last overt act alleged” in the indictment. *United States v. Charnay*, 537 F.2d 341, 354 (9th Cir. 1976) (quoting *Bergschneider v. Denver*, 446 F.2d 569, 569 (9th Cir. 1971) (per curiam)). In this case, the date of the last overt act alleged in the indictment is December 21, 2015, meaning

that, absent tolling, the limitations period for So's offense expired on December 21, 2020, more than a year before the indictment was returned on March 23, 2022. Thus, unless the running of the statute of limitations was suspended by the October 2020 tolling order issued under 18 U.S.C. § 3292, So is entitled to dismissal of his indictment.

Tolling under § 3292 does not take effect in the absence of an order from "the district court before which a grand jury is impaneled to investigate the offense" that makes two findings pertaining to the offense: (1) that an "official request" has been made to a foreign governmental authority for "evidence of [the] offense," and (2) "that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country." 18 U.S.C. § 3292(a)(1); *see United States v. Atiyeh*, 402 F.3d 354, 363 (3d Cir. 2005) ("The judge is authorized to order the suspension of the statute of limitations only if all the [statutory] conditions are satisfied."). If those findings are made, then the district court "shall suspend the running of the statute of limitations for the offense." 18 U.S.C. § 3292(a)(1); *see also Smith v. Spizzirri*, 601 U.S. 472, 476 (2024) ("[T]he use of the word 'shall' [usually] 'creates an obligation impervious to judicial discretion.'" (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998))).

Here, the tolling order provided that "the running of the statute of limitations for the offenses set forth in the government's ex parte application is hereby suspended for the period authorized by 18 U.S.C. [§] 3292(c)." And that order contained findings that "[t]he United States . . . made an official request . . . to an 'authority of a foreign country' with regard to the Republic of Korea on or about July 11, 2017," and that "[i]t reasonably appears, based on a

preponderance of evidence presented to the Court, that evidence of the offenses under investigation is located in the Republic of Korea.”

So argues that because tolling under § 3292 is “offense-specific,” *United States v. Gyetvay*, 149 F.4th 1213, 1227 (11th Cir. 2025), and the statutory term “offense” ordinarily refers to “a criminal violation with separate elements of proof, not a single criminal transaction,” *Miranda v. Anchondo*, 684 F.3d 844, 849–51 (9th Cir. 2012), the government’s failure to include conspiracy to commit federal funds bribery in either the tolling application or the proposed order it provided to the court means that this offense was not tolled, and therefore the indictment charging him with that offense was untimely. The government argues that (1) tolling under § 3292 applies to all offenses that are “intimately related” to any offenses specifically tolled; and (2) the statutory term “offense” should not be read to impose an implicit requirement that the government and district court list by statutory citation all offenses for which tolling is sought and ordered. *United States v. Swartzendruber*, No. 3:06-cr-136, 2009 WL 485144, at *5 (D.N.D. Feb. 25, 2009) (Erickson, J.); *United States v. Ratti*, 365 F. Supp. 2d 649, 656 (D. Md. 2005); *United States v. Wilson*, 249 F.3d 366, 374 (5th Cir. 2001), *abrogated on other grounds by Whitfield v. United States*, 543 U.S. 209 (2005).

We hold that tolling under § 3292 applies to every offense—that is, a course of conduct in violation of a particular statutory prohibition—that is covered by the district court’s tolling order and for which the required statutory findings have been made. Although the tolling order must identify which offenses are tolled, it need not do so by citation to the relevant statutory prohibition. Whether a particular offense is embraced by the tolling order is a

question of construction. And similar to how we construe an indictment, we determine the identity of the offenses covered by a tolling order based on their substance, not their label.

Although the tolling order here did not list by name or citation the charged offense of conspiracy to commit federal funds bribery, it is clear from context that this offense was covered by the tolling order. The district court ordered that the statute of limitations be suspended “for the offenses set forth in the government’s *ex parte* application.” And in providing detail on those offenses, the government’s application described conduct that embraced not only the essential facts of So’s conspiracy charge, but also other key facts alleged in the indictment. The offense charged is thus substantively the same as one of the offenses for which tolling was sought and ordered. The failure to identify this offense by the correct statutory citation was merely an “error, defect, irregularity, or variance that does not affect substantial rights.” Fed. R. Crim. P. 52(a).

