

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

UNITED STATES OF AMERICA

****UNDER SEAL****

Plaintiff,

CASE NO. 1:20-cr-24

v.

WANDA MAXIMOFF

**MEMORANDUM OF LAW IN
OPPOSITION TO
PLAINTIFF'S
MOTION TO DISMISS
ORAL ARGUMENT
REQUESTED**

Defendant.

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**DEFENDANT'S BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO
DISMISS ORAL ARGUMENT REQUESTED**

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INTRODUCTION

This case arises out of the government's failure to prosecute. The government is using the unfortunate global pandemic as a means to disregard an individual's right to a statute of limitations. Section 3288 under 18 U.S. Code was created to help the prosecution when a dismissal occurred because of a technicality or an irregularity with the grand jury, however, if this section is going to be abused then there would be no point of having a statute of limitations at all.

The order for the initial dismissal of information by the government does not state the reasoning for the dismissal. It was merely requested by the government and granted by a judge under seal. Defendant was unaware the motion had been filed nor dismissed. The government conveniently uses section 3288 and the pandemic to bring up this defense in order to indict Defendant after the statute of limitations had passed over a year ago. The statute of limitations of crimes is an important part of our justice system. The government is not allowed to simply ignore the statute of limitations and find ways around it to indict individuals when it is convenient for the government.

Therefore, Defendant requests this indictment be dismissed on its face because it is barred by the statute of limitations. Further, Defendant asks the court to dismiss all charges with prejudice because Defendant did not consent to the file and dismissal of the initial information.

Statement of Facts

Wanda Maximoff is a licensed attorney in the state of Stetson. Maximoff started her career as an intern for Agatha Harkness, an immigration attorney, before eventually moving into her own practice. Agent Woo Affidavit p. 4. Maximoff maintained a successful legal practice while also struggling with a lifetime of chronic kidney disease and raising her twin boys. Declaration of Monica Rambeau p. 2-3.

On September 23, 2021, Wanda Maximoff was arrested and charged on one count of violating 8 U.S.C. §1324(a)(1)(A)(iv) and (v). Wanda Maximoff Indictment, September 21, 2021. The sole count against Ms. Maximoff alleges that between May 31, 2007, and July 24, 2010, Ms. Maximoff encouraged and induced aliens to continue residing in the United States knowing that their continued residence would be in violation of the law. *Id* at 2. The government brought charges against Ms. Maximoff on July 22, 2020, and then immediately filed a motion to dismiss without prejudice. *United States v. Maximoff*, Order July 23, 2020. The Government did not seek the Defendant's consent to dismiss the charge. *Id*.

Between March 23, 2020, and March 29, 2021, Administrative orders suspended the grand jury from being able to meet due to the ongoing COVID-19 pandemic. Transcript line 61-65. The Government sought an indictment via grand jury in September of 2021, which brought about the case at bar. Wanda Maximoff. Transcript line 64-65. The indictment is brought from the findings of a two-year long investigation conducted by Special Agent Jimmy Woo from the Department of Homeland Security (DHS). Agent Woo Affidavit. Woo commenced his investigation on May 3, 2018. *Id*. Woo interviewed

a Guatemalan citizen (S.P.) who was in possession of an expired Stetson Driver's License. *Id.* S.P. was Mirandized, but only spoke conversational English. *Id.* at 3. Woo went on to investigate the matter further and attempted to interview more individuals that were clients Maximoff worked with in the past. *Id.* at 7. Woo ceased his investigation for six months in late 2018 before picking it back up in 2019. *Id.* at 5. As the statute of limitations neared expiration, the Government quickly filed charges against Maximoff in July of 2020. *United States v. Maximoff*, Order July 23, 2020.

Argument

- I. THE STATUTE OF LIMITATIONS DID NOT EXPIRE UNDER § 3298 BUT THE INDICTMENT WAS NOT DISMISSED DUE TO A TECHNICALITY NOR GRAND JURY IRREGULARITIES UNDER § 3288.

