TEAM 114

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

UNITED STATES OF AMERICA

Plaintiff,

v. CASE NO. 1:21-cr-36

WANDA MAXIMOFF

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR UNTIMELY RETURN AND TO PRECLUDE ENTITLEMENT TO EQUITABLE TOLLING

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INTRODUCTORY STATEMENT

This action arises out of the Government's claim against Defendant, Wanda Maximoff ("Ms. Maximoff"), for an alleged violation of 8 U.S.C. § 1324(a)(1)(A)(iv-v). The Defendant respectfully files this memorandum of law in support of the Motion to Dismiss for Untimely Return. Ms. Maximoff respectfully requests this Court to grant the motion to dismiss the Government's indictment for the following reasons:

I. The Defendant, Wanda Maximoff, is moving to dismiss the Government's case because the indictment was not timely returned in view of §§ 3288, 3298. Maximoff did not waive her right to prosecution by indictment under Federal Rules of Criminal Procedure 7(b), and therefore the Government never properly instituted their action. Also, § 3288 is completely inapplicable because the information was dismissed before the statute of limitations expired.

II. Equitable tolling is not warranted in this case. For equitable tolling for to be warranted there has to be extraordinary circumstances that caused the late filing, due diligence on behalf of the non-movant, and bad faith, deception, and false assurances on behalf of the movant. None of these factors are present in this case.

STATEMENT OF FACTS

A. *Factual Background*

The Defendant, Wanda Maximoff ("Ms. Maximoff") was a law clerk and later an associate for immigration attorney, Agatha Harkness ("Ms. Harkness"), beginning in 2007. (YAs Aff. ¶¶ 10, 19, 26.) Ms. Harkness introduced her clients to Ms. Maximoff to have her help work on their applications and paperwork to gain legal temporary residency. *Id.* at ¶ 9. Within some clients' paperwork, a note had been left with a phone number for "Scarlet" who would be able to aid them in obtaining immigration paperwork similar to an order of supervision ("OSUP"). *Id.* at ¶ 11. This is a Department of Homeland Security ("DHS") form issued by the Immigration and Customs Enforcement ("ICE") to aliens who have been ordered out of the United States but have a qualifying condition to remain. (Indictment ¶ 2.) The OSUP allows for such aliens to obtain particular benefits, including a Stetson Driver's License and an Employment Authorization Card. *Id.* at ¶ 4.

Two clients in particular, H.P. and S.P., a married couple, retained Harkness in 2008 after entering the country illegally in 2008. (YAs Aff. ¶ 9.) They obtained the note from Scarlet and called the provided phone number in which an unidentified man answered the phone and told them he could provide the necessary immigration documents for $10,000 in cash left in their mailbox. *Id.* at ¶ 12. H.P. and S.P. followed the unidentified man's instructions and obtained the fraudulent OSUP forms, which they used to obtain a Stetson driver's license and Employment Authorization Cards. *Id.* S.P. and H.P. told authorities they never met this "Scarlet" and would not be able to identify "Scarlet." *Id.* at ¶ 7. This all occurred during the time H.P. and S.P. were represented by Harkness. H.P. further

advised authorities that other aliens in their neighborhood paid "Scarlet" to obtain fraudulent immigration work until 2010 and that they were all clients if Harkness. *Id.* at ¶ 13. This is when Special Agent Jimmy Woo ("YA") of DHS opened an investigation file and then attempted to get in contact with Harkness to no avail. *Id.* at ¶ 14. Harkness has since been unable to be contacted by authorities and her home in Massachusetts is currently abandoned. *Id.* at ¶ 15.