A

We begin with the first contested issue between the parties—the meaning of “offense” in § 3292. Because Congress did not expressly define this term for purposes of § 3292, we read it in accordance with its ordinary meaning, as informed by the context in which the term is used. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) (“[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”); *Fischer v. United States*, 603 U.S. 480, 486 (2024) (explaining that meaning must be drawn from both “the specific context” in which a word or phrase appears as well

as “the broader context of the statute as a whole” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))).

We agree with So that the word “offense,” when used in the criminal context, is ordinarily tied to a particular criminal prohibition. See *Miranda*, 684 F.3d at 849–51 (surveying usage of “offense” in dictionaries and caselaw). Indeed, the etymology of that term implies that the conduct spoken of “offends” some norm, legal or otherwise. See, e.g., *Offence, Offense, n.*, Oxford English Dictionary (2d ed. 1989) (Sense 7.a) (“A breach of law, duty, propriety, or etiquette; a transgression, sin, wrong, misdemeanour, or misdeed; a fault.”); *Offense*, Black’s Law Dictionary (5th ed. 1979) (“The word ‘offense,’ while sometimes used in various senses, generally implies a felony or a misdemeanor infringing public as distinguished from mere private rights, and punishable under the criminal laws, though it may also include the violation of a criminal statute for which the remedy is merely a civil suit to recover the penalty.”).

This is likewise consistent with how other provisions in Chapter 213 of Title 18 use the term “offense”—to refer to something for which a person may be “prosecuted, tried, or punished” and for which “[an] indictment [may be] found or [an] information [may be] instituted.” 18 U.S.C. § 3282(a); see also *id.* §§ 3281, 3283, 3286, 3295 (similar); cf. *Advanced Integrative Med. Sci. Inst., PLLC v. Garland*, 24 F.4th 1249, 1256 (9th Cir. 2022) (“[A]ll acts *in pari materia* are to be taken together, as if they were one law.” (quoting *United States v. Stewart*, 311 U.S. 60, 64 (1940))). Thus, given the lack of any contrary indication in the statute, Congress most likely intended “offense” in § 3292(a)(1) to be read in accordance with its ordinary meaning: “a criminal violation with separate elements of proof, not a single criminal transaction.” *Miranda*, 684 F.3d at 851.

But even though the term “offense” almost always corresponds to a particular statutory prohibition, it sometimes does so in a generic way, as to refer to a particular type of offense in the abstract, and it sometimes does so in a circumstance-specific way, as to refer to a specific set of acts in which an offender engaged on a particular occasion. *See Nijhawan v. Holder*, 557 U.S. 29, 33–34 (2009); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). Here, context makes clear that “offense” is being used in the circumstance-specific sense. First, for tolling to apply, the statute requires that “evidence of an offense” be in a foreign country. 18 U.S.C. § 3292(a)(1). Evidentiary value is not an inherent characteristic of any particular item of evidence, but instead “exists only as a relation between an item of evidence and a matter properly provable in the case.” Fed. R. Evid. 401 advisory committee note. Anything can be evidence of a particular offense, so long as it tends to prove or disprove the existence of a fact that is of consequence in determining whether the offense was committed. *See Evidence*, Black’s Law Dictionary (5th ed. 1979); *Evidence*, *n.*, Oxford English Dictionary (2d ed. 1989) (Sense 6.a); Fed. R. Evid. 401. Thus, for the government to “indicat[e] that evidence of an offense is in a foreign country,” 18 U.S.C. § 3292(a)(1), it necessarily has to describe the specifics of the offense conduct to show that the item requested from a foreign government is, in fact, evidence of the offense sought to be tolled. Second, the statute refers to “a grand jury [that] is impaneled to investigate the offense.” *Id.* Investigations do not take place with respect to generic crimes; they are necessarily grounded in specific facts. For these reasons, it is implausible that § 3292 uses “offense” in the generic sense.

We likewise agree with So, and the Eleventh Circuit, that the statutory language makes clear that tolling under § 3292 is “offense-specific.” *Gyetvay*, 149 F.4th at 1227. The statute directs the district court to “suspend the running of *the* statute of limitations for *the* offense” if the two necessary findings pertaining to that offense are made. 18 U.S.C. § 3292(a)(1) (emphasis added). The use of the definite article “the” in reference to these singular nouns suggests that Congress was referring to a “discrete” statute of limitations applicable to a “discrete” offense. *Niz-Chavez v. Garland*, 593 U.S. 155, 166 (2021); *Gyetvay*, 149 F.4th at 1227. Thus, if the district court finds that evidence of an offense—i.e., a course of conduct in violation of a particular statutory prohibition—is located in a foreign country and that an official request has been made for such evidence, then its order granting the government’s application tolls the running of the statute of limitations for that offense and that offense only.

