TEAM 114

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

UNITED STATES OF AMERICA

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

WANDA MAXIMOFF
a/k/a "Scarlet"

Defendant.

GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT OF RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR UNTIMELY RETURN

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INTRODUCTORY STATEMENT

This action arises out of Defendant Wanda Maximoff's ("Ms. Maximoff") violation of 8 U.S.C. § 1324(a)(1)(A)(iv-v). This Government respectfully requests this Court to deny the Defendant's Motion to Dismiss for Untimely Return for the following reasons:

I. In compliance with § 3298, the Government properly instituted the action against Ms. Maximoff by filing the information prior to the expiration of the prescribed statute of limitations. This initial information filed against Ms. Maximoff was subsequently dismissed without prejudice; yet, because a grand jury was not in session at the time of dismissal, the Government properly returned the indictment within six months of the grand jury re-convening, in accordance with § 3288, and in the alternative, § 3289.

II. The Government is also entitled to the doctrine of equitable tolling due to the extraordinary circumstances presented by the COVID-19 pandemic. The Government exercised reasonable diligence in the prosecution of Ms. Maximoff, and even with no showing of bad faith, the Government is entitled to and justifiably seeks such tolling on due process grounds.

Due to the Government's inherent statutory compliance, as well as due diligence in the midst of unprecedented times resulting from COVID-19, as elicited above, the Defendant's Motion to Dismiss for Untimely Return should be denied.

STATEMENT OF FACTS

A. *Factual Background*

The Defendant, Wanda Maximoff was a law clerk and later an associate for immigration attorney, Agatha Harkness ("Ms. Harkness"), beginning in 2007. (YA's 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 multiple 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.) These conditions include being a national of a country without a diplomatic relation with the United States, being a single parent of a United States citizen child, or having a significant health condition. *Id.* at ¶ 3. The OSUP allows for such aliens to obtain particular benefits, including a Stetson Driver's License and an Employment Authorization Card. *Id.* at ¶ 4.

On May 3, 2018, one such client, S.P. was arrested for driving under the influence and was found to be in possession of an expired Stetson Driver's License; S.P. confirmed with a Special Agent of the DHS, Jimmy Woo ("YA"), that she had unlawfully entered the United States in 2008 and was a Guatemalan citizen. (YA's Aff. ¶ 5.) She explained that she, along with her husband H.P., purchased a forged OSUP from Scarlet for $10,000 although they had not qualified for the form, as did other aliens in their neighborhood

through 2010. *Id.* at ¶ 7. Upon the information learned through S.P. and subsequently H.P., as a result of S.P.'s arrest in 2018, YA contacted the DHS and initiated an investigation into the fraudulent OSUP files. *Id.* at ¶¶ 14, 15.

YA was sent undercover from August 15, 2018 to February 14, 2019 and thus tabled the investigation. (YA's Aff. ¶ 17.) Upon YA's return from working undercover, the investigation was re-opened. *Id.* at ¶ 18. In 2019, YA interviewed R.B. who explained that he had retained Harkness' firm for his immigration documentation, worked with Ms. Maximoff, received a note to contact Scarlet, and paid Scarlet $10,000 for a forged OSUP. *Id.* at ¶ 19. The aforementioned findings led YA to open an investigation into the identity of Scarlet, and more specifically, Ms. Maximoff as Scarlet. *Id.* at ¶¶ 23, 24. This included subpoenaed phone records, financial records, and flight records, as well as attempted contact and interviews with Ms. Maximoff's former clients. *Id.* at ¶¶ 25, 26, 27, 28, 29. Ms. Maximoff's fraudulent conduct of selling OSUPs under the identity of Scarlet was found to have occurred from May 31, 2007 to July 24, 2010. Indictment ¶ 5. The United States thus was required to institute the information or file the indictment no later than July 24, 2020, in order to be in compliance with 18 U.S.C. § 3298. (Indictment Order 1:5-1:6.)

