

Case No. 1:20-cr-24

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF STETSON
WESTVIEW DIVISION
Aug. 30, 2021

THE UNITED STATES OF AMERICA,

Prosecution,

-against

WANDA MAXIMOFF,

Defendant.

**PROSECUTION'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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INTRODUCTION

The Motion to Dismiss the Indictment should not be granted because of the extraordinary circumstances surrounding it. The Government properly filed an Information alleging that the defendant, Wanda Maximoff violated the Immigration and Nationality Act (“INA”). The Government was forced to dismiss the Information on July 23rd, 2020 due to the ongoing effects of the COVID-19 global pandemic and the suspension of grand juries. An Indictment against the defendant was promptly filed once the suspension of grand juries was lifted. On September 21st, 2021 a Grand Jury indicted the defendant for violating the INA under 18 U.S.C. §3288. This indictment was timely and proper. Additionally, the Government is entitled to equitable tolling of the statute of limitations due to the extraordinary and unprecedented nature of the COVID-19 pandemic at the time of the dismissal of the original Information. Accordingly, the Motion to Dismiss the Indictment should not be granted.

STATEMENT OF FACTS

Between May 31, 2007, and July 24, 2010, in the District of Stetson, the defendant, Wanda Maximoff, conspired to knowingly encourage and induce eight aliens to reside in the United States. (Indictment of Wanda Maximoff, dated Sept. 21, 2021 (“Indict.”), at ¶ 2). An investigation was opened up in 2018 when a former client of the law firm the defendant had previously worked at was

discovered with an illegal Stetson Driver's License from 2008. (Affidavit in Support of Information, dated July 22, 2020 ("Aff. Woo"), at ¶ 2, 5). Jimmy Woo, a Special Agent with the United States Department of Homeland Security ("DHS"), headed the investigation into the potential violation of the Immigration and Nationality Act. (Aff. Woo at ¶ 1, 1). During his investigation, Woo discovered that while the defendant was working at the immigration law office, several of the firm's clients obtained forged documentation. (Aff. Woo at ¶ 7, 29). Based on the defendant's tax returns and unaccounted for substantial cash deposits during 2007- 2010, Woo concluded that the clients who received fraudulent immigration documents were paying the defendant. (Aff. Woo at ¶ 7, 26-29). The earliest payment, by a former client, was made to the defendant on May 31, 2007, and the latest payment being made on July 24, 2010. (Aff. Woo at ¶ 7, 29).

Based on the facts from the investigation the Government filed an Information on July 22, 2020, 2 days before the statute of limitations running out on July 24, 2020. (Initial Appearance Transcript, dated Sept. 23, 2021 ("Int. App."), at ¶ 5, 58). The Information was dismissed without prejudice due to the unprecedented suspension of grand juries because of the COVID-19 global pandemic. (Int. App. at ¶ 5, 59-62). Once Administrative Order No. 21-008 lifted that suspension, on March 29, 2021, the government promptly filed an Indictment. (Int. App. at ¶ 5, 63-65).

On September 21, 2021, the defendant was indicted by a Grand Jury for violating the Immigration and Nationality Act. (Indict. at ¶ 2). The Grand Jury found that the defendant acted with reckless disregard for the fact that it is illegal, the defendant created fraudulent documents to help aliens, who were ineligible to obtain an OSUP, stay in the United States. (Indict. at ¶ 2). These documents included Stetson Driver’s Licenses and Employment Authorization Cards. (Indict. at ¶ 3). The defendant did not waive her right to an Indictment. (Int. App. at ¶ 5, 71)

Following the Indictment, the defendant was arrested at her home on September 23, 2021. (Supplemental Declaration of Agent Woo, dated Sept. 24, 2021 (“Woo Decl.”) at ¶ 1, 1).

