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

UNITED STATES OF AMERICA **Case No**. 1:21-cr-36
V.

WANDA MAXIMOFF
a/k/a "Scarlett"

Defendant.

_____/

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTORY STATEMENT

This Court is asked to grant Defendant's Motion to Dismiss the indictment in this case for want of timeliness pursuant to 18 U.S.C. §3298. Because Ms. Maximoff has been charged with a felony, she can be charged with an information only if she knowingly, intelligently, and voluntarily waived her indictment. It is the Defendant's position that she did not give the requisite waiver to allow the Government to proceed with the information. Thus, the only way that the Government could follow through with charging Ms. Maximoff is through a formal indictment. However, because the Government failed to meet the statute of limitation on bringing the charging document against Ms. Maximoff and thus should be precluded from bringing any charges.

Additionally, the Government has failed to meet the requirements of the statutes set forth in subsections 3281-3301 of the code. As a result, they are limited to an argument of there being a wartime Suspension Act, but they unfortunately cannot meet the requirements set forth by precedent. Additionally, as there are no statutory remedies for the Government to rely on, they must rely on equitable tolling to cure the untimeliness of their indictment. As a result, they must show that there are external circumstances that are outside of the control of the Government's control. However, the reason for the untimeliness of the indictment was wholly under the control of the Government. Additionally, the Government was not hindered from investigating the alleged crimes of Ms. Maximoff making the circumstances well within the control of the Government.

Ms. Maximoff submits that an evidentiary hearing is needed to further develop the facts, which are in dispute and determinative of this motion.

FACTS

Procedural History

Defendant Wanda Maximoff was charged with conspiracy to knowingly encourage and induce an alien to reside in the United States, knowing and in reckless disregard of the fact that such residence is and will be a violation of law, by manufacturing and selling false OSUPs to illegal aliens present in the United States. (Indictment, Sept. 21, 2021). The Government received an indictment approved by a Grand Jury on September 21, 2021. (Indictment, Sept. 21, 2021). The Government voluntarily dismissed the information against Ms. Maximoff without prejudice and attempted to move forward on the indictment against Ms. Maximoff. (Order, July 23, 2020). The initial appearance for Ms. Maximoff was September 23, 2021.

Factual History

Special Agent Jimmy Woo of the Department of Homeland Security was assigned to investigate alleged criminal actions that occurred after an informant who was illegally present was in possession of a drivers license. (Aff. Jimmy Woo ¶¶ 5, Jul. 22, 2020). The informant informed Agent Woo that she obtained the drivers license with help of a woman named "Scarlet" who assisted her husband with getting an Order of Supervision to obtain a drivers license for $10,000. (Aff. Woo ¶¶ 7). After Y.A. later learned that H.P was concerned about his immigration attorney, Agatha Harkness, not getting back in touch with him. (Aff. Woo ¶¶ 9). Agent Woo later learned that Ms. Maximoff worked for Harkness. (Aff. Woo ¶¶ 10). Once the informant's husband paid $10,000 and they left the office and received a note to call "Scarlet" to assist with obtaining immigration

paperwork. (Aff. Woo ¶¶ 19). After contacting "Scarlet" the informant and her husband were instructed to leave $10,000 in cash in the mailbox and the next day their forged paperwork was in there. (Aff. Woo ¶¶ 12).

Agent Woo then learned that there were multiple individuals that lived in the informant's neighborhood that also utilized "Scarlet's" services. (Aff. Woo ¶¶ 19). However, in light of this information, Agent Woo decided to table the investigation from August 15, 2018 to February 14, 2019. (Aff. Woo ¶¶ 17). After returning, Agent Woo spoke to one neighbor who identified Ms. Maximoff as the person that people referred to as "Scarlet". (Aff. Woo ¶¶ 19). Agent Woo then investigated the bank records, flight records, and other records of Ms. Maximoff while she was preparing to bring her investigation to the prosecutor's office (Aff. Woo ¶¶ 32-35).

On September 3, 2021 Agent Woo executed an arrest warrant on Ms. Maximoff around 10:45am. (Supp. Decl. Jimmy Woo ¶¶ 1, Sept. 24, 2021). This is the first time that Ms. Maximoff became aware of any investigations against her. (Hr'g Tr. 4; 73-74, Sept. 23, 2021).