B. ***Procedural History***

Due to the relentless COVID-19 pandemic, 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.* The United States initially filed the information in this case under seal on July 22, 2020 during this period of suspension, and it subsequently

requested the information and all accompanying matters to be dismissed; this was granted by the district court pursuant to Federal Rule of Criminal Procedure 48, and the case was dismissed without prejudice on July 23, 2020. *Id.* at 5:56-5:65. When the grand jury reconvened, the United States sought an indictment by the grand jury, and the grand jury subsequently charged Ms. Maximoff with one count in violation of 8 U.S.C. § 1324(a)(1)(A)(iv-v) on September 21, 2021. *Id.*

ARGUMENT

I. The Defendant's motion to dismiss the indictment as untimely pursuant to 18 U.S.C. § 3298 should be denied because the information filed by the Government instituted the action within the statute of limitations, and the indictment later filed by the Government was timely returned upon the reconvening of the grand jury.

Ms. Maximoff was charged with encouraging or inducing an alien to enter or continue to reside in the United States knowing that such residence is in violation of the law or engaging in a conspiracy to do so in violation of 8 U.S.C. § 1324(a)(1)(A)(iv-v). Since this was done if furtherance of commercial advantage or private financial gain, Ms. Maximoff is subject to trial for a fine under Title 18, imprisonment not more than 10 years, or both, for each alien in which the unlawful conduct occurred. *See* 8 U.S.C. § 1324(a)(1)(B)(i). As such, Ms. Maximoff has been charged with a felony because the offense is punishable by imprisonment exceeding one year. *See* 8 U.S.C. § 3156(a)(3). In order to comply with the expiration of the statute of limitations on July 24, 2020, the United States filed the information in July in order to institute, though not automatically prosecute, the action within the requisite time period. After its dismissal, the United States then had a six month period from the time the grand jury re-convened to file the indictment.

A. *A defendant is not required to have waived prosecution by indictment in order for the Government to institute an information.*

"[A]n 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. R. 7(b). The Government has filed an indictment in this case and does not even intend to prosecute Ms. Maximoff by information; however, it did initially file

the information in July in order to institute the action within the requisite statutory period. There is nothing within Rule 7(b) that bars the Government from doing so, nor is it ambiguous. When a statute is clear, and the plain language is unambiguous, there is no further analysis necessary. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Courts have been repeatedly advised to presume that a statute says what it means and means what it says, and that when it is unambiguous, "judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). It is unquestionable that prosecuted is distinguishable from instituted, and Rule 7(b) speaks unambiguously for itself. The applicable statute for the limitations period in this case states: "[n]o person shall be *prosecuted*, tried, or punished . . . 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 (emphasis added). It is clear that prosecuted and instituted are two completely different terms. Further, while institute is understood to mean to commence, or start, a civil or criminal action, prosecute is defined as "to commence *and carry out* (a legal action), to institute *and pursue* a criminal action, and to engage in or carry on". Institution, Black's Law Dictionary (11th ed. 2019); Prosecute, Black's Law Dictionary (11th ed. 2019).

Prosecution goes beyond mere institution. *See, e.g., United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998) (stating that the absence of the waiver does not render the filed information void); *United States v. Cooper*, 956 F.2d 960, 962-63 (10th Cir. 1992) (holding that Rule 7(b) does not prohibit the Government from filing the information

without a waiver of indictment). Numerous federal district courts have similarly agreed. *United States v. Rosecan*, No. 20-CR-80052, 2021 WL 1026070, at *4 (S.D. Fla. Mar. 17, 2021) (citing *United States v. Holmes*, No. 18-cr-00258, 2020 WL 6047232, at *8 (N.D. Cal. Oct. 13, 2020); *United States v. Briscoe*, No. CR RDB-20-0139, 2020 WL 5076053, at *2 (D. Md. Aug. 26, 2020); *United States v. Marifat*, No. 2:17-0189 WBS, 2018 WL 1806690, at *1-2 (E.D. Cal. Apr. 17, 2018); *United States v. Stewart*, 425 F. Supp. 2d 727, 729 (E.D. Va. 2006); *United States v. Hsin-Yung*, 97 F. Supp. 2d 24, 28 (D.D.C. 2000); *United States v. Watson*, 941 F. Supp. 601, 603 (N.D. W. Va. 1996)). As such, the information filed by the Government for this case in July is valid.

