Team No. 103

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF STETSON
WESTVIEW DIVISION

Case No. 1:20-cr-24

United States of America,

v.

Wanda Maximoff,
a/k/a "Scarlet"

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON LIMITATIONS GROUNDS

/s/ Team No. 103

Team No. 103
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INTRODUCTION

On September 23, 2021, Wanda Maximoff, an attorney, was arrested at the home of Monica Rambeua—Ms. Maximoff's childhood foster care parent. This arrest was for allegedly violating 8 U.S.C. § 1324(a)(1)(A)(iv) and (v). The United States (the "Government") claims Ms. Maximoff violated the statute between May 31, 2007, and July 24, 2010. Given the statute of limitations for the crime alleged against Ms. Maximoff is ten years under § 3298, Ms. Maximoff, by and through her attorney James Barnes, immediately moved to dismiss the Indictment on its face for violating the statute of limitations. In response, during Initial Appearances on the day of arrest, the government claims it satisfied the statute of limitations by filing an Information before the period expired, or that alternatively it is eligible to receive equitable tolling,

Pursuant to this Court's order, Ms. Maximoff now submits this memorandum of Law, denying the government's two theories, in support of her motion to dismiss the indictment.

STATEMENT OF FACTS

Wanda Maximoff is an American citizen, who overcame a difficult childhood—leaving the former Yugoslavia in 1982 after her parents died and being placed into an American foster care home—before becoming a successful attorney and mother. Rambeua Aff. ¶ 39. She graduated from Stetson International

University, with honors, and volunteered for a year in Germany, where she met Jarvis Odison, the father of her children. Id. at ¶ 39-40. While her children live overseas, Ms. Maximoff sends them money and sees them when she can.

Ms. Maximoff serves as policy counsel for an international medical research company, using her income to support friends and family. Id. at ¶ 40. Ms. Maximoff earned this job after graduating at the top of her law school class in 2008, and subsequently passing the bar exam on her first attempt. Id. Ms. Maximoff continues caring for her former foster mother, Monica Rambeau by driving Ms. Rambeua to medical appointments when in town and paying for Ms. Rambeau's nurse and aid care when Ms. Maximoff is away. Id. at ¶ 40-41.

While supporting her children and Ms. Rambeua, Ms. Maximoff also struggles through her own health issues. According to Dr. Darcy Lewis, M.D., Ms. Maximoff suffers from Stage 3 Moderate Chronic Kidney Disease, which has worsened and requires dialysis and doctor visits three times a week. Lewis Aff. ¶ 44. This constant medical care costs Ms. Maximoff around $1,650 per week, another expense she makes on top of supporting friends and family. Id. at 45.

The foregoing explains why it was such a surprise when Ms. Maximoff was arrested at Ms. Rambeua's house on September 23, 2021, for a sole charge that alleges a conspiracy between May 31, 2007, and July 24, 2010. Initial Appearance ¶ 30. Although the Government filed an Information against Ms. Maximoff on July

22, 2020 that was dismissed without prejudice, Ms. Maximoff was never aware of this filing and did not know of the charges against her until her arrest and thus never waived her right to an indictment under Federal Rule of Criminal Procedure 7. Initial Appearance ¶ 58-73. A subsequent indictment was not filed again by the government until September 21, 2021. Indictment.

The officers asked Ms. Maximoff about these alleged crimes and events from 2007—the year Ms. Maximoff worked diligently as a third-year law student, while simultaneously clerking for a local immigration attorney. Rambeua Aff. ¶ 41.

ARGUMENT

I. The Government should be time barred under § 3298 for submitting the indictment almost eleven years after the crime alleged against M. Maximoff.

The Government is time barred from bringing the present action as alleged in the complaint by 18 U.S.C § 3298. The applicable statute reads "No person shall be prosecuted, tried … unless the indictment is found, or the information is instituted not later than 10 years after the commission of the offense." 18 U.S.C.A 3298 (West).