We do not agree with So, however, that the failure to cite 18 U.S.C. § 371 (or otherwise list his charged offense by name) necessarily precludes tolling of that offense. There is no formal requirement in the statute that either the government or the district court enumerate by name or citation the offenses for which tolling is sought and ordered, and “[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.” *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, 605 U.S. 223, 234 (2025) (quoting *Jama v. ICE*, 543 U.S. 335, 341 (2005)). At the same time, we do not agree with the government’s atextual argument that an order granting a tolling application that describes one offense necessarily tolls all other offenses that are “intimately related” to the described offense. *Contra Swartzendruber*, 2009 WL

485144, at *5. The text of the statute does not contain this rule, and “absent provisions cannot be supplied by the courts.” *See Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) (brackets omitted) (quoting Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012)). Instead, we determine the legal effect of a tolling order the same way that we determine the legal effect of any other written instrument: through interpretation and construction of its terms.

B

We begin with general principles. “Court orders are construed like other written instruments, except that the determining factor is not the intent of the parties, but that of the issuing court.” *United States v. Spallone*, 399 F.3d 415, 424 (2d Cir. 2005). We look first to the text of an order to discern its content, and may resort to other parts of the record to resolve any ambiguities in the language of the text. 56 Am. Jur. 2d *Motions, Rules, and Orders* § 48; 60 C.J.S. *Motions and Orders* § 74. “Ambiguity in an order may arise from what is excluded from, as well as what is included in, the four corners of a paper.” *Anderson v. Stephens*, 875 F.2d 76, 80 (4th Cir. 1989) (per curiam). Moreover, a court order generally “will not be construed as going beyond the motion in pursuance of which the order was made, for a court is presumed not to intend to grant relief which was not demanded.” *Spallone*, 399 F.3d at 424 (quoting *Harrigan v. Mason & Winograd, Inc.*, 397 A.2d 514, 516 (R.I. 1979)); accord *Mayor of Vicksburg v. Henson*, 231 U.S. 259, 269 (1913). In the same vein, we presume, in the absence of a clear indication to the contrary, that an order has been issued in conformity to the provision of law that authorizes its issuance. *SEC v. Worthen*, 98 F.3d 480, 483 (9th Cir. 1996); *United States v. Cervantes-Valenzuela*, 931 F.2d 27, 29 (9th

Cir. 1991) (per curiam). Finally, the effect of a court order is determined by its substance and function, not mere matters of form. 56 Am. Jur. 2d *Motions, Rules, and Orders* § 48; *Union of Pro. Airmen v. Alaska Aeronautical Indus., Inc.*, 625 F.2d 881, 883 (9th Cir. 1980). “Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” Fed. R. Crim. P. 52(a); *see also* 28 U.S.C. § 2111.

We next consider the decretal language of the order, which states: “the running of the statute of limitations for the offenses set forth in the government’s ex parte application is hereby suspended for the period authorized by 18 U.S.C. [§] 3292(c).” This decree was accompanied by the two findings required for tolling: (1) “The United States, through the Department of Justice, Office of International Affairs, made an official request, . . . to the Republic of Korea on or about July 11, 2017,” and (2) “It reasonably appears, based on a preponderance of evidence presented to the Court, that evidence of the offenses under investigation is located in the Republic of Korea.” *See* 18 U.S.C. § 3292(a)(1). Accordingly, the salient question is whether So’s charged offense was one of the offenses the district court was referring to when it spoke of “the offenses set forth in the government’s ex parte application” and “the offenses under investigation.”

To answer that question, we must look to other parts of the order, the application on which it was based, and the evidence that formed the basis of the district court’s order. In its order, the district court made the following relevant finding:

A Grand Jury impaneled in the Central District of California has been conducting an

investigation into allegations involving bribery, in violation of 18 U.S.C. § 1952; wire fraud, in violation of 18 U.S.C. § 1343; honest services fraud, in violation of 18 U.S.C. § 1346; unlicensed money transmissions, in violation of 18 U.S.C. § 1960; and money laundering, in violation of 18 U.S.C. § 1956. No indictment has been returned.

This finding corresponds with the following relevant language in the government's application:

[T]he United States seeks to suspend the running of the statute of limitations for offenses arising out of the grand jury's investigation of SO . . . and others, for bribery, in violation of 18 U.S.C. § 1952; wire fraud, in violation of 18 U.S.C. § 1343; honest services fraud, in violation of 18 U.S.C. § 1346; unlicensed money transmissions, in violation of 18 U.S.C. § 1960; and money laundering, in violation of 18 U.S.C. § 1956.