Under Federal law, the statute limitations for Immigration and Nationality Act offenses is ten years. 18 U.S. Code § 3298. However, under 18 U.S. Code § 3288 when an indictment or information which charges a felony is dismissed after the statute of limitations, a new indictment may be returned within six months of the date of the dismissal. In the event there are no regular grand juries in session, a new indictment within six months of the next regular grand jury will not be barred by the statute of limitations. 18 U.S. Code § 3288.

In the present case, Ms. Maximoff can establish the fact that the statute of limitations had not run. The charges allege that Ms. Maximoff engaged in the conduct between May 31, 2007 and July 24, 2010. According to § 3298, the statute of limitations expired on July 24, 2020. The Grand Jury indicted Ms. Maximoff on September 21,

2021. However, on July 22, 2020, the Government filed a materially identical information against Ms. Maximoff and had it dismissed under seal. Consequently, under § 3298, information was instituted before the statute of limitations expired.

However, under §3288 a new indictment may only be returned within six months of the dismissal if the dismissal was due to irregularities of the grand jury.

Accordingly, the question at issue is whether the indictment was timely returned in view of § 3288 due to the suspension of the grand jury.

A new indictment, that is otherwise time-barred, can be allowed if the previous dismissal is related to grand jury irregularities. *United States v. Moriarty*, 327 F.Supp. 1045, 1048 (E.D. Wis. 1971). However, if the dismissal is because of a failure to prosecute then a reindictment is not possible. *United States v. DiStefano*, 347 F. Supp. 442 (S.D.N.Y. 1972)

Therefore, in order for a new indictment to be allowed the previous dismissal must have been related to grand jury irregularities and must be filed within six months from when the next regular grand jury is convened. For example, in *Moriarty*, the government dismissed the initial indictments because “the interests of justice demand[ed] no further prosecution.” *Id.* at 1047. The government asserted that their reasoning was broad enough to include grand jury irregularities. *Id.* The court held that “[s]ection 3288 is specific in its requirement that an otherwise time-barred count can be allowed only if the earlier dismissal related to irregularities occurring in connection with jury proceedings.” *Id.* at 1048. Additionally, in absence of such reasoning “it cannot be held that the running of the period of limitation has been tolled.” *Id.*

However, the court does not have the power to reinstate an indictment when it is not because of technical defects or grand jury irregularities, but because of a failure to prosecute. For example, in *DiStefano*, the government continuously adjourned the case because the government was having difficulty locating a witness. 347 F. Supp. at 444. Subsequently, the court granted the defendants' motion to dismiss the indictment for a failure to prosecute. Accordingly, on appeal, the district court affirmed the court of appeals stating that "where the indictment has been dismissed for failure to prosecute, reindictment is not possible once the statute of limitations expires" and the court distinguished this from when the indictment was dismissed due to irregularity in the grand jury.

In the present case, the initial motion was filed merely two days before the statute of limitation expired. This motion was an order for dismissal under seal. The government requested that the information relevant to this case be dismissed and the judge granted this request. However, the order does not specify the reasoning behind the motion to dismiss. The government would have us believe that the dismissal was due to our unprecedented times and the suspension of the grand jury. In fact, the investigation was tabled for six months by the affiant for another assignment. This is a failure to prosecute.

The statute of limitations is construed in favor of the criminal defendant. *Moriarty*, 327 F.Supp. at 1047. In this case, the government does not have an explicitly stated reason for the dismissal of the information and § 3288 requires that the dismissal be related to grand jury irregularities or technicalities. *Id.* Furthermore, in *DiStefano* the court ruled that it does not have the power to reinstate an indictment when it was

dismissed because of a failure to prosecute. That is what we are facing here. The government in this case ordered the information to be dismissed to delay the prosecution similar to the government in *DiStefano*.

In conclusion, the statute of limitations extension under § 3288 does not apply to this case because the dismissal was not due to irregularities in the grand jury but because of a failure to prosecute. And accordingly, the court should dismiss this indictment on its face.

