

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

UNITED STATES OF AMERICA,)
)
)
)
)
v.)
)
WANDA MAXIMOFF,)
Defendant.)
_____)

CASE NO. 1:21-cr-36

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

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INTRODUCTION

COMES NOW Defendant, Wanda Maximoff, by and through her attorneys, respectfully moves to dismiss this case as untimely pursuant to 18 U.S.C. § 3298 for violation of the statute of limitations. The United States (hereinafter the “Government”) is not entitled to the six (6) month extension of the statute of limitations set forth in 18 U.S.C. § 3288 because the statute is inapplicable to the facts of this case. Furthermore, the Government is not entitled to the doctrine of equitable tolling because there was ample time to press charges against Ms. Maximoff prior to the suspension of the grand jury and therefore, the extraordinary circumstance of the COVID-19 pandemic cannot be said to have caused the Government’s delayed filing. Accordingly, Wanda Maximoff, by and through her attorneys, respectfully moves to dismiss the Indictment.

STATEMENT OF FACTS

On September 23, 2021, a grand jury returned an Indictment against Defendant Wanda Maximoff; alleging that between May 31, 2007, and July 24, 2010, Ms. Maximoff violated § 1324(a)(1)(A)(iv), (v), by conspiring to knowingly encourage and induce an alien to reside in the United States by manufacturing and selling false and fraudulent OSUPs¹ to aliens illegally present in the United States

¹ An Order of Supervision (“OSUP”), DHS Form I-220B, is a document issued by United States Immigration and Customs Enforcement to aliens who have been ordered removed from the United States, pursuant to a final order of removal, and who could not be removed due to qualifying conditions. An OSUP authorizes the release of an alien to the community under prescribed reporting conditions.

who did not qualify to receive an OSUP. *Maximoff Indictment*. For this charge, Ms. Maximoff faces a maximum term of imprisonment up to ten (10) years, a maximum term of supervised release of up to three (3) years, a \$250,000.00 fine, and a special assessment. *Initial App.* ¶ 35-37.

Prior to the returned Indictment in this matter, the Government filed a sealed Information against Ms. Maximoff on July 22, 2020. *Initial App.* ¶ 57-58. The following day, July 23, 2020, the Government moved to dismiss the Information, without prejudice, and the Honorable Judge Bradley returned a signed order dismissing the Information. ¶ 58-60. The Government contends they filed the July 2020 Information due to Administrative Order No. 20-019, which suspended the grand jury because of COVID-19 until March 29, 2021. ¶ 60-64. Despite the Government's on-going investigation beginning on or about May 3, 2018, it claims it was "forced" to file the July 2020 Information to comply with the ten (10) year statute of limitations set forth in 18 U.S.C. § 3298, which would have expired on July 24, 2020. *Woo Aff.* ¶ 7. However, Ms. Maximoff was not aware of the Government's investigation of the alleged federal crime until her arrest on September 23, 2021. *Initial App.* ¶ 73-74. Accordingly, Ms. Maximoff never waived her constitutional right to an indictment, thereby rendering the July 2020 Information *null and void*; causing it to have no effect on any applicable statutes of limitations. ¶ 71-75.

ARGUMENT

I. Prosecution is barred by the statute of limitations.

Dismissal of this case is warranted because the Indictment returned against Ms. Maximoff in September 2021 violated the applicable ten (10) year statute of limitations set forth in 18 U.S.C. § 3298. The Government relies on the Information filed on July 22, 2020, to comply with the statute of limitations; however, Ms. Maximoff never waived her constitutional right to an indictment, thereby rendering the July 2020 Information null and void and causing the Indictment returned on September 23, 2021, to fall outside of the statute of limitations.

A. The Government violated 18 U.S.C. § 3298.

The Supreme Court has long upheld the importance of statute of limitations as means 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 “encourag[e] law enforcement officials promptly to investigate suspected criminal activity. *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). In criminal cases, the Court emphasized that statutes of limitations must be “liberally interpreted in favor of repose.” *Id.* at 115. If there is doubt about the statute of limitations in a criminal case, it should be construed in favor of the defendant. *United States v. Gilbert*, 136 F.3d 1451, 1454 (11th Cir. 1998).

Here, there is no doubt! Ms. Maximoff was charged with violating 8 U.S.C. § 1324(a)(1)(A)(iv), the prosecution of which is barred “unless the indictment is found, or the information is instituted not later than ten (10) years after the commission of the offense.” 18 U.S.C § 3298. The Government accuses Ms. Maximoff of committing the alleged crime between May 31, 2007, and July 24, 2010. Therefore, the Indictment returned against Ms. Maximoff in September 2021 violated § 3298 because the applicable statute of limitations would have expired on July 24, 2020.