Although there may be situations where the enumeration of specific statutory prohibitions in a tolling order implies that no offenses in violation of other prohibitions are tolled, we do not think that is what the district court intended here. *Cf. Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (explaining that the *expressio unius* canon only has force when there is an indication “that items not mentioned were excluded by deliberate choice, not inadvertence”). For instance, had the government sought tolling with respect to

six distinct offenses, each corresponding to a separate statutory prohibition, and the district court's order listed only five statutory prohibitions when identifying the offenses tolled, the natural inference would be that the offense corresponding to the excluded statute falls outside of the tolling order's scope. By contrast, the order here tracked the offenses listed in the government's application one-for-one, thus evincing an intent to grant the government's application in its entirety. This conclusion is further reinforced by the district court's adoption of the government's proposed order without substantive change.

Rather than the product of a deliberate exclusion, the omission of any mention of conspiracy or federal funds bribery appears to be the result of a misimpression by the government's attorney about which statute So's conduct violated.⁵ And as in other contexts, we determine an offense's identity not by its label, but by its substantive description. For instance, the Supreme Court has long said that "[i]n order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the

⁵ This misimpression is clear from the statement in the application and the order that the grand jury was investigating "bribery, in violation of 18 U.S.C. § 1952." Section 1952, otherwise known as the Travel Act, does not prohibit bribery per se. A Travel Act violation consists of traveling in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce with intent to facilitate or engage in certain specified forms of "unlawful activity." See 18 U.S.C. § 1952(a); *United States v. Dailey*, 941 F.3d 1183, 1190 (9th Cir. 2019). "[B]ribery . . . in violation of the laws of the State in which committed or of the United States" is one of the forms of "unlawful activity" to which the statute's prohibition applies. 18 U.S.C. § 1952(b)(i)(2). Bribery by itself therefore does not necessarily constitute a violation of § 1952.

charge is immaterial.” *United States v. Hutcheson*, 312 U.S. 219, 229 (1941). Instead, the court “must look to the indictment itself, and, if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute.” *Williams v. United States*, 168 U.S. 382, 389 (1897); *see also United States v. Gordon*, 641 F.2d 1281, 1287 (9th Cir. 1981) (collecting cases reaffirming this principle). By way of analogy, to determine whether So’s charged offense was tolled by the district court’s order, which granted the government’s application in its entirety, we must examine the essential facts of the offense alleged in the indictment and determine whether that offense was substantively described in the government’s application for tolling.

The offense of conspiracy has three elements: “(1) an agreement to accomplish an illegal objective, (2) one or more overt acts in furtherance of the illegal objective and (3) the requisite intent necessary to commit the underlying substantive offense.” *United States v. Arbelaez*, 812 F.2d 530, 534 (9th Cir. 1987) (per curiam). On the first element, the indictment alleged that “Defendant SO promised [Lee] that [Woo Kyung M.I.T.] would win the Contract [from GM] if [Lee] gave \$5 million to defendant SO in ‘cash.’” On the second element, the indictment alleged that So committed various acts in furtherance of this illegal objective, including that “[o]n December 8, 2015, at a meeting with [GM] executives, defendant SO formally recommended that the Contract be awarded to [Woo Kyung M.I.T.].” And on the third element, the indictment alleged that “the parties knew and understood” that the \$5 million “was a bribe to obtain the Contract” from GM, facts which evince the requisite

intent to commit the underlying substantive offense of federal funds bribery. *See* 18 U.S.C. § 666(a)(1)(B) (“intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of [a covered] organization”).

All the essential facts for the elements of conspiracy are also described in the tolling application. The application stated that “SO demanded a bribe to ensure that LEE’s company was selected as the supplier for a [supply] contract with GM,” that Lee “paid a bribe to SO to secure [the] contract,” and that “SO recommended [Woo Kyung M.I.T.] as the supplier for a GM contract in 2015.” Thus, the application described an agreement to accomplish an illegal objective, an overt act committed by So in furtherance of that objective, and the requisite intent necessary to commit the underlying substantive offense of federal funds bribery—the essential facts of conspiracy, So’s charged offense. Moreover, the application also provided additional details about the offense that correspond to the other facts alleged in the indictment, such as the use of hawala brokers in Los Angeles to transfer the bribe money from South Korea to the United States, details about how the money was handed over to So, and the dates on which certain overt acts in furtherance of the conspiracy occurred. And the missing items of evidence that supplied the basis for the government’s application—certified copies of the Busan Reports—are clearly material to proving the conspiracy. We therefore conclude that the charged offense of conspiracy to commit federal funds bribery was one of the offenses for which tolling was sought and ordered and that the erroneous label placed on that offense did not affect So’s substantial rights.