Agent YA was then given another assignment and tabled this "Scarlet" investigation from August 15, 2018, through February 15, 2019. *Id.* at ¶ 17. Upon YA's return from working undercover, the investigation was re-opened. *Id.* at ¶ 18. In 2019, YA interviewed R.B., who unlawfully entered in the United States in 2009 and retained Harkness for his immigration case but that he later utilized "Scarlet" to obtain a forged OSUP for $10,000. *Id.* at ¶ 19. YA later learned the phone number for "Scarlet" belonged to the Law Office of Agatha Harkness. *Id.* at ¶ 22. Based off this initial investigation, YA turned his investigation to Wanda Maximoff alleging her to be the identity of "Scarlet" with no further investigation into Harkness despite her disappearance. *Id.* at ¶ 24. During this investigation, YA interviewed former clients of Maximoff in which he learned from one in particular, I.M., that he believed the one dropping off the forged documents was his attorney, Harkness, and not Maximoff. *Id.* at ¶ 30. Agent YA, however, reported that he did not find this information credible but failed to provide an explanation for why he dismissed this evidence from I.M. *Id.*

B. *Procedural History*

The United States filed an information against Wanda Maximoff ("Defendant"), under seal, on July 22, 2020, with a supporting affidavit from Agent YA. (Order 1:8-1:10.) The government then dismissed the information and all matters pertaining to this case pursuant to Federal Rules of Criminal Procedure 48 on July 23, 2020. During this time, the grand jury was suspended under Administrative Order No. 20-019 beginning March 23, 2020. (Initial Appearance R. 5:60-5:65.) This suspension was lifted a little over a year later on March 29, 2021, through Administrative Order No. 21-008. *Id.* When the grand jury reconvened, the United States sought an indictment by the grand jury under 18 U.S.C. § 3288. *Id.* The grand jury charged Ms. Maximoff with one count in violation of 8 U.S.C. § 1324(a)(1)(A)(iv-v) alleging that Ms. Maximoff committed the illegal acts between May 31, 2007, and July 24, 2010. (Indictment ¶ 5.) The statute of limitations for this offense was set to run on July 24, 2020, and this indictment was returned on September 21, 2021. *Id.*

ARGUMENT

I. The motion to dismiss for untimely return should be granted because the Government returned the Indictment in violation of the statute of limitations after failing to properly institute the action within the requisite period and then subsequently urging a six-month extension in compliance with a completely inapplicable statute.

"No person shall be prosecuted, tried, or punished for any non-capital offense . . . 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. § 3298. For criminal cases, the statute of limitations begins to run when the crime is complete. *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). Though additional later filing outside of the statutory limitations period may be permissible, it must be expressly provided by the law and the initial filing of the indictment or information must have been timely filed within the defined statutory period. *Powell v. United States*, 352 F.2d 705, 707 n.5 (D.C. Cir. 1965); *see Toussie*, 397 U.S. at 115.

It would be a mistake for this Court to find that the Information filed on July 22, 2020 tolled the statute of limitations because it was filed without the defendant's waiver of indictment by the defendant. As a result, this information was void upon filing and could not properly "institute" the action within the statute of limitations. It would be further error to hold that the new indictment was permitted under § 3288 because that statute only applies when an "information charging a felony is dismissed for any reason *after* the period prescribed by the applicable statute of limitations has expired." 18 U.S.C. § 3288. (emphasis added). The Government dismissed their information on July 23, 2020, one day before the limitations period ended. Therefore, by the plain language of § 3288, it is

inapplicable to the facts of this case. For these reasons, this Court should render the new indictment untimely and grant the defendant's motion to dismiss.

A. *The Government failed to obtain a waiver of indictment from Ms. Maximoff in violation of Federal Rule of Criminal Procedure 7(b), and it was thus void from its inception and did not properly "institute" the action within the requisite statute of limitations.*

The starting point for statutory interpretation is always the language of the statute and "when a statute speaks with clarity on an issue," the judicial inquiry ends such that courts must follow the plain meaning of the statutory text. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). Moreover, in resolving disputes over the meaning of statutory words, courts must seek to afford words their ordinary meaning. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). The ordinary meaning of to "institute" something is "to originate and get established" or "to set going." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/institute, (last visited Aug. 28, 2021). Similarly, Black's Law Dictionary defines "institute" as "to commence; as to institute an action." Institute, Black's Law Dictionary (11th ed. 2019). These dictionary definitions must be read in the context in which they are used.