B. ***Since the information was dismissed without prejudice and the grand jury was out of session due to COVID-19, a new indictment was permissible within six months of the date in which the grand jury re-convened.***

While the information the Government filed in July properly instituted the action within the limitations period, it was ultimately dismissed without prejudice by the court. The court has the authority to dismiss an information if unnecessary delay would occur in presenting the charge to the grand jury or bringing the defendant to trial. Fed. R. Crim. P. R. 48(b). It also permits the government to dismiss an information with leave of court, or to file for the dismissal of an information. Fed. R. Crim. P. R. 48(a); *id.* advisory committee's note. When an information charging a felony is dismissed for any reason prior to,[1] or after, the expiration of the applicable statute of limitations, and no regular grand jury is in session at the time of the dismissal or expiration of the limitations period, then a new

[1] When it is dismissed prior to the expiration of the statute of limitations, the limitations period must expire within six months of the date of dismissal in order for the extension to apply.

indictment may be returned within six months of when the next regular grand jury is convened and shall not be barred by any statute of limitations. 18 U.S.C. §§ 3288, 3289.

Ms. Maximoff committed a trafficking-related offense under section 274(a) of the Immigration and Nationality Act, or 8 U.S.C. § 1324. Accordingly, the statute of limitations in this case was ten years from the last date in which her offense had been committed. *See* 18 U.S.C. §§ 3298. Since her fraudulent conduct occurred from May 31, 2007 to July 24, 2010, the statute of limitations in this case thus expired on July 24, 2020. The information that was filed by the Government instituting this action was dismissed on July 23, 2020. While application of 18 U.S.C. § 3288 plainly provides a six month extension from the time the grand jury re-convened, the Government accepts that it addresses when an information is dismissed after the statute of limitations has passed and concedes that this statute would be inapplicable to our case. However, 18 U.S.C. § 3289 is the exact same as § 3288, except for the fact that it involves cases in which the dismissal of the information occurs prior to the expiration of the limitations period, and it therefore properly applies.

While the Government acknowledges that we have previously represented to the Court that the indictment was sought in compliance with 18 U.S.C. § 3288, we would like to formally amend this assertion to rather be in compliance with 18 U.S.C. § 3289. In July 2020, when the information was dismissed and the statute of limitations expired, the grand jury had been suspended under Administrative Order No. 20-019. Since no regular grand jury was thereby in session at the time in which the statute of limitations expired, it was permissible for the Government to return an indictment within six months from the date in

which the next regular grand jury was convened. *See* 18 U.S.C. §§ 3289. Under Administrative Order No. 21-008, this date was March 29, 2021; therefore, the Government's return of a new indictment was timely if it were filed by September 29, 2021. The new indictment in this case was filed and dated over a week prior, on September 21, 2021. Thus, the Government timely returned the new indictment in this case after it had properly instituted the action by filing the information within the statute of limitations.

II. Even if the Government's filing of the initial information in July were found to be nullified or the return of the new indictment in September untimely, the defendant's motion to dismiss should be denied because the unprecedented COVID-19 pandemic requires equitable tolling of the statute of limitations.

A trial court "has the power to hear an untimely petition because the running of the limitations period would 'not divest the circuit court of the power to try the case.'" *Patrick v. State*, 91 S.3d 756, 758 (Ala. Crim. App. 2011) (*quoting Ex parte Seymour*, 946 S.2d 536, 539 (Ala. 2006)). The Government does not deny that the threshold to trigger equitable tolling is a high one, and it acknowledges that it bears the burden of proof on this point. *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000); *see Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Nevertheless, equitable tolling is available in extraordinary circumstances beyond the state's control and unavoidable even with the exercise of diligence – like the COVID-19 pandemic. *See Patrick*, 91 So. 3d at 758. A court has the discretion to toll the statute of limitations when justice so requires. *Nickum v. City of Bainbridge Island*, 153 Wash. App. 366, 378 (2009). Here, the Government is entitled to equitable tolling of the statute of limitations, as has been substantiated in similar cases by various courts nationwide.