ARGUMENTS

I. Defendant Maximoff did not waive her right to an indictment under FRCP 7(b), therefore the information filed by the Government cannot be used against her

Federal Rule of Criminal Procedure 7(b) states that "an offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant – in open court and after being advised of the nature of the charge and of the defendant's rights – waives prosecution by indictment." See FRCP 7(b). Based on the statutory

language, it is clear that in order for the Government to prosecute a criminal defendant via an information, the defendant must waive their prosecution by indictment.

This waiver has been found to be valid where it is formally and explicitly waived in court. See *US v. Mota*, 17 Fed. Appx. 61 (2d Cir. 2001); *US v. Gaskins*, 393 §Fed. Appx. 910 (3d Cir. 2010). Another method by which a defendant may waive their prosecution by indictment is by physically signing a waiver. See *US v. Simms*, 69 Fed. Appx. 524 (3d Cir. 2003). The bottom line is that a defendant's waiver of an indictment must be made "knowingly, voluntarily, and intelligently." *Matthews v. US*, 622 F.3d 99, 101 (2d Cir. 2010); *US v.* Jiminez, 54 Fed. Appx. 369, 370 (3d Cir. 2002). As the Second Circuit Court of Appeals stated, "[T]he waiver of indictment has been deliberately clothed in formal procedure. It must be made in open court and the defendant must be told the nature of the charge and informed of his rights before he is allowed to consent to the waiver." *US v. Macklin*, 523 F.2d 193, 196 (2d Cir. 1975).

It is clear from the record that Defendant Maximoff never had an opportunity to waive her prosecution by an indictment under Federal Rule of Criminal Procedure 7(b). In order for Defendant Maximoff to have waived her prosecution by an indictment she would have needed the opportunity to go before the court and file a pretrial motion to dismiss the information/indictment under Federal Rule of Criminal Procedure 12(b)(1). This was not the case and nothing in the record indicates anything to the contrary.

The Government has pushed forward and is placing all its eggs in one basket. That basket is a fraudulent attempt to circumvent the Rules of Criminal Procedure. "The right to have a case presented to a grand jury prior to being tried or convicted of a felony is

inviolable unless it is waived by the accused." *US v. Sepulveda*, 57 F. Supp. 3d 627, 628 (E.D. Va. 2014) (citing *Stirone v. United States*, 361 U.S. 212, 215-16 (1960)).

Furthermore, Defendant Maximoff was not even aware of the charges against her until the day she was arrested, which was also the day of her initial appearance. Police arrested Maximoff at 10:45 am. Her initial appearance before the court was at 2:00 pm. In less than twelve hours Defendant Maximoff went from being arrested to facing federal conspiracy charges in violation 8 USC § 1324(a)(1)(A)(iv) and (v). Serious felony charges that require a thorough defense to be prepared.

While the Rule 7(b) does not specify who must advise the defendant of the nature of the charge and the defendant's rights, a natural reading of the statute lends to the notion that a judicial officer ought to be the one to fulfill this task. This is due to the fact that an indictment serves a similar purpose as a probable cause hearing or an arraignment. As this Court is well aware, both of these hearings involve the court informing the defendant of the nature of the charges against the defendant as well as the defendant's rights. The District Court should have advised Defendant Maximoff of the charges against her and her rights.

To conclude, Defendant Maximoff never waived her right to prosecution by an indictment. Therefore, the Government cannot use the information to charge Defendant Maximoff since under 7(b) the only way the Government can use an information is if the defendant explicitly, knowingly, and voluntarily waives their right to be prosecuted by the indictment. But that is not what happened here. Therefore, the Government cannot use the information against Defendant Maximoff.

II. The Government cannot prosecute Defendant Maximoff based off the indictment because the statute of limitations expired

18 USC § 3298 lists the statute of limitations for acts in violation of the Immigration and Nationality Act as ten years. According to the information and indictment that followed, Defendant Maximoff is accused of violating 8 USC § 1324(a)(1)(A)(iv) and (v) between May 31, 2007 and July 24, 2010. The United States Supreme Court held in *Toussie v. US* that "statutes of limitations normally begin to run when the crime is complete." *Toussie v. US*, 397 US 112 (1970). Per the record, Defendant Maximoff's conduct ended on July 24, 2010. If we follow the appropriate statute of limitations that means that the statute of limitations expired on July 24, 2020. This indictment was not filed until September 21, 2021. That is over one year past the statute of limitations.