Being charged with a violation of the INA, Ms. Maximoff faces up to ten years of imprisonment per § 1324(B) and under our Constitution, an indictment is required to "commence" the prosecution of an "infamous crime." U.S. Const. amend. V. (stating "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…"). This constitutional requirement is codified and enforced by Rule 7 of the Federal Rules of Criminal Procedure, which states that an

offense must be prosecuted by an indictment if it is punishable "by imprisonment for more than one year." Fed. R. Crim. P. 7(a)(1)(B). Such an offense may be prosecuted by information only 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." *Id.* § 7(b). Therefore, in the context of these constitutional and statutory requirements, to have an information validly "instituted" and thus "commence" the prosecution of the alleged felony offense in this case, it is clear that a waiver of indictment is required from the defendant.

Since the Government has failed to meet this requirement, it did not properly "institute" its information under § 3298 and the information was null. Furthermore, to "prosecute" an individual as stated under Rule 7 and to "institute" as used in § 3298 for an information are virtually synonymous. To claim the institution of an information under § 3298 is different from requiring a waiver "to prosecute" under Rule 7 is to deny these terms their commonly accepted meaning.[1] It is this Court's duty to follow the plain meaning of the statutory text; since the Government's information was incapable of tolling the statute of limitations, this Court must render the subsequent indictment untimely and dismiss this cause of action against the defendant.

Further, the Supreme Court *rejected* the government's interpretation that the complaint was still sufficient to trigger the extension of the limitations period despite the complaint being insufficient to comply with the requirement of probable cause, holding that "the complaint, to initiate the time extension, must be adequate to begin effectively the

[1] Institution, Black's Law Dictionary (11th ed. 2019) (defining "institution" as the "commencement of ... a civil or criminal action"); Prosecute, Black's Law Dictionary (11th ed. 2019) (defining "prosecute" as "[t]o commence and carry out a legal action").

criminal process prescribed by the Federal Criminal Rules." *Jaben v. United States*, 381 U.S. 214, 217-20 (1965). It is evidently clear that a felony prosecution cannot commence without the defendant's notice and waiver of their right to indictment. *See United States v. Sharma*, No. 4:14-CR-61, 2016 WL 2926365, at *2 (S.D. Tex. May 19, 2016) ("…a felony prosecution may be instituted by an information; however, it is possible only when the charged party waives formal indictment."), appeal dismissed (5th Cir. 16-20381) (July 13, 2016); *United States v. Machado*, No. CRIM.A.04-10232-RWZ, 2005 WL 2886213, at *2 (D. Mass. Nov. 3, 2005) (rejecting the government's argument that an information, unaccompanied by a waiver, is properly "instituted" for purposes of the statute of limitations when it is filed). Therefore, an information unaccompanied by the defendant's waiver, is insufficient to keep the statute of limitations from running.

Permitting the government to toll the statute of limitations with a waiverless information would also promote bad policy. To permit such action would be the equivalent of permitting the government to ignore our clearly established rules of criminal procedure and still have the privilege of extending their time to prosecute. To follow the Government's interpretation would mean "that once having filed a complaint, the Government need not further pursue the complaint procedure at all and, in the event that the defendant pressed for a preliminary hearing and obtained a dismissal of the complaint, that the Government could nonetheless rely upon the complaint . . . as having extended the limitation period." *Jaben*, 381 U.S. at 218. The government should not have free reign to extend the statute of limitations when it fails to follow required procedural rules and the command of our Constitution.

B. ***The Government's allegation of compliance with § 3288 is incapable of saving their indictment even though it was returned within six months of the grand jury being reconvened because the information was dismissed before, and not after, the expiration of the statute of limitations, rendering § 3288 entirely inapplicable.***

Sections 3288 and 3289[2] of Title 18 of the United States Code may permit a 6-month extension of time for an indictment to be returned without being time-barred by the statute of limitations. *United States v. Charnay*, 537 F.2d 341, 354 (9th Cir. 1976). These saving statutes are not operative in every case and are confined to those situations expressly delineated in the statute. In fact, the title of each statute clearly expresses when that particular section becomes applicable: § 3288 is "Indictments and Information Dismissed After Period of Limitations," and § 3289 is "Indictments and Information Dismissed Before Period of Limitations." The Government has asserted compliance with 18 U.S.C. § 3288, which is one such savings clause for when an order is dismissed after the expiration of the statute of limitations. It states the following:

> 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...if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations. 18 U.S.C. § 3288.