II. THE GOVERNMENT IS NOT ENTITLED TO EQUITABLE TOLLING OF THE CRIMINAL STATUTE OF LIMITATIONS UNDER § 3282 AND § 3298

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” U.S. CONST. amend. V. “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.” FED. R. CRIM. P. 7(b). Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense . . . unless the indictment is found, or the information is instituted within five years after such offense shall have been committed. 18 U.S.C. § 3282. This section is modified by law in 18 U.S.C. § 3298 which extends the statute of limitations to ten years for violations of 8. U.S.C. § 1324.

Tolling the criminal statute of limitations should not be granted in this case because Ms. Maximoff was not responsible for the Government’s inability to file the charges properly within the allotted amount of time. The Government did not properly

dismiss the case against Ms. Maximoff in July 2020 and therefore the current indictment is null and void under the statute of limitations. Tolling should only be allowed in extremely limited circumstances in which the defendant actively prevented the plaintiff from bringing forth the cause of action, which Ms. Maximoff could not have possibly done in this case.

The purpose of a statute of limitations is to limit exposure to criminal prosecution to a fixed period following the occurrence of acts deemed punishable by criminal sanctions. *Toussie v. United States*, 397 U.S. 112, 114 (1970). Such limitations are designed to protect 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 punishment. *Id.* A time limit may encourage law enforcement officials promptly to investigate suspected criminal activity. *Id.* at 115. Congress has declared a policy that the statute of limitations should not be extended “except as otherwise expressly provided by law.” *Id.* quoting 18 U.S.C. §3282. Criminal statutes of limitations are to be liberally interpreted in favor of repose *Id.* Any statute of limitations incorporates the idea that beyond a certain period of limitation the defendant’s right to a fair trial is prejudiced. *United States v. Midgley*, 143 F.3d 174 (1998).

Criminal Statutes of limitations are subject to tolling, suspension, and waiver. *United States v. Levine*, 658 F.2d 113 (1981). Equitable tolling of a statute of limitations may apply where a complaint succeeds a filing deadline through either the complainant’s benign mistake or an adversary’s misconduct. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, (1990). “Equitable Tolling may be appropriate if (1) the defendant has

actively misled the plaintiff, (2) if the plaintiff has ‘in some extraordinary way’ been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.” *Midgley* at 179. Courts invoke the doctrine of equitable tolling only sparingly and will not toll a statute because of what is at best a “garden variety claim of excusable neglect” on the part of the defendant. *Irwin* 498 U.S. at 96. 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 interests of justice.” *Id.* Information and prosecution are not synonyms of one another. *United States v. Rosecan*, 2021 WL 1026070. An Information is instituted when it is properly filed. *Id* at 3.

In *Midgley*, the defendant was charged with multiple counts of controlled substance and firearms violations. 142 F.3d at 175. The court confirmed that there are only three situations that permit tolling of criminal statutes of limitations: 1) defendant has actively misled the plaintiff, 2) plaintiff has in some extraordinary way been prevented from asserting his rights, and 3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum. *Id* at 178.

The court went on to state that federal courts should only invoke equitable tolling sparingly and absent any showing of intentional inducement or trickery by the defendant the statute of limitations should be tolled only in rare situations. *Id* at 179.

In *Atiyeh*, the defendant was charged with multiple counts of illegal gambling, wire fraud, and money laundering. The nature of the charges involved operations and evidence that had to be procured from foreign countries. An order was signed by the

court to suspend the statute of limitations for a period. The government argues that it relied in good faith on the order and therefore is entitled to equitable tolling of the statute of limitations. *Atiyeh*, 359-262.

The court drew on a multitude of cases that cautioned the use of tolling. Recounting the fact that statutes of limitations are in place for a reason; to protect the rights of the accused from having to defend themselves from charges that stem from actions that have been muddied by the waters of time. *Id* at 367. The court established that the Defendant did not induce the government's current situation, and the "principles of justice do not demand that the statute of limitations be tolled under the current circumstances. This court has never applied equitable tolling to rescue a government indictment filed after the statute of limitations has lapsed." *Id*.