The defense is aware of 18 USC § 3289, which states in pertinent part that if an indictment or information charging a felony is dismissed for any reason before the statute of limitations has expired, the Government may extend the applicable period. Additionally, if no regular grand jury is in session in the appropriate jurisdiction at the expiration of the applicable statute of limitations, a new indictment will not be barred by the statute of limitations. Also see *United States v. Rabb*, 680 F.2d 294. Defense is not arguing that these requisite facts did not occur. Rather, we are of the notion that 18 USC § 3289 allows the Government to disregard the statute of limitations and trample on defendants' rights.

Statutes of limitations exist for three primary reasons. Firstly, they provide repose and peace for the defendant. At some point a defendant must feel that they no longer face

the possibility of litigation. Statutes of limitations promote fairness by "protect[ing] individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." See *Toussie v. US*, 397 US 112, 114-15 (1970).

Here, Defendant Maximoff is being accused of crimes she allegedly committed more than ten years ago. This is well beyond the applicable statute of limitations. Accordingly, a defendant needs to be aware of when they could face possible charges and when they could not. Our adversarial judicial system relies on both parties entering the litigation arena with the best possible cases put forth. What justice is it if an individual defendant never knows that they are facing impending litigation. Without effective notice Defendant Maximoff cannot prepare an adequate defense. Nor should she or any defendant be out in a situation where the Government is able to come down on her with all of its resources while she is left to scramble and recover any evidence and witnesses she can.

Secondly, statutes of limitations are designed to favor the defendant by requiring the Government to bring forth the claim early enough to enhance the accuracy of any evidence. See *Bd. of Regents v. Tomanio*, 446 US 478 (1980). Statutes of limitations are meant to improve efficiency by encouraging Government agents "promptly to investigate suspected criminal activity." *Toussie* at 115.

If statutes of limitations did not exist, then the Government would have free reign to bear all of its resources onto a defendant who then must rely on evidence that has long passed. Furthermore, the record shows that during the course of the investigation prior to

Defendant's arrest, Special Agent Woo actually tabled his investigation into Maximoff from August 15, 2018 through February 14, 2019. Nearly six months passed where nothing was done on this case and no further investigations took place. For the Government to start an investigation, drop the investigation, then pick it up once more and bring charges seems quite incredulous.

Thirdly, statutes of limitations ensure fairness towards the defendant by monitoring the Government's conduct. This is accomplished by preventing fraud. See *Pickett v. Brown*, 462 US 1, 14-15 (1983). And promoting diligence. See *Rotella v. Wood*, 528 US 549, 550 (2000).

As previously stated, the Government tabled their own investigation for six months. Evidence could have gone stale. Almost half of the witnesses disappeared from the country or passed away. For the Government to table this investigation and file an indictment past the statute of limitations would be an egregious blow to this Court's jurisprudence.

To conclude, while 18 USC § 3289 exists, it is a bad statute that disregards the rights of criminal defendants and tramples on the very reason statutes of limitations exist. Furthermore, the Government should not be permitted to skirt around the statute of limitations here. Therefore, the Government cannot use the indictment against Defendant Maximoff.

III. Congress has set forth the statutes that limit and toll the statutes in the criminal prosecution of particular offenses in 18 U.S.C. Chapter 213 §§3281-3301

Federal law has set forth the requirements and limitations for prosecution of criminal actions. Accordingly, unless otherwise provided by law, the Government cannot

prosecute, try or punish for any non-capital offense unless the indictment or information is instituted within 5 years after the offense of committed. Congress has extended the time for certain offenses, such as is the case here with trafficking-related offenses where Congress has set the time bar to 10 years after the offense is committed. 18 USC §3298. Unless otherwise provided by statute, the Government has very limited options under these circumstances to attempt to toll the statute of limitations.

The only applicable statutory options for tolling the Government can argue is Wartime Suspension of Limitations Act and tolling for certain terrorism offenses, but they are unable to prove the requisite elements. 18 USC §3297 (hereinafter "The Act") states that "when the United States is at war or Congress shas enacted a specific authorization for the use of Armed Forces…the running of any statute of limitations…is tolled for 5 years." This applies to criminal acts only and could be relied on by the Government. Here, we can see that Congress has not exacted the armed forces to fight the pandemic, and thus, this would be an insufficient route for the Government to rely on to toll the statute of limitations. However, The Act does not require a formal declaration of war. *United States ex rel. Carter v. Haliburton Co.,* 710 F.3D 171 (4th Cir. 2013).