Here, the alleged crimes of the defendant occurred from May 31, 2007 through July 24, 2010. Thus, the statute of limitations expired ten years after the last day of conduct, on July

[2] The Government failed to assert compliance under § 3289, but that statute rather states: "[w]henever an indictment or information charging a felony is dismissed for any reason *before* the period prescribed by the applicable statute of limitations has expired…" 18 U.S.C. § 3289 (emphasis added).

24, 2020. However, the court signed and dismissed the information prior to this date, on July 23, 2020.

Congress had a clear intent that these savings statutes should only become applicable in defined cases. The Government is without recourse in trying to apply § 3288 when its information was filed before the statute of limitations has ended. *See United States v. Grady*, 544 F.2d 598, 601 n.3 (2d Cir. 1976) (stating that § 3288 allows indictment after the limitation period has run only if the prior indictment has been dismissed and that § 3288 is "operative, by its express terms, only after the limitation period has run"). Thus, the Government is not entitled to saving its indictment by this statute because it dismissed its information *before* the statute of limitations had expired. The Court's decision on this issue is therefore straightforward. The Court should grant the Defendant's motion to dismiss due to untimely return because the Government's assertion of § 3288 is plainly irrelevant to the facts of this case. However, in anticipation of the Government's untimely assertion of § 3289, we will additionally address its inapplicability to this case.

As discussed above, the July information was invalid from its inception. This defect in the information constitutes a "reason that would bar new prosecution" under §§ 3288 and 3289 in which the filing of a new indictment after the statutory limitations period is not permitted. *See United States v. Machado*, No. CRIM.A.04-10232-RWZ, 2005 WL 2886213, at *2 (D. Mass. Nov. 3, 2005) (stating that the court has "no subject matter jurisdiction over a prosecution in which the government has filed an information without obtaining a valid waiver of indictment. The jurisdictional nature of the waiver is grounded in the Fifth Amendment, which requires the government to prosecute felonies by

indictment."). Where an indictment is required, the filing of an information cannot confer jurisdiction over the case even if the defendant waives the filing of an indictment. *United States v. Choate*, 276 F.2d 724, 728 (5th Cir. 1960); *Young v. United States*, 354 F.2d 449, 452 (10th Cir. 1965) (holding that only when both the information and a valid waiver of indictment have been filed is the court vested with jurisdiction).

Since a court cannot prosecute a case without jurisdiction, § 3289 does not permit the filing of a new indictment after a waiverless information has been dismissed. This is further supported by the statutes' legislative history. Congress declared that the primary purpose in amending §§ 3288 and 3289 was to permit its sections to extend "to felony proceedings instituted by information as well as by indictment . . . [t]he amendments would therefore permit reindictment in similar cases where an information was filed after the defendant waived in open court prosecution by indictment." *Charnay*, 537 F.2d at 354 (citing Senate Report No. 1414, 2 U.S. Code Cong. and Admin. News pp. 3257-3258 (1964)). Thus, § 3289 was intended to permit reindictment in felony proceedings first instituted by information, but only in those cases where an information was filed *after* the defendant waived in open court prosecution by indictment.

Congress clearly intended that for §§ 3288 and 3289 to apply to situations in which an information is used to commence a felony prosecution against a defendant, the defendant must first have waived their constitutional right to a grand jury indictment. To follow the Government's interpretation that a waiverless information could toll the statute of limitations for an untimely indictment under § 3289 would lead to the absurd results of subverting a defendant's constitutional rights and our criminal procedure rules. The role of

the courts in statutory interpretation is to effectuate Congress's intent; for this Court to impose a different meaning for properly "instituting" an information under §§ 3288 and 3289 would not only be a violation of separation of powers, but also the denial of basic constitutional rights.

