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.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON LIMITATIONS GROUNDS

/s/ Team No. 103

Team No.103
Assistant United States Attorney

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INTRODUCTION

The United States (the "Government"), by and through its attorney, the United States Attorney for the District of Stetson, respectfully submits this memorandum in opposition to the Defendant's Motion to Dismiss the Indictment.

The Government timely filed the Information against the Defendant, within 10 years of the offense. At this time, the judicial system was suspended due to the COVID-19 pandemic. Accordingly, the Court dismissed the Information without prejudice. The grand jury later returned a materially identical Indictment within 6 months after the suspension was lifted and the initial Information dismissed; therefore, the Indictment was timely filed under 18 U.S.C. §§ 3288, 3298. In addition, the balance of equities weighs against dismissing the Indictment because any delay in the grand jury proceedings was caused by the extraordinary COVID-19 pandemic while the Government diligently pursued prosecution of the Defendant.

Accordingly, for the reasons set forth in detail below and in consideration of the facts of this matter, the Government respectfully asks this Court to deny the Defendant's Motion to Dismiss the Indictment.

STATEMENT OF FACTS

In 2007, the Defendant, Wanda Maximoff was employed as a law clerk at the Law Office of Agatha Harkness where the Defendant remained until her termination in 2010. Woo Aff. ¶ 26. During this time, the Defendant managed various

immigration cases and assisted undocumented aliens with their applications to become lawful temporary residents. *Id.* at ¶ 10. The Defendant is a national of the former Socialist Federal Republic of Yugoslavia and a naturalized United States citizen. Indictment ¶ 5.

In April 2008, two of Maximoff's clients, S.P and her husband, H.P unlawfully entered the United States. *Id.* at ¶ 7. At this time, S.P. and H.P retained Agatha Harkness as their immigration attorney. *Id.* at ¶ 9. On May 7, 2008, H.P. and S.P. were introduced to the Defendant. *Id.* at ¶ 10. Between May 7, 2008 and May 21, 2008, the Defendant spent over 50 hours working with H.P and S.P. on their applications to become temporary residents. *Id.*

Two days later, H.P. and S.P. discovered a note hidden within the paperwork drafted by the Defendant. *Id.* at ¶ 11. The note contained a number for someone named "Scarlet." *Id.* Additionally, the note suggested that "Scarlet" could expedite the process of obtaining immigration paperwork "like an OSUP." *Id.*

An OSUP, DHS Form I-220B, is an order of supervision issued by the United States Immigration and Customs Enforcement ("ICE") to aliens who have been ordered to be removed from the United States but could not be removed due to qualifying conditions. Indictment ¶ 2. The order allows aliens to apply for state driver's licenses, employment cards, and other benefits. *Id.* at ¶ 4. H.P. did not qualify to obtain a legitimate OSUP. Woo Aff. ¶ 12. H.P called the number for

"Scarlet" and subsequently paid $10,000 in cash left in a mailbox for "Scarlet" in exchange for fraudulent OSUP forms. *Id.*

Within the period of the Defendant's employment at the law firm, specifically between the dates of May 31, 2007 and July 24, 2010, at least six other clients (I.M, T.D., S.D., A.T., J.C., and R.B.) also tendered $10,000 in cash to "Scarlet" in exchange for fraudulent OSUP forms. *Id.* at ¶ 25. The Defendant was then terminated from the firm in late 2010. *Id.*

On May 3, 2018, Special Agent Jimmy Woo of the Department of Homeland Security ("DHS") interviewed S.P. following her arrest for driving under the influence. *Id.* at ¶ 5. During the interview of S.P. and a subsequent interview of H.P. on August 10, 2018, the information about the fraudulent OSUP forms came to light and prompted an investigation into the Law Office of Agatha Harkness. *Id.* at ¶ 14. After an interview with R.B. on February 19, 2019, Agent Woo received the phone number for "Scarlet" and discovered the number did not belong to Harkness but rather Harkness' staff. *Id.* at ¶ 23.

On March 18, 2019, Agent Woo subpoenaed the Defendants phone records, financial records and flight records. *Id.* at ¶ 25. The financial records showed that the Defendant claimed income of between $40,000 and $65,000 during her employment with Harkness; however, her bank records reflected 24 separate and significant deposits totaling $220,000 over the same period of time. *Id.* at ¶ 26.