A. *The Government has exercised reasonable diligence in its efforts to prosecute Ms. Maximoff amidst a raging pandemic.*

The predicates for equitable tolling include the state's exercise of diligence, as well as bad faith, deception, and false assurances made by the defendant. *Millay v. Cam*, 135 Wash. 2d 193, 206 (1998). It may not be invoked in the absence of bad faith by the defendant and reasonable diligence by the prosecution. *Prekeges v. King County*, 98 Wash. App. 275, 283 (1999). Additionally, "[a] superseding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending and was timely and the superseding indictment does not broaden or substantially amend the original charges." *United States v. Italiano*, 894 F.2d 1280, 1282 (11th Cir. 1990); *see also United States v. Farias*, 836 F.3d 1315, 1324 (11th Cir. 2016). This applies equally to a timely filed information and an initial indictment. *See United States v. Briscoe*, No. CR RDB-20-0139, 2020 WL 5076053, at *2 (D. Md. Aug. 26, 2020) (stating that "[a]lthough the rule is ordinarily applied as between superseding and original indictments, there is no reason why a subsequent indictment cannot relate back to a preceding, valid information because the two forms of charging documents are treated the same for statute of limitation purposes").

The notice considerations that permit tolling in cases of superseding indictments apply in the case of new indictments as well. *Italiano*, 894 F.2d at 1282. That is, the limitations period will "only be tolled if the charges and allegations in the new indictment are substantially the same as those in the original indictment" or the original information filed. *Id.* A new indictment refers to an indictment returned after the pending indictment

or information has been dismissed. *Id.* The allegations brought by the Government in the information are identical to the ones brought in the subsequent indictment. The Government brought an indictment after the information, which again had been properly filed in accordance with the statute of limitations, was dismissed by the court.

Since the charges in the superseding indictment were identical to those in the July information, it related back so as to not be barred by the statute of limitations. *See id.* The Government in this case has had to continuously attempt to bring the charges despite COVID's postponement of court operations, which displays its reasonable diligence in the pursuit of properly prosecuting Ms. Maximoff. Even in the face of an argument that there was no bad faith on the part of the defendant, and irrespective of the Government's compliance and satisfaction of the predicates of equitable tolling, the statute of limitations should still be equitably tolled on the grounds of due process, as it does not require a showing of bad faith.

B. *Where there is an extraordinary circumstance present, like COVID-19, equitable tolling is both permissible and necessary to aid in combatting the extenuating challenges posed on courts and society.*

The Government is entitled to equitable tolling under due process upon showing that although it exercised due diligence, there was some extraordinary circumstance that stood in its way and prevented timely filing. *See* U.S. Const. amend. XIV; *Bush v. State*, 428 S.W.3d 1, 22 (Tenn. 2014). Diligent pursuit does not require the Government to undertake futile attempts to pursue its claim, nor to exhaust everything imaginable; rather, it simply requires that the Government make reasonable efforts. *See Whitehead v. State*, 402 S.W.3d 615, 631 (Tenn. 2013). The Government's filing of an information to institute

the action in July, in addition to its return of a new indictment upon the re-convening of the grand jury, indicate that the Government has made such reasonable efforts in this case. The unprecedented COVID-19 pandemic is precisely the instance of an extraordinary circumstance that commands the application of equitable tolling.