ARGUMENT

I. THE INDICTMENT AGAINST THE DEFENDANT WAS TIMELY UNDER 18 U.S.C. §3288/§3298.

The Indictment is clearly within the statute of limitations following the timely filing of an Information against the defendant under 18 U.S.C. §3288. §3288 states “if no regular grand jury is in session in the appropriate jurisdiction when the Indictment or Information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by a statute of limitations.” 18 U.S.C. §3288. The Government clearly and timely sought an indictment within the six months limitation as set forth by 18

U.S.C. §3288. Further, the Government’s filing of an Information was properly instituted regardless of whether or not there was prosecution on the charge against the defendant. There is nothing in the statutory language of §3282/3298 that states ‘a prosecution’, rather than the Information, must be instituted before the expiration of the 5 year period. *U.S. v. Rosecan*, 20-CR-80052, 2021 WL 1026070 (S.D. Fla. Mar. 17, 2021). Additionally, although a waiver is necessary to proceed with prosecution, it is not the case that a waiver is needed to file an information. *Id.* at 3. The Government is within its clear legal rights to file an information without a waiver, as “institute” and “prosecute” are not equivalent terms.

A. No Grand Jury was in Session when Information was Dismissed, the Government Timely Sought an Indictment to Comply with 18 U.S.C. §3288.

The Indictment is clearly within the statute of limitations following the timely filing of an Information against the defendant under 18 U.S.C. §3288. On March 23th 2020, the grand jury was suspended as a result of COVID-19. (Int. App. at ¶ 5, 59-62). It was not until March 29th, 2021 in Administrative Order No. 21-008 that the Court lifted that suspension. (Int. App. at ¶ 5, 63) After the court lifted the grand jury suspension, the Government timely and promptly sought an Indictment by the Grand Jury within six months to comply with 18 U.S.C. §3288. (Int. App. at ¶ 5, 64-65). Thus, in this case, COVID-19 forced the suspension of the grand jury convening and therefore directly caused the dismissal of the Indictment

against the defendant.¹ However, once Administrative Order 21-008 reconvened the grand jury, the Government timely and promptly sought an indictment within six months to comply with 18 U.S.C. §3288.

Despite the Information being dismissed before the statute of limitations had run, 18 U.S.C. §3288 clearly states that if no grand jury is convened, a new indictment shall not be barred by any statute of limitations.

Because 18 U.S.C. §3288 requires the Government to seek an indictment within six months following a grand jury suspension, and the Government clearly and sufficiently did so in this case, there is no reason why the Government's Indictment against the defendant should be considered untimely.

B. An Information was Properly Instituted Before the Expiration of the Statute of Limitations Under 18 U.S.C. §3282/§3298.

The Government's filing of an Information was properly instituted regardless of whether or not there was prosecution on the charge against the defendant. 18 U.S.C. §3298 states that "No person shall be prosecuted, tried, or punished ...under 274(a) of the Immigration and Nationality Act unless the indictment is found or the information is *instituted* not later than 10 years after the commission of the offense."

¹ The Government acknowledges that the Order on Initial Appearance dated January 21st, 2021, limits the scope on issues to be argued before the court. The issues are "(1) whether the Indictment was timely returned in view of §§3288, 3298; and (2) whether the Government is otherwise entitled to any equitable tolling of a criminal statute of limitations." However, the Government reserves the right to seek all available remedies under 18 U.S.C. §3289. The Government dismissed the Information against the defendant before the statute of limitations and § 3289 deals with the extension of the statute of limitations on information dismissed before the limitations period has ended.

There is nothing in the statutory language of §3282/3298 that states ‘a prosecution’, rather than the information, must be instituted before the expiration of the 5 year period. *U.S. v. Rosecan*. In *Rosecan*, the defendant argues that the information filed by the Government was not properly “instituted” because it was not accompanied by a waiver of indictment and therefore was insufficient to begin prosecution within the statute of limitations. *Id.* at 2. However, the court held that the terms “prosecuted” and “instituted” are not equivalent and regardless of the presence of a waiver, an information is properly instituted when it is filed. *Id.* at 3. Similar to the defendant in *Rosecan* who did not sign a waiver, defendant Maximoff did not sign a waiver of the indictment. However, like the Court in the *Roescan* who found the Information was properly instituted because it was properly filed here the Government properly filed an Information. Therefore, the Government’s filing of the Information against the defendant was properly “instituted” regardless of whether or not there was prosecution on the charge against her.