On March 23, 2020, this Court suspended the grand jury due to COVID-19. Administrative Order. No. 20-019. On July 22, 2020, the Government filed the Information charging the Defendant with conspiracy to encourage and induce aliens to continue residing in the U.S. knowing that their residence is in violation of the law and for the purpose of commercial advantage or private financial gain in violation of Title 8, U.S. Code § 1324(a)(1)(A)(iv), (v). Dkt. No. 2. On July 23, 2020, the Court dismissed the Information without prejudice. Dkt. No. 1.

The Court lifted the suspension on March 29, 2021 in Administrative Order No. 21-008. Within six months of the order lifting the suspension, the grand jury returned an Indictment on September 21, 2021. Indictment ¶ 5.

On September 23, 2021, The Government executed an arrest warrant on the Defendant. Woo Supp. Decl. ¶ 1.

ARGUMENT

I. The Indictment was timely returned in view of 18 U.S.C. §§ 3288, 3298.

This matter comes before this Court on Defendant's Motion to Dismiss the Indictment ("Motion") on the grounds that the prosecution is barred by the statute of limitations. The Defendant contends that, because she had not waived indictment, the Information filed on July 22, 2020 is null and void for purposes of the limitations statute. 18 U.S.C. § 3298. The Defendant's conclusion, however, does not follow from her premise.

§ 3298 requires that the Information must have been instituted not later than 10 years after the commission of the offense. *Id.* Additionally, where the Information charging a felony is dismissed after the 10-year period prescribed by the statute of limitations has expired, a new indictment may be returned within six months of the date of the dismissal. 18 U.S.C § 3288.

As the following memorandum details, the weight of authority on this issue finds that a defendant's waiver of indictment is not required to institute an Information. Accordingly, (A) the filing of a waiverless Information is valid to institute the Information for purposes of the statute of limitations under § 3298, and the subsequent filing of the Indictment within six months of the dismissal of the Information satisfies the statute of limitations pursuant to § 3288. Further, (B) the Defendant's case law in support of its premise is mere dicta that is both distinguishable from the case at bar and generally unpersuasive.

Accordingly, the Government respectfully requests that this Court denies the Defendant's Motion.

A. The filing of a waiverless Information with the district court is sufficient to institute the Information for purposes of the statute of limitations under § 3298.

The 7th Circuit has considered whether the filing of an Information with the district court is sufficient to institute the Information for the purposes of the statute of limitations. 18 U.S.C. § 3298; *United States v. Burdix-Dana*, 149 F.3d 741, 742

(7th Cir. 1998). In *Burdix-Dana*, the Defendant argued that whether an Information has been "instituted" should be defined by whether the Government has the ability to proceed with a prosecution; therefore, because the Defendant had not waived her right to an indictment, the prosecution could not proceed and consequently, the information was not instituted. *Id.* at 742.

The 7th Circuit disagreed. *Id*. The court held that the absence of a waiver did not make the filing of an Information a nullity. *Id*. The court found that Rule 7(b) "does not forbid filing an information without a waiver. It simply established that prosecution may not proceed without a waiver." *Id.* at 742-43. The Court held that this issue is entirely separate from the issue of limitations. *Id.* Accordingly, *Burdix-Dana* stands for the conclusion that "the filing of an information is sufficient to institute it" within the meaning of the statute of limitations. *Id.* at 743.

Other jurisdictions have compellingly agreed with *Burdix-Dana*. The 10th Circuit has held that Rule 7(b) does not prohibit the filing of an Information without a waiver by the Defendant but prohibits *prosecution* without a waiver; therefore, an Information could be filed within the statute of limitations period, providing a legitimate basis for the prosecution on a subsequent indictment. *See United States v. Cooper*, 956 F.2d 960, 962-63 (10th Cir. 1992)

Accordingly, *Cooper* held that the statute of limitations defense turns on whether the Information was filed within the limitations period, not whether

prosecution may proceed. *Id.*; *see also United States v. Hsin-Yung*, 97 F. Supp. 2d (D.D.C. 2000) (citing *Cooper* and *Burdix-Dana* with approval); *United States v. Rosecan*, 20-CR-80052-RUIZ(s), 2021 WL 1026070 at *2-4 (S.D. Fla. Mar. 17, 2021) (citing *Cooper* and *Burdix-Dana* with approval); *United States v. Marifat*, CR 2:17-0189 WBS, 2018 WL 1806690 at *2-3 (E.D. Cal. Apr. 17, 2018) (following *Burdix-Dana*).