The Legislative intent behind this statute is to "limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." Toussie v. United

States, 397 U.S. 112 (1970). This 10-year time period protects civilians from facing a charge that becomes increasingly more difficult to defend. More specifically, due to the accumulation of years that have passed since the crime, it becomes more difficult, if not impossible, to gather evidence and to get accurate recollections from not only the defendant but any witnesses as well. Here, the alleged crime took place between May 31, 2007, and July 24, 2010, and it involves several witnesses and multiple records that need to be cross examined and accounted for. The legislative intent behind § 3298 is to prevent exactly this, the incredibly difficult task of reaching ten to fourteen years in the past to gather information and confirm sources and aliases. This is meant to protect civilians like Ms. Maximoff from serving extended criminal punishment based off cloudy testimony and dated evidence.

It is crucial that any indictment or information filed be within the 10-year period of the statute to uphold the legislative intent behind § 3298. For example, the Northern District of Georgia found the return date of the indictment of December 21, 2016, was "well within ten years of the date alleged in the indictment relevant to this court." United States v. Romeo-Hernandez, No. 116CR00430ELRLTW4, 2019 WL 1049764, at *7 (N.D. Ga. Feb. 8, 2019) ("allege[ing] that the defendant, aided and abetted by others, for commercial advantage and financial gain, did encourage and induce an alien to come to, enter,

and reside in the United States, knowing and in reckless disregard of the fact that such residence was and would be in violation of the law"). The "date of the alleged offense (the filing date of Form I-485), January 12, 2012, as well as the initials of the alien that was purportedly induced by Defendant, aided and abetted by others, to "come to, enter, and reside in the United States." Id. In United States v. Abdi, No. 1:13-CR-00484-JEC, 2014 WL 3828165, at *3 (N.D. Ga. Aug. 4, 2014), the government conceded under § 3298 that "since the indictment at issue was returned on December 10, 2013, Abdi accurately contended that the conspiracy charge must set forth an overt act on or after December 10, 2003, to satisfy the statute of limitations."

Here, the indictment against Ms. Maximoff falls well beyond the 10-year statute of limitations set forth in § 3298 and therefore must be barred as untimely. Unlike the timely filing of the indictment in Romeo-Hernandez, the government's ability to file an indictment expired on July 24, 2020. The indictment against Ms. Maximoff is dated September 21, 2021, is therefore well outside the expiration date. The case at hand is like the proper acknowledgment of an expired indictment charging in Abdi, where an overt act on or after July 24, 2010, must have occurred to satisfy the statute of limitations.

Thus, the September 21, 2021, indictment is time barred in accordance with § 3298's statute of limitations.

A. The Government is not using § 3288 under its legislative intent and therefore should not be permitted its six-month grace period

The government should be time barred not only because their indictment was filed eleven years after the alleged crime but also because they are not using the six-month grace period under § 3288 as intended. When original charges have been dismissed, the ten-year statute of limitations under § 3288 could be extended within six calendar months of the indictment, however, courts must determine whether the extension follows the original legislative intent.

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final... 18 U.S.C.A 3288 (West).

The purpose of this statute is that "if the defendant was indicted within time, then approximately the same facts may be used for the basis of any new indictment obtained after the statute has run, if the earlier indictment runs into legal pitfalls." United States v. Marifat, No. CR 2:17-0189 WBS, 2018 WL 1806690, at *2 (E.D. Cal. Apr. 17, 2018). The purpose of statutes of limitations are to "protect individuals from having to defend themselves against charges when the basic facts may have been obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." United States v. Sorcher, 498 F. Supp. 2d 603, 607 (E.D.N.Y. 2007) Therefore, the primary concern

of the courts is "whether the defendant had notice of the charges against him, such that he knows that he "will be called to account for [his] activities and should prepare a defense." Id. "So long as the defendants may be said to have been put on notice of the criminal acts, they are alleged to have committed in order to allow them to prepare adequately a defense to the same, the protective purposes of the criminal statute of limitations will have been served." United States v. Frequency Elecs., 862 F. Supp. 834, 844 (E.D.N.Y. 1994) (reasoning that the defendants had sufficient notice of the crimes and therefore cannot argue in good faith that they did not have notice of all the charges against them). As long as the courts find that the indictment has given a defendant sufficient notice of the "core of the criminality," the government can be entitled to the six-month extension under § 3288. Sorcher, 498 F. Supp. 2d at 614. One way in which a defendant can be found to be aware of their charges is by choosing not to waive prosecution by indictment. United States of America v. Palacio, No. 21-20301-CR, 2021 WL 3518143, at *3 (S.D. Fla. July 12,2021) (reasoning that the six-month grace period under § 3288 was timely when the judge filed an order of dismissal when the defendant chose not to waive prosecution by indictment).