If the statute’s language is clear, there is no need to go beyond the statute’s plain language into legislative history. *United States v. Noel* 893 F.3d 1294, 1297 (11th Cir. 2018). In *Noel*, the court holds that in construing the language of a statute, “we begin where all such inquiries must begin: with the language of the statute itself.” *Id.* at 1297. Further, “if the statute's language is clear, there is no

need to go beyond the statute's plain language into legislative history.” *Id.* at 1297. Therefore, when interpreting the meaning of §3298 and §3282, the Government must first look at the statute’s language before delving into legislative history. The language in §3298/§3282 is clear as there is nothing in the language to imply “institute” ought to be equivalent to “prosecute”.

1. The Absence of a Waiver of Indictment Does Not Void the Filing of An Information.

Filing an information without a waiver does not make it void. *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998). In *Burdix-Dana*, the defendant, similarly to Maximoff, argues that in a felony proceeding under the Federal Rules of Criminal Procedure 7(b), an information is not “instituted” unless the defendant has waived her right to an indictment and prosecution may proceed based on the information. *Id.* at 742. However, the court states that “while we recognize that the absence of a valid waiver of prosecution by indictment bars the acceptance of a guilty plea or a trial on the relevant charges, see Fed.R.Crim.P. 7(b), we do not believe that the absence of this waiver makes the filing of an information a nullity.” *Id.* Rule 7(b) does not forbid filing an information without a waiver; it simply establishes that prosecution may not proceed without a valid waiver.” *Id.*

Despite there being no possibility for prosecution on the waiver less charge against the defendant, the Government’s filing of an Information without a waiver of the indictment is beyond sufficient to institute that information.

II. THE GOVERNMENT IS ENTITLED TO EQUITABLE TOLLING OF A CRIMINAL STATUTE OF LIMITATIONS.

The Government is entitled to equitable tolling of the 10-year statute of limitations due to the District's suspension of the grand jury during the unprecedented COVID-19 pandemic. Equitable tolling allows a petitioner to bring suit after the statutory period has expired if "extraordinary circumstances" outside of their control made it impossible to timely assert a claim. *Dolinska-Madura v. Countrywide Home Loans, Inc.*, No. 8:06-cv-2073-T-24TBM, 2008 U.S. Dist. LEXIS 126931, at *19 (M.D. Fla. June 17, 2008). Criminal statutes of limitations are subject to tolling, suspension, and waiver. *United States v. Levine*, 658 F.2d 113, 119-121 (3d Cir. 1981). Although the doctrine of equitable tolling is most typically applied to limitation periods on civil actions, "there is no reason to distinguish between the rights protected by criminal and civil statutes of limitations." *U.S. v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998), (quoting *Powers v. Southland Corp.*, 4 F.3d 223, 233 (3d Cir. 1993)).

Petitioners are entitled to equitable tolling if they can demonstrate: (1) that they have pursued their rights "diligently", and (2) that some "extraordinary circumstance" prevented timely filing. *Holland v. Florida*, 130 S. Ct. 2549, 2552 (2010). Diligence and extraordinary circumstances are separate elements that must be met before there can be any equitable tolling. *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 755 (2016) *See also, Cadet v. Fla. Dep't of Corr.*, 853 F.3d

1216, 1218 (11th Cir. 2017) (criminal case that cites directly to the elements used in the civil case *Menominee*). The exercise of a court's equity powers must be made on a case-by-case basis to grant all the relief necessary to correct particular injustices. *Holland*, 130 S. Ct. at 2552.

Here, the government is entitled to equitable tolling of the statute of limitations on the charges of defendant Maximoff violating the Immigration and Nationality Act. First, the Government has pursued their rights diligently by filing an Information on July 22, 2020. (Int. App. at ¶ 5, 58). Second, extraordinary circumstances exist due to the suspension of grand juries because of the COVID-19 Global Pandemic. (Int. App. at ¶ 5, 59-62).

A. The Government Diligently Pursued their Rights.

The Government pursued their rights diligently due to the timely filing of the Information and the filing of the Indictment within six months of the reinstatement of grand juries. Equitable tolling of a statute of limitations will be granted if the petitioner can demonstrate they pursued their rights diligently. *Holland*, 130 S. Ct. at 2552. The diligence required for equitable tolling is reasonable diligence, not maximum feasible diligence. *Downs v. McNeil*, 520 F.3d 1311, 1323 (11th Cir. 2008).