In *Rosecan*, the court fully adopted the logic of *Burdix-Dana* and *Cooper* by analyzing the plain language of the limitations statute. *Rosecan*, 2021 WL 1026070 at *3; *See United States v. DBB, Inc*., 180 F.3d 1277, 1281 (11th Cir. 1999) ("The starting point for all statutory interpretation is the language of the statute itself."). Here, like in *Rosecan*, the plain language of the statute requires that the information be "instituted" to satisfy the statute of limitations. *Id.*

Based on the logic of *Burdix-Dana* and *Cooper*, the *Rosecan* court found that the terms "prosecuted" and "instituted" are not analogous. *Id.* Accordingly, the court held that an information is "instituted" when it is properly filed, regardless of a defendant's waiver. *Id; See also United States v. Holmes,* No. 18-cr-00258, 2020 WL 6047232 at *8 (N.D. Cal. Oct. 13, 2020); *United States v. Watson*, 941 F. Supp. 601, 603 (N.D. W. Va. 1996).

Here, the weight of authority supports the Government's position that the Information was timely filed because it has been well established that the filing of a

waiverless Information is valid to institute the Information for purposes of the statute of limitations under § 3298.

Further, pursuant to 18 U.S.C § 3288, where the Information is timely filed, a new indictment may be returned within six months of the date of the dismissal. Accordingly, the superseding indictment is also timely filed in this case. 18 U.S.C. § 3288.

B. The Defendant's case law in support of her Motion to Dismiss is distinguishable and unpersuasive in this matter.

Here, the Defendant could only possibly muster minimal support for her proposition in support of her Motion. *United States v. B.G.G.*, Case No. 20-80063-CR-Middlebrooks [ECF No. 35-1] ("B.G.G. Order"); *United States v. Machado*, No. CRIM.A.04-10232-RWZ, 2005 WL 2886213 (D. Mass. Nov. 3, 2005); *United States v. Sharma*, CRIM. No. 4:14-CR-61, 2016 WL 2926365 (S.D. Tex. 2016). These cases are ultimately unpersuasive for the reasons outlined below.

Firstly, the Defendant relies almost exclusively on *B.G.G.* in support of her theory that the waiverless Information is null and void in this case. However, the limitations analysis in *B.G.G.* is inappropriately premised on the issue of legislative intent rather than the plain language of the statute itself. *B.G.G. Order* at 12-19. Here, the language of §3298 is clear and unambiguous; therefore, it is not proper nor necessary to analyze beyond the plain language into the realm of legislative intent. *United States v. Noel*, 893 F.3d 1294, 1297 (11th Cir. 2018) ("if the statute's

language is clear, there is no need to go beyond the statute's plain language into legislative history").

Second, in *Machado*, the Court's analysis of the statute of limitations is merely dicta, and it is unpersuasive dicta at best. *Machado,* 2005 WL 2886213 at *1. In *Machado*, the Defendant's limitations argument failed to mention the presence of two different Informations. *Id.* The presiding judge only dismissed the later Information on the grounds that it was duplicative of the prior Information. *Id.* at *2. Only after the judge stated that the duplication *alone* warranted dismissal of the later information did the Defendant further argue that dismissal was also warranted on limitations grounds. *Id.* at *1-2. Accordingly, the statute of limitations issue was not necessary to the Court's conclusion, and was therefore dicta.

Beyond dicta, the reasoning in *Machado* is also unpersuasive, and the Defendant's reliance on it is therefore misplaced. *Id.* In *Machado,* the court interpreted the word "institution" to require the ability to "prosecute" a criminal action. *Id.* at *2. Based on this, the court concluded that in order to satisfy the requirement that the information be "instituted" it must include a waiver of indictment. *Id.* However, as reasoned by the court in *Rosecan*, there is a clear distinction between "prosecution" and "institution." *Rosecan*, 2021 WL 1026070 at *2-4. The statutory language of §3298 does not suggest that a "prosecution" rather than the information, must be instituted before the period of limitations expires. *See*

Marifat, 2018 WL 1806690 at *2. Accordingly, "instituted" is more properly equated with "filing," as proffered by the Government in the case at bar. *Rosecan,* 2021 WL 1026070 at *4.