COVID-19 brought court functions to a standstill, and even the grand jury was suspended under Administrative Order No. 20-019. The only option the Government had was to preserve Ms. Maximoff's file until it was safe for court activities to reconvene, inevitably portrayed by its motion to dismiss the information in July. The Government prioritized the health of the people, and the filing of an indictment prior to the expiration of the statute of limitations was made impossible by public health measures taken to prevent the spread of COVID-19. Crimes as serious as conspiracy and fraud should not escape prosecution because of an unavoidable, viral crisis, the likes of which have not been experienced in over a century. Further, due process requires equitable tolling in this case because the circumstances and limitations imposed by COVID-19 were external to the Government's own decisions and conduct.

The times in which we currently live constitute anything but "normal" circumstances. The entire world has been, and continues to be, in the midst of a health crisis due to the COVID-19 pandemic. The United States was not spared from this viral overtake, and the death toll has eclipsed those of every other country. Joe Murphy, et. al, Graphic: Coronavirus Deaths in the U.S., Per Day (April 7, 2020), https://www.nbcnews.com/health/health-news/coronavirus-deaths-united-states-each-day-2020-n1177936. To slow the spread of the virus, Stetson declared mandatory stay-at-

home measures, including closing schools, businesses, and courthouses, and all other non-essential services. Ms. Maximoff has not had her liberty interests ignored, but they rather require temporary suspension due to circumstances initiated by the pandemic. There has further been no action that "shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987).

In *People ex rel. Arogyaswamy v. Brann*, the court found that good cause for tolling the statute of limitations was established because no grand juries were being empaneled. *People ex rel. Arogyaswamy v. Brann*, 126 N.Y.S.3d 341, 343 (N.Y. Sup. Ct. 2020). Good cause must consist of some compelling fact or circumstance which prevented disposition of the complaint or rendered such action against the interest of justice. *Id.* at 344; *see, e.g.*, N.Y. Crim. Proc. Law § 180.80(3) (McKinney). Whether there is good cause for a delay pursuant to COVID-19 must be determined on a case-specific factual inquiry. "The inability to conduct hearings . . . establishes good cause." *Id.* at 347. As previously described, COVID-19 stagnated the court's ability to proceed with Ms. Maximoff's case. Issues previously thought routine for the court have become complex, and the normal delays which occurred when courts were fully functional have significantly multiplied.

While equitable tolling should rightfully be reserved for the rare circumstances outside the party's control that make it unconscionable to enforce a limitations period, this was undoubtedly one such circumstance. *See Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *e.g. Sullivan v. State*, 913 So. 2d 762, 763 (Fla. Dist. Ct. App. 2005) (holding that all limitation periods authorized by both rules and statutes having to do with procedurally guaranteeing the right to a speedy trial were *tolled* in Seminole County due

to hurricanes and serious inclement weather). Similar to how hurricanes may both interrupt the ability of courts to perform their duties and pose a threat to the general public, the COVID-19 pandemic has threatened the health, safety, and lives of people globally.

Courts rely on such cases only for the manner of suspension (tolling), and not the limits of the suspension. *Smith v. State*, 310 So.3d 1101, 1104 (Fla.App. 1 Dist., 2020). It is intended to lay a foundation as to how time should be tolled, rather than the specific limits to place on the circumstances present. *Id*. A court's decision to suspend trials and statutory time limits should apply to all limitations involving the 'speedy trial procedure'. *Id*. This is interpreted to include the statute of limitations, as it is indisputably part of the 'speedy trial procedure.' *Id.* at 1103. "If the court had intended to suspend the requirements only for the time for trial itself, it could have indicated in the paragraph specifically suspending trials that the suspension also applied to the time limit to bring a defendant to trial." *Id*. Since suspending trials encompasses all time limits, including the statute of limitations, the allowance of equitable tolling is inferable from this Court's order.

CONCLUSION & PRAYER

This Court should deny the Defendant's Motion to Dismiss for Untimely Return because the Government complied with §§ 3298, 3288, 3289 and exercised due diligence in the timely filing of the information and indictment in the face of an extraordinary circumstance due to the COVID-19 pandemic.

Dated this 30th day of August, 2021.

Respectfully submitted,

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