III

Because we conclude that the tolling order embraces the charged offense of conspiracy to commit federal funds bribery, the timeliness of the indictment depends on how long the statute of limitations was tolled by that order.

The key fact for determining the length of the suspension period is the date when the South Korean government took “final action” on the official request. This date is relevant in two respects. First, the initial calculation for the suspension period depends on the length of time from “the date on which the official request is made” to “the date on which the foreign court or authority takes final action on the request.” 18 U.S.C. § 3292(b). Second, if the foreign government took “final action” prior to the expiration of the natural limitations period, then the statute of limitations may be suspended for no more than six months; otherwise, it may be suspended for a maximum of three years. 18 U.S.C. § 3292(c).

The official request to the South Korean government was made on July 11, 2017. Absent tolling, the limitations period for So’s offense would have expired on December 21, 2020. *See* 18 U.S.C. §§ 371, 3282(a). The indictment charging So with federal funds bribery was returned on March 23, 2022. Thus, if “final action” on the official request took place prior to December 21, 2020, then the indictment against So—fifteen months later—was untimely.

So argues that “final action” took place either on April 16, 2019, when South Korean officials produced over 3,200 documents responsive to the government’s MLAT request, or on November 30, 2020, when South Korean officials informed the government that they had “no data” on the missing Busan Reports. We disagree. Under § 3292, “final action” on an official request only occurs when the foreign

government sends “a dispositive response to each item set out in the official request.” *United States v. Bischel*, 61 F.3d 1429, 1433 (9th Cir. 1995). And here, South Korean officials were still making efforts to produce certificates of authenticity for the Busan Reports in July 2021, which strongly indicates that prior responses were not dispositive as to that category of evidence. Accordingly, the district court did not err in denying So’s motion to dismiss on timeliness grounds.

A

The resolution of the parties’ dispute on “final action” turns on what makes a foreign government’s response to an official request “dispositive.” *Bischel*, 61 F.3d at 1433. The parties’ disagreement tracks a split of authority between the Fifth and Eleventh Circuits. So contends that a foreign government’s response is dispositive “when the foreign government believes it has completed its engagement and communicates that belief to our government.” *United States v. Meador*, 138 F.3d 986, 992 (5th Cir. 1998). The government contends that the finality of a foreign government’s response depends not on the “subjective” belief of the foreign government at the time of its response, but on an “objective” assessment of whether each item in the request has received a definitive yes or no. *United States v. Torres*, 318 F.3d 1058, 1063 (11th Cir. 2003).

Although we have not yet explicitly addressed the proper perspective for determining finality under § 3292, this question is effectively resolved by our decision in *Bischel*. In that case, the defendant had been charged and convicted of various offenses involving British commodity brokers. 61 F.3d at 1431. The U.S. government accordingly made an official request to the United Kingdom for “bank records,

records of precious metals trading activity, and certification of the authenticity of the records by an English court,” and obtained a corresponding tolling order under § 3292. *Id.* at 1431–32. Almost two years after the request was made, and after the natural statute of limitations had expired, U.K. officials produced the requested records, but not the certificates of authenticity. *Id.* at 1432. Consequently, discussions between U.S. and U.K. authorities about the certificates of authenticity “continued after the records were received and through the time of the indictment on July 30, 1992.” *Id.* at 1434.

In light of these continued discussions, we held that “the district court could reasonably have found that [when the substantive evidence was produced] British officials had not yet finally decided whether to comply with the United States’s request for a certification of authenticity.” *Id.* The necessary implication of this holding is that finality is determined by examining the substance of the foreign government’s response in reference to the official request for evidence and determining whether the foreign government has either produced the items requested or definitively indicated that it cannot or will not produce those items. The communicative intent of the foreign government is relevant only on an item-by-item basis, not as to the finality of a response on the whole. *Contra Meador*, 138 F.3d at 992.

We addressed a similar issue in *United States v. Hagege*, 437 F.3d 943 (9th Cir. 2006). In that case, the official MLAT request asked that Israeli officials initially produce uncertified copies of documentary evidence so that the government could have that evidence “as quickly as possible for use in the pending investigation.” *Id.* at 947. The official request also asked that, “when the time for trial in the United States approaches,” the Israeli officials produce “some or all

of the non-certified evidence . . . in certified form.” *Id.* In June 2002, the Israeli government produced uncertified copies of the documents, and the letter accompanying this production stated that “[t]he above captioned request was executed” and that “in the future, should you need certified copies of the bank statements please let me know.” *Id.* (alteration in original).