The only other option for the Government to rely on the Wartime Suspension Act, would be to show that the United State is at war. Presently, we are dealing with the novel Coronavirus, which has spread globally causing a pandemic. The purpose of The Act was to allow the Government additional time to discover and punish offenses where, because of the war, it was unable to deal with offenses prior to the expiration of the statute of limitations. Here, we see that the Government themselves failed to take action on

prosecuting Ms. Maximoff. Additionally, COVID-19, although a pandemic, affects all countries similarly. This is not a conflict between a few countries nor are international relations at, and thus cannot be classified as what congress covered under The Act. Additionally, especially when the statute of limitations has expired, The Act can rarely be used to statutorily, or equitably toll, the expired statute. *Id* at 200.

IV. Because there are no statutory provision allowing the tolling of the statute of limitations, the Government must rely on the common law remedy of equitable tolling.

The statute of limitations was designed to "balance the rights of a defendant against criminal charges where the underlying facts may have eroded over time with the interest of the Government in swiftly investigating the alleged criminal activity." *Toussie v United States*, 397 U.S. 112, 114 (1970). The Supreme Court of the United States has held that statute of limitations for criminal actions should be "liberally interpreted in favor of repose." *Id.* Under "rare and exceptional" circumstances the doctrine of equitable tolling allows the court to extend the limitation period even though it is expired. *Turner v Johnson,* 177 F.3d 390, 391-92 (5th Cir. 1998) citing *Irwin v Dep't of Veteran Affairs,* 498 U.S. 89, 96 (1990). The doctrine should not be used often and should never be used in cases of "garden variety excusable neglect." *Id*.

Presently, we are dealing with a criminal matter at hand. Courts are very reluctant to utilize equitable tolling on criminal statute of limitations, this Honorable Court is allowed to "invoke the doctrine only sparingly, and under very narrow circumstances." *Irwin v Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990). "Absent a showing of intentional inducement or trickery by the defendant, a statute of limitations should be tolled only in

the ‘rare situation where equitable tolling is demanded by sound legal principles as well as the interest of justice.” *United States v Midgley*, 142 F.3d 174, 179 (3d Cir. 1998) (quoting *Alvarez-Machain v United States*, 96 F.3d 1246, 1251 (9th Cir. 1996)).

Equitable tolling is not in this situation appropriate because the Government cannot show that there was an extraordinary circumstances that precluded them from filing the correct information/indictment. The Supreme Court has held that in order for a petitioner to establish his right to equitable tolling he must prove two elements. First, the petitioner must show “that he has been pursuing his rights diligently. Second, the petitioner must show that “some extraordinary circumstance stood in his way.” See *Irwin*, 498 U.S.at 96. The Supreme Court has defined extraordinary circumstances as “external obstacle[s] that caused a litigant’s delay” that were “beyond [the litigant’s] control.” *Menominee Indian Tribe v United States*, 764 F.3d 58, 59 (2016). Additionally, the Court stressed the importance of the second prong ensuring the importance that the extraordinary circumstances are dealing with matters outside the petitioner’s control.

Here, the Government spent time between May 3, 2018 and September 23, 2021 investigating this action and failed to do what was necessary to timely bring this action against Ms. Maximoff. There was nothing in the Government’s affidavit that shows that time was of the essence or that they were doing anything other than wasting time. Because the Government failed to meticulously investigate the present action and failed to timely bring a charge against Ms. Maximoff, then they should be precluded from using equitable tolling to save them.

Conclusion

In conclusion, the Government incorrectly brought an indictment and failed to timely file it against Ms. Maximoff. As a result of the untimely indictment the Government relied on an information to continue their case against Ms. Maximoff, but failed to get her to properly waive her indictment. The Government then relies on equitable tolling to save their case. However, they failed to timely investigate Ms. Maximoff, and cannot show that there were "extreme circumstances" preventing them from doing so. Thus, there are no statutory provisions allowing for the tolling of the statute of limitations in this case, and this is not a situation where this Court should allow the extreme and rare tolling based on equitable reasons.

Respectfully submitted this 30th day of August, 2021.

/s/ Team 106
Counsel for Defendant