Accordingly, dismissal is warranted because prosecution is barred by the statute of limitations.

B. 18 U.S.C. § 3288 does not apply to this case.

The statute of limitations for prosecuting felonies extends six (6) months when an indictment or information is dismissed *after* the original statute of limitations expires. 18 U.S.C. § 3288. Here, the Government relies on § 3288 to comply with the applicable statute of limitations, and in doing so, the Government argues the Indictment was returned against Ms. Maximoff in accordance with § 3288 following the timely filing of the Information in July 2020. However, for the following reasons, § 3288 does not apply to Ms. Maximoff’s case, so the Government is not entitled to an extension of the statute of limitations.

1. The Information was dismissed before the statute of limitations expired.

When the language of a statute is plain, courts must enforce the statute according to its terms. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). If a statute is unambiguous, people are entitled to rely on the law as written without fear that courts might disregard its plain terms based on an extratextual consideration. *Bostock v. Clayton Cty*, 140 S. Ct. 1731, 1749 (2020).

18 U.S.C. § 3288 plainly states that it applies to dismissals of indictments and informations *after* the applicable statute of limitations has expired. Here, the Government overlooks the obvious defect in applying § 3288 to Ms. Maximoff's case and disregards the clear instructions from the Supreme Court on statutory interpretation. The Information filed against Ms. Maximoff was dismissed on July 23, 2020, but the applicable statute of limitations did not expire until the following day, July 24, 2020. Therefore, it is clear and unambiguous that the Information was dismissed *before* the statute of limitations expired. Accordingly, § 3288 does not apply.

2. Ms. Maximoff never waived her right to an indictment.

Even if this Court were to interpret 18 U.S.C. § 3288 to include Ms. Maximoff's case, the statute still does not apply because Ms. Maximoff never waived her constitutional right to an indictment. Under the Fifth Amendment, the Government is required to prosecute felonies by indictment. U.S. CONST. amend. V.

The Government may prosecute non-capital felonies by information rather than indictment if the defendant waives prosecution by indictment. FED. R. CRIM. P. 7(b). Without said waiver, an information cannot perform the same charging function as an indictment. *United States v. Machado*, No. CRIM.A.04-10232-RWZ, 2005 WL 2886213, at *2 (D. Mass. Nov. 3, 2005).

Here, it would have been impossible for Ms. Maximoff to waive her right to an indictment because the July 2020 Information was sealed and she never knew about her investigation until her arrest on September 23, 2021. Nonetheless, the Government argues the July 2020 Information is still valid for the purposes of statutes of limitations. Using *United States v. Rosecan* as the foundation for its argument, the Government contends Rule 7(b) of the Federal Rules of Criminal Procedure does not prohibit the filing of an information without a waiver, but only prevents prosecution without a waiver. No. 20-CR-80052-RUIZ(s), 2021 WL 1026070 (S.D. Fla. Mar. 17, 2021). However, the Government's application of *Rosecan* to Ms. Maximoff's case is flawed.

Unlike Ms. Maximoff, who was never aware she was under investigation, the defendant in *Rosecan* was aware of his investigation. *Id.* Additionally, the *Rosecan* defendant signed a statute of limitations tolling agreement with the Government approximately three (3) months prior to the Government filing an information

against him. *Id.* Therefore, *Rosecan* is inapplicable and should hold no precedential authority in this case.

United States v. Machado provides the accurate interpretation of the indictment waiver exception. 2005 WL 2886213. In *Machado*, the Government acknowledged that a waiver of indictment is required to prosecute a defendant, but argued it is not required to institute charges. *Id.* at *2. Rebuking the Government's argument, the district court in *Machado* correctly noted that the institution of charges is the first step of the prosecution. *Id.* Accordingly, the court held that since an information is the "functional and constitutional equivalent of an indictment only when accompanied by a valid waiver of indictment," the waiver requirement should apply in the statute of limitations context. *Id.* Furthermore, a court in possession of an information without a waiver of indictment lacks subject matter jurisdiction, leaving such an information "virtually meaningless." *Id.* (quoting *United States v. Wessels*, 139 F.R.D. 607, 609 (M.D. Pa. 1991)).