Here, the government has filed the indictment way past the ten-year statute of limitations and the six-month grace period under § 3288. The indictment should be barred because it was untimely submitted.

Additionally, should the court find that COVID-19 merits an additional nine-month extension, the government is not using § 3288 under its legislative intent and therefore should be time barred from the six-month grace period. Palacios exemplifies the proper use of § 3288; unlike in Ms. Maximoff's case, the government here filed the original indictment just two days before the statute of limitations of ten-years and then attempted to take advantage of the six-month grace period under § 3288. Unlike the legislative intent highlighted in Marifat, the government did not use the extension for any legal pitfalls, rather for their lack of timeliness with this matter.

Considering there has been a lapse of eleven years between the alleged crime and now, many of the basic facts may have been obscured and thus, it puts Ms. Maximoff in danger of extended prison time and fines because of acts in the "far-distant past." Unlike the previous notices to defendants in Frequency Elecs., Ms. Maximoff had no idea she could possibly be charged for these crimes until her arrest on September 23, 2021, almost eleven years after the alleged crime. Unlike the defendants in Frequency Elecs., Ms. Maximoff can argue in good faith that she never received any notice of any charge until September of 2019. Additionally, she was not able to waive indictment for the July 22, 2020, indictment because she was never put on notice and never given a choice to waive the indictment like the defendant in Sorcher.

Given Ms. Maximoff was never put on notice for the crimes charged against her until September of 2021 and the indictment was submitted in September of 2021, the government should be time barred under § 3298 and should not be entitled to the six-month extension under § 3288. Even if the court found in favor of a COVID-19 additional extension, the indictment should still be time barred because it has not used it in consideration of the original legislative intent of § 3288.

II. The Government should not be entitled to any equitable tolling of a criminal statute of limitations in its attempted prosecution of Ms. Maximoff

As an initial matter, criminal statutes of limitations serve to protect individuals from government investigations where time's passage may obfuscate clarity, and they are intended to be "liberally interpreted in favor of repose." E.g, Toussie, 397 U.S. at 114-15; United States v. Marion, 404 U.S. 307, 322 n.14 (1971). Given the government delayed indictment beyond the statute of limitations, it is now attempting to employ the judicially created equitable tolling doctrine—a doctrine, typically found in the civil context, see United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)—that permits filing beyond the statutory deadline. Courts vacillate on how frequently, and in what circumstances, this doctrine should be used. Compare Young v. United States, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are "customarily subject to 'equitable tolling,' so long

as it does not go against congressional intent), with Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002) ("Courts may evaluate whether it would be proper to apply [equitable tolling], although [it is] to be applied sparingly."). Overall, receiving this judicial remedy is rare—(1) the government must first prove equitable tolling is ever available for extending a criminal statute of limitations, and then (2) show that it is needed under this case's specific factual circumstances.

A. Government prosecutors can never receive equitable tolling when they fail to meet criminal statute of limitations deadlines

Currently, whether prosecutors can seek to equitably toll a criminal statute of limitations is unsettled. Lower courts have diverged on the topic. Compare Midgley, 142 F.3d at 179 (holding open the possibility equitable tolling could be used for criminal statute of limitations), with In re Grand Jury, 2011 WL 5834016, at *1 (D.C.C. Nov. 7, 2011) (denying any precedent exists for the government trying to toll a statute of limitations). While the Supreme Court has permitted equitable tolling in criminal cases, this occurred for a *defendant* filing for habeas corpus beyond the filing deadline, see Holland v. Florida, 560 U.S. 631, 652 (2010), aligning with prior decisions outlining how statutes of limitations are primarily instituted to protect defendants. See, e.g., Toussie, 397 U.S. at 114-15.

Given no direct precedent, equitable tolling's possible availability depends on statutory intent. See Lozano v. Montoya Alvarez, 572 U.S. 1, 10 (2014). Congressional silence on permitting tolling for 18 U.S.C. § 3288 can be evidence

of not wanting to permit that judicial remedy, see Toussie, 397 U.S. at 123, especially since Congress has implemented exceptions in the same title—Chapter 18 of the US Code—for other crimes. For example, Congress statutorily permits tolling for, among other crimes, offenses against children, 18 U.S.C. § 3283, terrorism, 18 U.S.C. § 3286, and during wartime, 18 U.S.C. § 3287. Here, § 3288's silence likely shows Congress did not intend for equitable tolling to be available.