Lastly, the court's analysis of the limitations issue in *Sharma* is flawed in the same ways as *Machado* and *B.G.G.*, and in fact, *Sharma* only further distinguishes those cases from our own. *Sharma,* 2016 WL 2926365 at *1. In *Sharma*, the Court's ruling on the limitations issue departed from *Burdix-Dana* and instead turned on the issue of exigency. *Id.* at *3. There, the Court found that the government is "not free to file a complaint at a time when it does not have its case made, simply to extend the time within which it may act" without a showing of exigency. *Id*. (citing *Jaben v. United States,* 381 U.S. 214 (1965)). Like *Machado* and *B.G.G.*, the Court held that an information is only "instituted" for limitations purposes, when the government is "able to prosecute on the Information," but carved out an exception for exigent circumstances. *Id*. at *3-4.

Even if this Court is inclined to adopt the district court's interpretation of "institute" rather than the 10th Circuit's *Burdix-Dana* and *Rosecan* interpretation, the record here clearly reveals an exigency basis for the filing and subsequent dismissal of the Information; namely, the novel COVID-19 pandemic which suspended the grand jury. Administrative Order. No. 20-019. Given the order of

authorities, and the distinguishing factors of this case compared to *Sharma*, this Court should adopt the *Burdix-Dana* and *Rosecan* analysis of the limitations issue.

With no legitimate support for the argument that the Information was not timely instituted, the Defendant effectively encourages this Court to prohibit the Government from lawfully utilizing § 3288 by dismissing the Indictment with prejudice. The Government respectfully requests that this Court declines the Defendant's invitation to do so.

II. The Government is entitled to equitable tolling of the statute of limitations for a delayed filing of the indictment

The Government also argues in the alternative that the balance of equities weighs in favor of tolling the statute of limitations in light of the COVID-19 pandemic and the year long judicial shutdown of the court system. Equitable tolling of the statute of limitations has significant support in federal case law.

The Government was diligent in pursuing indictment of the Defendant on September 21, 2021 and the delay in filing was caused by extraordinary circumstances beyond the Government's control. This meets the standard for equitable tolling as outlined in *United States v. Buchanan*, 638 F.3d 448 (4th Cir. 2011).

Additionally, Congress has shown strong statutory support for tolling criminal statute of limitations in certain extraordinary circumstances. In times of war, 18 U.S.C. § 3287 tolls the statute of limitations for crimes of fraud and other crimes

against the Government. The COVID-19 pandemic analogizes to times of war in the factors which are most important to a decision to toll the statute of limitations.

The appellate courts and courts of last resort of many other states have made the decision to toll the statute of limitations across the board in light of the COVID-19 pandemic. This sets a strong precedent that this situation is an extraordinary circumstance that requires tolling of the statute of limitations to preserve justice.

A. There is long-standing precedent for equitable tolling of the statute of limitations in criminal cases.

United States v. Buchanan held that equitable tolling of the statute of limitations for certain reasons is due even if congress did not explicitly address those reasons. 638 F.3d 448 at 456. In *Buchanan*, the Defendant violated his supervised release and lived as a fugitive from the law for 13 years. After later being caught and charged with multiple violations of his supervised release the Defendant raised a limitations defense arguing that his period of supervised release had passed a decade ago and that the violations were not charged within the statutory limit post-supervised release. Although the statute explicitly allowed for a 30-day tolling when prisoners were arrested for a different crime while out on supervised release, it was otherwise silent. The Court held that the Defendant's status as a fugitive was due to his own misconduct and that the Government was entitled to equitable tolling to charge the supervised release violations. *Buchanan* at 457; *see also Anderson v.*

Corall, 263 U.S. 193, 197 (1923) (the government is entitled to equitable tolling when a parolee breaks his parole agreement and becomes a fugitive).

The reasoning of *Buchanan* and other cases applying equitable tolling when the Defendant was a fugitive is in line with standard justifications for equitable tolling as outlined in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990). As outlined by *Irwin* the two kinds of justifications are:

> "We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, to the text of the note or where the complainant has been induced or tricked by his adversary's misconduct." 498 U.S. 89, 96

Buchanan is an example of the second situation in which equitable tolling is allowed, when the delay was caused by the adversary's misconduct. In light of the support for tolling of the statute of limitations without any explicit denial of tolling because only the first test is satisfied, this indicates support for applying equitable tolling in criminal cases, but that the extraordinary circumstances that would satisfy the first test for the Government rarely occur.