The defendant contended that this response—particularly the statement that the production of the uncertified documents “executed” the request—demonstrated that the scope of the official request did not include certification of the documents. *Id.* at 954. We rejected this contention, however, reasoning that the defendant’s theory “would turn application of § 3292 on ‘the subjective opinion of foreign countries—whether correct or not—rather than on an objective assessment’ of the scope of an official request.” *Id.* (quoting *Torres*, 318 F.3d at 1063). And after concluding that the district court did not err in construing the MLAT request to include a future request for certification, we held that the June 2002 response could not constitute “final action” on the request because “[a]t this point, the Israeli government had not provided the certificate of authenticity, nor had it indicated it would not comply with the request for certification.” *Id.* at 955–56. Like with *Bischel*, the interpretation of both the official request and the foreign government’s responses was an “objective” assessment; the only part of the analysis that depended on the “subjective” intent of the foreign government was the assessment of its continuing willingness to comply with the official request. Accordingly, So’s argument is foreclosed by circuit precedent.

B

To determine when South Korean officials took “final action” on the July 2017 MLAT request, we must first look to the categories of evidence sought by that request. As noted above, the U.S. officials requested six categories of substantive evidence and two different types of authentication for such evidence. Accordingly, “final action” on this request occurred when South Korean officials provided a definitive response on all eight items in the request. *Bischel*, 61 F.3d at 1433–34.

By April 2019, South Korean officials had provided a dispositive answer on almost all items in the request. The only point of contention involves the Busan Reports, a subset of the item in the request labeled “Records Seized During Search Warrants.” Uncertified copies of those reports were provided by South Korean officials in early 2018. Those reports were not included, however, in the April 2019 production of certified records and materials. As a result, even though the government had all the substantive evidence that had been requested, it was missing certification of “the chain of custody for [such] materials . . . seized during the course of Korea’s investigation.”

Because the government was missing certification of authenticity for the Busan Reports, the April 2019 response can only be considered “dispositive” if the facts indicate that South Korea had “finally decided [not] to comply” with that aspect of the MLAT request. *Bischel*, 61 F.3d at 1434. And the facts here indicate that no such final decision had been made—a response that is incomplete due to an inadvertent omission is not “dispositive” as to the missing items. *Torres*, 318 F.3d at 1065; *Hagege*, 437 F.3d at 954–56. As in *Bischel*, discussions between U.S. and South Korean

authorities continued after the April 2019 response, and South Korean officials made an effort to search for the reports when prompted by U.S. officials. These facts indicate a continuing willingness to comply with the request.

The November 2020 response is likewise not dispositive. To be sure, had the U.S. government been missing the Busan Reports themselves, South Korea's response that it had "no data" on the reports, would likely have qualified as a dispositive answer about its inability to locate and produce such evidence. But because the U.S. government already had copies of the reports and merely needed certification of their authenticity, the November 2020 response did not completely dispose of the official request. Indeed, South Korean officials later proposed an alternative method of certifying authenticity after further discussions between the countries in 2021, which demonstrates that South Korea had not yet made a final decision in November 2020 about whether to comply with the outstanding items in the request. *Bischel*, 61 F.3d at 1434.

Therefore, the October 2021 letter, in which South Korean officials informed the government they had no way to certify the authenticity of the Busan Reports, is the only response that could be considered "final action" on the 2017 MLAT request. Because such action occurred after the expiration of the natural limitations period and more than three years after the official request was made, the statute of limitations for So's charged offense was extended until December 21, 2023. *See* 18 U.S.C. § 3292(c). Accordingly, the district court did not err in denying So's motion to dismiss.

IV

So's final argument is that the district court erred in failing to instruct the jury on his statute-of-limitations defense. In So's view, because the determination of what constitutes "final action" for purposes of § 3292 is a mixed question of law and fact, *see Torres*, 318 F.3d at 1061, this question fell within the exclusive province of the jury. *Cf. United States v. Gaudin*, 515 U.S. 506, 512 (1995) ("[T]he application-of-legal-standard-to-fact sort of question . . . , commonly called a 'mixed question of law and fact,' has typically been resolved by juries.").