Additionally, Congress has already debated this exact issue—tolling criminal statutes of limitations—and decided against it. After former President Trump declared COVID-19 a national emergency, his Department of Justice (DOJ) asked Congress to pause the criminal statute of limitations during all national emergencies and for the year following the emergency's end. See Betsy Woodruff Swan, DOJ Seeks New Emergency Powers Amid Coronavirus Pandemic, Politico (Mar. 21, 2020), available at https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023. Yet, Congress specifically left this provision out of COVID-relief legislation, showing it did not believe the pandemic is grounds for tolling statutes of limitations. See Matt Zapotosky, Justice Department's Coronavirus Considerations Rankle Civil Liberties Advocates, Washington Post (Mar. 23, 2020), available at https://www.washingtonpost.com/national-security/justice-department-

coronavirus-laws/2020/03/23/6b860018-6d01-11ea-b148-e4ce3fbd85b5_story.html.

Finally, courts have leveraged administrative workability arguments in weighing whether to permit equitable tolling. For example, in the tax collecting context, the Supreme Court held individuals may not pursue IRS refunds on taxes they mistakenly overpaid when their requests are made past the request deadline. See United States v. Brockamp, 519 U.S. 347, 352 (1997). In this case, the Court determined that since the IRS processes more than 200 million tax returns each year, permitting equitable tolling on a case by case basis would cause the IRS to potentially litigate an unmanageable number of cases per year, id, going against the idea of equitable tolling being "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." Wallace v. Kato, 549 U.S. 384, 396. Given the "unusual circumstances" here is a global pandemic affecting everyone, it is a common state of affairs that could strain the judicial system.

B. Alternatively, even assuming equitable tolling is *ever* available in this context, the government must meet the test for earning the judicially created remedy

Though the government will not be able to show equitable tolling criminal statutes of limitations is ever available, it additionally cannot make out a case it is entitled to tolling in this case. In proving deservedness, a litigant seeking equitable

tolling "bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." E.g., Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). These are distinct elements and not amorphously weighted factors. Menominee Indian Tribe of Wisc. v. United States, 577 U.S. 250, 256 (2016).

First, the prosecution must prove it diligently exercised its rights in pursuing Ms. Maximoff. In Pace, the Court found a petitioner filing for federal habeas corpus ineligible for equitable tolling given the petitioner waited years, without a valid reason, to assert the claims. Pace, 544 U.S. at 419. Likewise, here the government delayed its prosecution of Ms. Maximoff beyond what a court would defend using its equitable powers. The government filed its information July 22, 2020, exactly two days before a *ten year* statute of limitations expired, indicating inefficient or inattentive information gathering. Additionally, while the government was alerted to a potential crime on May 3, 2018, it tabled the investigation in light of an undercover task force assignment from August 15th, 2018 to February 14, 2019. Equitable tolling does not exist to protect a government that fails to prosecute one individual because it prioritizes another.

Next, the government, assuming it proved it diligently exercised its rights, must also show it faced circumstances—both extraordinary and beyond its control—which caused it to miss the statutory deadline. Menominee Indian Tribe

of Wisc., 577 U.S. at 256-57. While a global pandemic, at first glance, meets that criterion, it does not reflect precedent, which, in the criminal context, requires either the defendant intentionally misleading or tricking the prosecution, Midgley, 142 F.3d at 179, or, when the defendant is seeking tolling, defense attorney misconduct that, at minimum, surpasses a "garden variety claim" of negligence. See Holland, 560 U.S. at 652. Here, there was neither misleading nor negligent behavior; in fact, the government is not claiming anything *unique* to this case, but rather the overarching global pandemic that affects each American equally.

CONCLUSION WITH PRAYER FOR RELIEF

For the reasons stated above, (1) the government's indictment was not timely returned in view of §§ 3288, 3298, and alternatively (2) is not entitled to any equitable tolling of the statute of limitations. Accordingly, Defendant respectfully requests that the Court grants Defendant's motion to dismiss and dismiss the government's prosecution of Ms. Maximoff as time barred under the statute of limitations.