Although the statute in question in *Machado* is 18 U.S.C. § 3282, the Government concedes there is no material difference from the language in 18 U.S.C. § 3298. 2005 WL 2886213. Therefore, applying *Machado* to Ms. Maximoff's case, the Information filed in July 2020 was *virtually meaningless* because it lacked Ms. Maximoff's waiver of indictment.

Accordingly, § 3288 does not apply and the Government is not entitled to a six (6) month extension on the statute of limitations.

II. The Government is not entitled to the doctrine of equitable tolling because it failed to exercise due diligence when filing the information.

A delay in the Government's filing cannot be attributed to the burdens the COVID-19 pandemic has placed on the court system because the Government had ample opportunity to prosecute Ms. Maximoff prior to the onset of the pandemic but failed to do so. Equitable tolling is a narrow doctrine that enables the courts to toll a statute of limitations for "compelling" justifications. *Envtl. Safety Consultants, LLC v. United States*, 97 Fed. Cl. 190, 193 (2011). To benefit from equitable tolling, one must demonstrate that they have been diligent in pursuit of their claims. *China v. Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1817 (2018). The party seeking to invoke equitable tolling bears the burden of persuasion and must establish a compelling basis for such relief. *Donovan v. Maine*, 276 F.3d 87, 91 (1st Cir. 2002). The principles of equitable tolling are typically applied in civil actions, but courts apply the same principles to criminal actions. *Powers v. Southland*, 4 F.3d 223, 233 (3d Cir. 1993).

A. The totality of the circumstances approach supports the finding that the Government failed to exercise due diligence in filing the information.

When deciding whether to apply the doctrine of equitable tolling, courts must make a case-by-case determination when new situations demand it. *Holland v. Florida*, 560 U.S. 631, 649 (2010). The Court stressed that in applying equitable tolling, courts should avoid “mechanical rules” and look at the special circumstances arising out of each case “to meet new situations [that] demand equitable intervention.” *Id.* at 650. Following *Holland’s* flexible approach, several circuits have adopted a totality of the circumstances analysis, concluding that equitable tolling is warranted when “the totality of the circumstances makes it clear that extraordinary circumstances stood in the way of petitioner’s timely filing.” *Ross v. Barano*, 712 F.3d 784, 802-03 (3d Cir. 2013).

Currently, the district courts have not uniformly applied a flexible approach when evaluating petitions seeking equitable tolling during the pandemic. *Mix v. Warden*, No. 2:21-CV-126, 2021 WL 977875, at *3 (S.D. Ohio Mar. 16, 2021). However, the totality of the circumstance analysis is consistent with the Supreme Court’s emphasis on flexibility in equitable procedure. *Holland*, 560 U.S. at 650. Several courts have found that the pandemic is an extraordinary circumstance in which equitable tolling should apply; however, the majority of these decisions focus on the burdens COVID-19 has placed on the investigation of one’s claim, not the

prosecution. *Cowan v. Davis*, No. 1:19-cv-00745-DAD, 2020 WL 4698968, at *2 (E.D. Cal. Aug. 13, 2020)., *Kilck v. Cenikor Found.*, 509 F. Supp. 3d 951 (S.D. Tex. 2020)., *Brown v. Davis*, 482 F. Supp. 3d 1049 (E.D. Cal. 2020).

Unlike the petitioner in *Cowan*, the pandemic did not have any effect on Ms. Maximoff's investigation. No. 1:19-cv-00745-DAD, 2020 WL 4698968, at *3 (E.D. Cal. Aug. 13, 2020). In Ms. Maximoff's investigation, Agent Woo conducted multiple interviews and subpoenaed Ms. Maximoff's phone and financial records by October 2019. The Government was able to fully investigate Ms. Maximoff without any hindrance from the COVID-19 pandemic. In exercising due diligence, the Government should have begun its filing soon after the conclusion of the investigation and before the suspension of the grand jury. Instead, the Government chose to file the sealed Information without a waiver two (2) days before the statute of limitations expired, and then swiftly moved to dismiss.

The Government claims even if the Indictment is untimely, it is still entitled to equitable tolling of the statute of limitations due to the pandemic. The Government began investigating Ms. Maximoff on or about May 3, 2018, and by October 2019, it appears the Government had enough probable cause to bring the case to the grand jury. The Government could have pressed charges against Ms. Maximoff anytime between October 2019 and before the start of the suspension of the grand jury on March 23, 2020. Instead, the Government filed the Information two (2) days before

the statute of limitations expired. The Government had four (4) months to file prior to the suspension of the grand jury but failed to do so. Therefore, the Government is using the pandemic as an excuse for its untimeliness and lack of due diligence.