In *Rosecan*, the government filed an information charging Dr. Rosecan with multiple counts of healthcare fraud. The statute of limitations for the latest offense would have expired on August 24, 2020. However, on April 9, 2020, Dr. Rosecan, who was aware of the investigation prior to the filing of the information, signed a Tolling Agreement with the Government that extended the statute of limitations to November 24, 2020. *Rosecan*, at 1.

Rosecan argued that the information filed by the government is void because it was not accompanied by a waiver of indictment and was therefore insufficient to begin prosecution. *Id* at 2. The court in this unpublished opinion relied on caselaw from the seventh and eleventh circuit. The court ruled that the plain language of §3282 does not

equate “prosecuted” and “instituted.” An Information is instituted when it is properly filed. *Id* at 3.

The court in *Midgley* ruled that tolling a statute should only be permitted when the Defendant acted in a manner that prevented the plaintiff from filing in the appropriate forum in the appropriate allotment of time under the statute of limitations. Neither Maximoff nor her actions fall under the Court’s three-part test for allowing tolling:

1) Defendant has actively misled the plaintiff. Maximoff was not made aware of the investigation against her until the very morning she was arrested. It is impossible to claim that Maximoff actively misled the prosecution in this case. 2) plaintiff has in some extraordinary way been prevented from asserting his rights. Plaintiff filed their indictment and have been allowed to proceed with their charges over a year and a half after the statute of limitations has ended. The government has been asserting their rights without interruption since the beginning of these proceedings. Lastly, 3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum. All charges were brought in the correct forum. Even if the government’s claim that the pandemic did not allow them to properly bring these charges against Ms. Maximoff are true, Ms. Maximoff is not responsible for the Government’s untimely indictment and therefore no tolling of the statute of limitations should be granted by this honorable court.

The court in *Atiyeh* ruled that tolling statutes of limitations should be done very rarely if ever at all. A balance has been struck by congress in drafting §3282 and §3298. That balance should be respected and only interrupted if the Defendants bad faith actions caused the prosecution to miss the time frame laid by the statute of limitations.

In the case at bar, not only was the statute of limitations set in §3282 doubled by §3298, but the investigators suspended their investigation for six months near the end of the statute of limitations and are now asking the Defendant to accept prosecution for events that allegedly happened almost 12 years ago. All though it is true that the government could in no way have predicted a global pandemic to suspend the grand jury from convening, Maximoff in no way shape or form could have caused the COVID-19 pandemic to occur. Maximoff did not give rise to the government's current situation, and she should not be held responsible as if she did. The government had plenty of opportunities to bring these charges against Maximoff before the global pandemic started and failed to do so. Maximoff was not even aware of these charges brought against her until a year and a half after the statute of limitations had ended.

The court in *Rosecan* ruled that the plain language of §3282 only requires that the “information” be “instituted” to satisfy the statute of limitations. An information is instituted when it is properly filed. *Rosecan* at 3. In the case of Maximoff, the government did not properly file an information before the statute of limitations ran its course. The Government brought charges in Federal Court against Maximoff only two days before the statute of limitations ended the government failed to indict Maximoff properly because they did not convene a Grand Jury. The government proceeded to file a motion to dismiss their own case without the consent of the Defendant, in plain violation of Fed. R. Crim. P. 7(b).

Ms. Maximoff was not made aware of the charges against her in July 2020 when the Government indicted her in Federal Court and then improperly dismissed those

charges without her consent. Ms. Maximoff could not have possibly prevented the Government from bringing forth this cause of action in a timely manner and therefore tolling the criminal statute of limitations should not be granted by this honorable court.

Conclusion

For the foregoing reasons, Defendant asks this Honorable Court to dismiss all charges with prejudice.

Dated September 23, 2021,

Respectfully submitted,

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