B. Because the Government was diligent in pursuing its rights and filing was delayed by extraordinary circumstances outside of the Government's control equitable tolling is justified

Holland v. Florida, 560 U.S. 631 (2010), restates the principle that equitable tolling is valid if the party seeking relief "has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely

filing." *Holland* at 649 (internal quotation marks omitted). In the case of *Holland*, Defendant's attorney was negligent by missing a deadline to file a habeas corpus petition even after Holland's repeated letters reminding his attorney to file the petition. Holland's repeated urging his lawyer to file the habeas corpus petition indicated that he diligently pursued his rights and the fact that his lawyer nevertheless chose to not heed his instructions were extraordinary circumstances beyond Holland's control. Therefore the Court held that since the Defendant was diligent in pursuing his rights and filing was delayed due to his appointed attorney's extraordinary misconduct he had satisfied the requirements and was entitled to an equitable tolling of the statute. 560 U.S. 631, 654.

In the immediate case, the Government diligently pursued indictment of the Defendant. Agent Woo's affidavit was sworn on July 22nd, 2020, in the middle of the judicial shutdown. In light of the Government's inability to present that information to a grand jury, the Government sought, instead, to preserve its case against the Defendant by filing an information the same day. When the court system reopened, the Government relied on its earlier filed information and promptly sought indictment of the Defendant before a grand jury within the six-month period allowed by 18 U.S.C. 3288.

C. Equitable tolling for an unprecedented judicial shutdown in light of a global pandemic is consistent with other statutory reasons for statute of limitations tolling

Congress has explicitly recognized that there are catastrophic national situations where tolling of the criminal statute of limitations is necessary. The Wartime Suspension of Limitations Act tolls the statute of limitations for any criminal cases in which the Defendant sought to defraud the Government while the U.S. is in a state of war. 18 U.S.C. § 3287. This is done in consideration of the effects war has on the prosecution of crime and an understanding that tolling the statute of limitations is an effective way to preserve justice while the court system is under excessive strain.

The catastrophic and extraordinary effect of COVID-19 pandemic and the effect it has had on the court system is in line with the effects war has had on the court system. Congress recognizes the importance of tolling statutes of limitations in times of catastrophe; however, it is too burdensome to expect Congress to consider every potential catastrophe which would have an effect as great as war does on the judicial system. COVID-19 was unforeseen and unforeseeable by Congress yet 18 U.S.C. § 3287 shows that congressional intent was to allow the court system to handle its far-reaching effects. That Congress has, since the COVID-19 pandemic, not chosen to address the issues of tolling does not indicate lack of intent to rectify situations such as this. Rather it indicates Congress's strong reliance on the courts

which have already in many areas made the decision to toll criminal statutes of limitations.

D. State supreme courts have tolled the statute of limitations across the board in light of judicial shutdowns caused by the COVID-19 pandemic

A significant number of states whether through orders by the state court of last resort or by executive order from the governor, have tolled the statute of limitations both for civil and criminal matters for varying durations because of the COVID-19 pandemic. These orders were issued without accounting for specific equitable factors of each case. Statute of Limitations Quick Guide (During COVID-19 Pandemic), USLAW Network (December 2020), https://www.uslaw.org/files/Compendiums2020/COVID-10_Statute%20of%20Limitations/2020_USLAW_NETWORK_COVID_19_Statute_of_Limitations_Quick_Guide_COMPILATION_version.pdf.

Tolling of the statute of limitations only when the balance of equities is in favor of the Government then is a limited adoption of the measures taken by other states. Delaware's Administrative Order No. 3 on March 22, 2020 for example would allow a criminal prosecutor who missed the statute of limitations through negligence to file a late complaint without relying on any earlier filed information. The Government is not asking for such a blanket order in this case, but rather a consideration of the equities in light of the fact that the Government timely filed an

information against the Defendant and relied on the Information in light of the judicial shutdown.

Because the Government diligently pursued indictment of the Defendant and that the delay in indictment was caused by the extraordinary COVID-19 pandemic it is entitled to equitable tolling under *Holland v. Florida*. The COVID-19 pandemic and subsequent judicial shutdown is unprecedented and has caused far-reaching harm to the court system. An equitable decision to allow this case to be properly tried is in keeping with the goals of justice and fairness.

CONCLUSION

In light of the facts and law referenced above, the Government urges this Court to deny the Defendant's Motion to Dismiss the Indictment.

Respectfully Submitted,

/s/ Team No. 103
Assistant United States Attorney