B. The doctrine of equitable tolling will not apply when the Government relies on its statutory interpretation in good faith.

The Government relies heavily on the Seventh Circuit Court of Appeals' interpretation of criminal statutes of limitations and Rule 7(b) of the Federal Rules of Criminal Procedure to justify its filing of the Information without a valid waiver. *United States v. Burdix-Dana*, 149 F.3d 741, 742 (7th Cir. 1998) (holding that filing an information without a valid waiver will not make such filing null and void). However, this Court has not yet ruled on this issue, making the Government's argument for the application of equitable tolling nothing but a mere safety net should this Court reject its interpretation of the statute.

Equitable tolling has “never been applied to rescue a government indictment filed after the statute of limitations has lapsed.” *United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005). The Government in *Atiyeh* argued that because it relied in good faith that the statute of limitations would be suspended, equitable tolling should apply. *Id.* However, the Court refused to adopt a good faith exception to equitable tolling. *Id.* Congress has the authority to make a “good faith” exception to criminal statutes of limitations but has yet to do so. *See United States v. Podde*, 105 F.3d 813, 820 (2d Cir. 1997); *See also United States v. Gaither*, 926 F. Supp. 50, 53 (M.D. Pa.

1996). Even if the Government pursues their case with diligence and in good faith, it is not entitled to equitable tolling of the statute of limitations merely because it is without fault. *United States v. Midgley*, 143 F.3d 174, 179 (3d Cir. 1998).

Even though the Government is claiming that the hardships caused by COVID-19 justify the application of equitable tolling in Ms. Maximoff's case, this is merely a guise for the fact that they are asking this Court to recognize and apply a good faith exception. The Government filed the Information without a waiver in good faith, and as such, it is not entitled to equitable tolling. Furthermore, as displayed in *Midgley* and *Atiyeh*, a good faith exception to equitable tolling has never been recognized by the courts, and Congress has the authority to enact such an exception but has yet to do so.

The Government's filing of an Information without a waiver was invalid; thus, the Government cannot rely on equitable tolling to rescue the prosecution from being barred by the statute of limitations. Blaming the hardships caused by COVID-19 as the reason for the delay is a strategic argument that disguises the Government's request for this Court to recognize a good faith exception to equitable tolling.

C. Rejection of the tolling legislation proposed by the Department of Justice rebukes the Government's argument for equitable tolling.

Shortly after the outbreak of COVID-19, the Department of Justice (hereinafter the "DOJ") proposed legislation asking Congress to pause the statute of limitations for criminal investigations during national emergencies and for one (1)

year following the end of the national emergency.² Despite the push from the DOJ, there has been no change in the statutes of limitations by Congress. Many courts have issued orders in response to the outbreak, but the majority of them have not addressed the statutes of limitations or have explicitly stated that they remain unchanged. *E.g.* Standing Order No. 20-9, In re: Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic (D.D.C. Mar. 16, 2020), Order of the Chief Judge No. 18, In the Matter of Suspension of Jury Trials and Other Proceedings During the COVID-19 Public Emergency (S.D. Cal. Mar. 17, 2020). However, two (2) courts in Texas have issued orders to toll all applicable statutes of limitations through May 1, 2020. 1 Special Order No 13-5, Court Operations under the Exigent Circumstances Created by the COVID-19 Pandemic (N.D. Tex. Mar. 13, 2020), 12 General Order 20-03, Court Operations under Exigent Circumstances Created by the COVID-19 Pandemic (E.D. Tex. Mar. 16, 2020).

Congress's rejection of the proposed legislation by the DOJ and the courts reluctance to toll all statutes of limitations works against the Government's argument that they are entitled to equitable tolling. This Court will be required to look at the facts and circumstances surrounding the Government's delayed prosecution of Ms. Maximoff and will discover COVID-19 was not the sole cause of the delayed filing.

² Information regarding the proposed legislation can be found at: Betsy Swan, DOJ Seeks New Emergency Powers amid Coronavirus Pandemic, (Mar. 21, 2020, 1:01 PM), <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>.

Accordingly, the Government is not entitled to the doctrine of equitable tolling.

CONCLUSION

WHEREFORE, Defendant Wanda Maximoff respectfully requests this Honorable Court to grant her Motion to Dismiss and dismiss this prosecution with prejudice because it is barred by the statute of limitations.

Respectfully Submitted,

s/ _____
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September 23, 2021