So is mistaken about what questions must be submitted to the jury. It is the exclusive province of the jury to determine "the facts of the offense" relevant to guilt or innocence—i.e., the facts constituting the essential elements of the crime. *Alleyne v. United States*, 570 U.S. 99, 107–08 (2013); *Gaudin*, 515 U.S. at 511; *see also Apprendi v. New Jersey*, 530 U.S. 466, 476–81 (2000) (explaining that the facts of the offense for purposes of the Sixth Amendment include "any fact (other than prior conviction) that increases the maximum penalty" (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999))). But factual disputes that do not concern the elements of the offense may properly be resolved by the court without violating the defendant's right to trial by jury. *See, e.g., United States v. O'Brien*, 560 U.S. 218, 224 (2010) (stating that sentencing factors "can be proved to a judge" rather than a jury); *Jackson v. Denno*, 378 U.S. 368, 388–91, 391 n.19 (1964) (explaining that the voluntariness of a confession cannot be resolved by the trial jury, but may be resolved by "the trial judge, another judge, or another jury" as a jurisdiction sees fit).

Timeliness defenses do not necessarily fall within the jury's exclusive province. Although the crime being committed within the limitations period is undoubtedly a "predicate to a conviction," the timeliness of the indictment is not, strictly speaking, an "element of the crime." *Renderos v. Ryan*, 469 F.3d 788, 796 (9th Cir. 2006). Whether a statute-of-limitations defense must go to the jury thus depends on whether the merits of that defense turn on the facts of the offense conduct. For instance, "[t]he duration of a conspiracy for purposes of the statute of limitations is a fact question for the jury" because it concerns the timing of events that are part of the offense. *United States v. Walker*, 653 F.2d 1343, 1346 n.6 (9th Cir. 1981). By contrast, whether a defendant was "fleeing from justice" may be determined by the court—the defendant's actions and intent in keeping himself away from federal officials are unrelated to the commission of the offense for which he was trying to evade punishment. *United States v. Gonsalves*, 675 F.2d 1050, 1053–54 (9th Cir. 1982).

The question of when "final action" on the MLAT request occurred falls into the latter category. The only actions relevant to this determination are the actions of the U.S. officials requesting the evidence and the foreign officials responding to that request; no facts that constitute part of the commission of the offense are implicated. *See Bischel*, 61 F.3d at 1433–34. Thus, even though the question of when "final action" occurred is a mixed question of law and fact, it is nonetheless a question a judge may decide. Accordingly, the district court did not err in refusing to instruct the jury on this question.

AFFIRMED.

LEE, Circuit Judge, dissenting.

Before an indictment is returned, federal prosecutors can ex parte seek to suspend the statute of limitations for “the offense” being investigated if relevant evidence remains in a foreign country. 18 U.S.C. § 3292.

The problem here is that the federal government in its ex parte application never specified “the offense”—conspiracy to commit offense or to defraud United States under 18 U.S.C. § 371—that became the basis of the guilty verdict. Instead, the government listed five other offenses that were never charged. Based on the government’s application, the district court tolled the statute of limitations for those five offenses only—but not the actual offense that defendant Brian So committed.

We must apply the law as written by Congress: Section 3292 requires the government to specify “the offense” for which it wants the statute of limitations tolled. While I agree with the majority that Section 3292 does not require a specific U.S. Code citation, the government must provide sufficient information for the court to understand which offense is at issue. Nothing in the government’s application or the court order suggests that “the offense” being tolled was the conspiracy to defraud the United States. I reluctantly believe that So’s conviction must be overturned. I respectfully dissent.

* * * *

We must start, as always, with the text of the statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (“As in all statutory construction cases, we begin with the language of the statute”). And words “are to be given the meaning that proper grammar and usage would assign

them.” Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012).

The relevant tolling provision reads as follows:

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.

18 U.S.C. § 3292(a)(1) (emphasis added). The use of the definite article “the” in “the offense” suggests that it must refer to a particular criminal code provision. *See Niz-Chavez v. Garland*, 593 U.S. 155, 166 (2021) (noting that “a definite article with a singular noun” means a “discrete thing” in discussing the term “the notice”). Indeed, Congress knows how to craft a broader tolling statutory provision if it wants to do so. *Cf.* 18 U.S.C. § 3287 (tolling “*any* offense [] involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not”) (emphasis added).

The majority opinion thus correctly holds that “the offense” in Section 3292 means “a criminal violation with separate elements of proof, not a single transaction.” I also agree with the majority that the statute does not require the

government to list a statutory citation or the formal name of the offense. We, however, part ways on what then must be shown by the government. Given the statutory text, I believe that the government must provide sufficient information for the district court to determine what “the offense” is. *United States v. Gyetvay*, 149 F. 4th 1213, 1228 (ruling that § 3292 requires the government to “make clear to the judge to whom the application is presented which charges the government seeks to be tolled”).