II. Equitable tolling is not warranted because the Government did not investigate diligently and the defendant did not act in bad faith, deceive the Government, or make false assurances.

To decide if equitable tolling is warranted there must be a fact-specific inquiry into the circumstances surrounding the late filing. *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001). There are two predicates for equitable tolling. The party asking for equitable tolling must show that they exercised diligence when trying to file, as well as bad faith, deception, and false assurances made by the non-movant. *Millay v. Cam,* 135 Wash.2d 193, 206 (1998). Not only that but the party moving for equitable tolling must "demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of <their> filing" *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003), as amended (Nov. 3, 2003). Equitable tolling cannot be invoked in the absence of bad faith on the part of the defendant and reasonable diligence on the part of the prosecution. *Prekeges v. King County*, 98 Wash. App. 275, 283 (1999).

First, we must look at the specific facts of this case. The government first learned of the possibility of a crime on May 3, 2018. The government did a brief investigation and then suspended it because the lead investigator, Agent Woo, was going to be a part of an undercover operation. After returning from the operation on February 14, 2019, Agent

Woo continued his investigation. The last interview was conducted by Agent Woo on October 28, 2019. The Government did not file anything until July 22, 2020, two days before the statute of limitations expired. Up until the arrest on September 23, 2021, the defendant, Ms. Maximoff, had no idea that she was under investigation.

The State did not exercise diligence when investigating this crime. Not only could they have assigned a different agent to be the lead investigator while Agent Woo was undercover, but Agent Woo completed his interviews on October 28, 2019, three months prior to the first recognized case of COVID-19 in the United States, and nine months before the Government filed anything. The Government and Agent Woo had plenty of time to file an indictment prior to the pandemic and prior to the tolling of the statute of limitations. Because of this the Government will not be able to demonstrate a causal relationship between the extraordinary circumstance and the lateness of their filing, as required. This is because the extraordinary circumstance the government is claiming cause their lateness was COVID-19 however, the initial investigation began two years prior to the first case of COVID-19 in America and the last interview of the investigation was four months prior to the first case of COVID-19 in America. A diligent lead investigator would have completed their investigation and filed the indictment prior to the outset of COVID-19 in America, or at the least had another agent take over the investigation while they were undercover for a year.

Even if the state had been diligent in their investigation, it is literally impossible to satisfy the second requirement of equitable tolling which is bad faith, deception, and false assurances made by the defendant. Here, Ms. Maximoff did not know about the

investigation until the day she was arrested. She could not have done anything to slow down the Government's investigation. There is an absence of bad faith on the part of the defendant, meaning that equitable tolling cannot be invoked.

A. *Equitable tolling is not warranted because the information filed prior to the tolling of the statute of limitations was not pending when the indictment was filed*

The Eleventh Circuit has stated that a superseding indictment is valid as long as the original indictment is valid and still pending, and the original and superseding indictments do not differ to the extent that it burdens the defense. *United States v. Italiano*, 894 F.2d 1280, 1282 (11th Cir. 1990). Courts have stated that this same logic applies when discussing information that has been filed. *See United States v. Briscoe*, No. CR RDB-20-0139, 2020 WL 5076053, at *2 (D. Md. Aug. 26, 2020). This means that information can take the place of an indictment. So as long as a valid and still pending information was filed prior to the statue of limitations expiring, and it does not differ greatly from the superseding indictment, then the superseding indictment, even if it was filed after the statute of limitations expired, is timely.

The Government has also failed to meet this standard. They did file information prior to the tolling of the statute of limitations however by the time the Government filed their indictment the information was no longer valid or pending because it had been dismissed.

Because of this, the Government does not qualify for Due Process or Equitable Tolling. The Government did not exercise diligence, the Defendant did not act in bad faith, try to deceive the government, or make false assurances, and there was not a valid and still

pending indictment or information on file whenever the Government filed its indictment past the statute of limitations.

CONCLUSION & PRAYER

For the reasons set out above, the Defendant respectfully requests that the Court dismiss the Government's indictment as untimely and deny the Government's request for equitable tolling.

Dated this 30th day of August 2021.

Respectfully submitted,

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