Reasonable diligence requires the effort a reasonable person would be expected to deliver under similar circumstances. *Doe v. Busby*, 661 F.3d 1001,

1015 (9th Cir. 2011). In *Doe*, the petitioner requested equitable tolling for his petition based on the fact that he continuously checked in with his attorney about the status of his petition, and when he found out his petition had actually not been filed, he submitted a new one within ten days. *Id.* at 1006. The Court held that the petitioner was entitled to equitable tolling because he diligently pursued his rights as any other reasonable person in his situation would have. *Id.* at 1015.

Here, the Government promptly filed the Information before the date the statute of limitations ran out and then filled the Indictment once grand juries were reinstated. Like the petitioner in *Doe*, who acted as any other reasonable person would by filing a new petition after learning the initial petition had not been filled, The Government has acted as another reasonable prosecutor would by filing the Indictment after our initial Information was dismissed without prejudice due to the impossibility of a grand jury. Although the Indictment was filed six months after Administrative Order No. 21-008 lifted the suspension of grand juries, it is still reasonable even if it could have been filed soon as the law does not require maximum feasible diligence. *Downs*, 520 F.3d 1311, 1323. *See also, Grant v. Swarthout*, 862 F.3d 914, 918 (9th Cir. 2017) (A literal impossibility to file is not required equitable tolling is appropriate even where "it would have technically been possible for a prisoner to file a petition," so long as the prisoner "would have

likely been unable to do so"). Thus, reasonable diligence has been taken by the prosecution, and therefore equitable tolling should be granted.

B. Extraordinary Circumstances Outside of the Government's Control Exist.

The COVID-19 Pandemic is outside of the prosecution's control and has caused delays in our ability to file an Indictment against the defendant within the 10-year statute of limitations for INA claims. Equitable tolling of a statute of limitations will be granted if the petitioner can demonstrate that some "extraordinary circumstance" outside of their control prevented timely filing.

Holland, 130 S. Ct. at 2552. When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling may be granted. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

Global pandemics can constitute an extraordinary circumstance. *Brown v. Davis*, 482 F. Supp. 3d 1049, 1058 (E.D. Cal. 2020). In *Brown*, the petitioner moved to extend the statute of limitations for their federal habeas petition due to the ongoing effects the COVID-19 pandemic will have on its timely completion notwithstanding the exercise of reasonable diligence. *Id.* at 1052. This claim is supported by the (1) states of emergency at the national, state, and local levels, (2) stay-at-home orders, (3) cancellation of prison visits and, (5) remote school. *Id.* at 1055. The Court granted equitable tolling holding that "extraordinary circumstances" brought about by the COVID-19 pandemic rendered the petitioner

presently unable to file a complete federal habeas petition before the requested, as tolled, filing deadline.” *Id.* at 1058.

Here, the suspension of grand juries due to the global COVID-19 pandemic caused an inability to file the claim against defendant Maximoff within the statute of limitations. Like the petitioner in *Brown*, who was unable to file their petition within the current statute of limitations due to a global pandemic, here the Government was unable to file our Indictment within the 10-year statute of limitations due to the suspension of grand juries as a direct result of the same COVID-19 pandemic. It was impossible for the government to file an Indictment without a grand jury as, unless waived, defendants are required by law to have a grand jury present for indictments of crimes in which they could be imprisoned for more than one year. U.S. Const. amend V. *See also*, Fed. R. Crim. P. 7(a). The charges against defendant Maximoff carry a maximum term of imprisonment for up to 10 years. 8 U.S.C. § 1324(a)(1)(A)(iv).

Even if the Information could have been filed sooner in 2020 before the onset of the pandemic caused nationwide shutdowns, it was still filed within the initial statute of limitations prior to the suspension of grand juries. (Int. App. at ¶ 5, 58). In addition, it was impossible to know how serious the COVID-19 pandemic would become when the virus was first discovered in China in 2019. Thus,

extraordinary circumstances outside of the control of the prosecution exist and therefore equitable tolling should be granted.

CONCLUSION

For the foregoing reasons, the Government respectfully requests this Court deny Defense's Motion to Dismiss the Indictment. The Indictment was (1) timely and (2) qualifies for equitable tolling. Therefore, dismissal should not be granted.

Dated: August 30, 2021

Respectfully Submitted,

/s/ TEAM 102

Attorneys for Prosecution

Team 102