The prosecutors did not meet the statutory requirement of identifying “the offense” that they sought to toll. So, a General Motors supply-chain manager, had solicited a \$5 million bribe from a South Korean manufacturing company that hoped to notch a large GM contract. After years of investigation, So was charged with and convicted of “conspiracy to commit offense or to defraud United States.” 18 U.S.C. § 371. But the government’s *ex parte* application to toll the statute of limitations never referred to 18 U.S.C. § 371 or the conspiracy charge. Instead, it stated:

Pursuant to Title 18, United States Code, Section 3292, the United States seeks to suspend the running of the statute of limitations for offenses arising out of the grand jury’s investigation . . . for bribery, in violation of 18 U.S.C. § 1952; wire fraud, in violation of 18 U.S.C. § 1345; honest services fraud, in violation of 18 U.S.C. § 1346; unlicensed money transmissions, in

violation of 18 U.S.C. § 1960; and money laundering, in violation of 18 U.S.C. § 1956.

Nowhere in the *ex parte* application did the government state that it wanted to suspend the statute of limitations for the conspiracy to defraud the United States in violation of 18 U.S.C. § 371. Nothing in the record suggests that the government could not have pursued this charge at the time it submitted its *ex parte* application. Nor is there anything indicating that the government somehow learned something new between the time it submitted this application and when So was indicted. The government made the deliberate choice to list only these five offenses in its *ex parte* application and to omit the conspiracy charge.

Based on the government's representations, the district court granted the request, stating that “the running of the statute of limitations for *the offenses set forth in the government's ex parte application is hereby suspended[.]*” In short, the district court's order only suspended the statute of limitations for those five offenses listed by the government. Despite being aware that the court had only suspended the statute of limitations for the five offenses listed in its *ex parte* application, the government did *not* obtain an indictment on those five offenses—and instead prosecuted So on an offense that was not tolled.

The majority opinion contends that the factual bases for the elements of the conspiracy charge are essentially covered in the indictment and the tolling application, so we should construe the application as effectively including the conspiracy charge. To be sure, these five offenses are substantively similar to the conspiracy to defraud the United States offense, as they arise out of the same criminal activity engineered by So. But the word “offense” means “a criminal

violation with separate elements of proof, not a single criminal transaction.” *Miranda v. Anchondo*, 684 F.3d 844, 851 (9th Cir. 2012). The fact that the conspiracy charge arises out of the same criminal transaction as the other five listed offenses does not excuse the government from its statutory duty to list each “offense” that it seeks to toll the statute of limitations.

In *United States v. Gyetvay*, the Eleventh Circuit rejected the holistic factual approach advocated by the majority. 149 F.4th at 1213. The issue there was whether the statute of limitations for the failure to file federal income tax returns had been tolled where the application did not list that offense, even though the ex parte application included similar charges such as “tax evasion,” “filing false tax returns,” “impeding the due administration of the Internal Revenue laws,” and “conspiracy to defraud the United States.” *Id.* at 1225. The government argued that the application had “described the grand jury’s investigation of multiple offenses, including the defendant’s ‘potential failure to report all income earned.’” *Id.* at 1227. The Eleventh Circuit rejected that argument because “the specific offense [that the defendant was indicted on] was not mentioned in the government’s application” and thus “the government did not satisfy the requirements of § 3292(a)(1).” *Id.* at 1229. So, too, here—the government did not meet the requirements that the plain statutory text mandates.

The majority also argues that the omission of the bribery charge may have been “the result of a misimpression by the government’s attorney about which statute So’s conduct violated” and that “error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” Fed. R. Crim. P. 52(a). But this is no mere scrivener’s or clerical

error that we can cast aside in favor of the substance. The government here cited five substantive offenses and omitted the substantive offense that was prosecuted. Absent evidence showing a clerical-type error led to this omission, I do not think we can even consider letting the government off the hook in failing to follow the statutory requirements.

To be clear, the equities in this case do not favor So. He was found guilty of engaging in a bribery conspiracy that undermined our laws and eroded the integrity of our market system. He also cannot genuinely complain that evidence was tainted or lost by any purported extension of the statute of limitations. But I believe the statutory text compels a reversal here. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (noting the Court’s unwillingness to “soften the import of Congress’ chosen words”).

I respectfully dissent.