

CASE NO.: 1:20-cr-24

UNITED STATES OF AMERICA,

Plaintiff,

v.

WANDA MAXIMOFF,

Defendant.

DEFENDANT'S MOTION TO DISMISS WITH INCORPORATED
MEMORANDUM OF LAW

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INTRODUCTION

Undersigned counsel, on behalf of the defendant, Wanda Maximoff, respectfully files its Motion to Dismiss the above-styled indictment, with prejudice. The Government's filing of the indictment violates the statute of limitations, which, in turn, violates Ms. Maximoff's right to due process under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

As support for her motion for dismiss, Ms. Maximoff argues the following:

STATEMENT OF FACTS

On September 21, 2021, in the District of Stetson, a grand jury returned an Indictment against Ms. Maximoff. The Indictment alleges that between May 31, 2007, and July 24, 2010, Ms. Maximoff, using the alias "Scarlet," conspired to knowingly encourage and induce an alien to reside in the United States, while in disregard of the fact that this is a violation of the law. Specifically, the Indictment alleges that Ms. Maximoff manufactured and sold false and fraudulent Order of Supervision ("OSUP") forms to aliens who were illegally present in the United States and did not qualify to receive OSUP forms for the purposes of obtaining Stetson Drivers' Licenses and Employment Authorization Cards. This conduct is prohibited under 8 U.S.C., § 1234(a)(1)(A)(iv), (v).

The Indictment filed here violates U.S.C. § 3298, which requires that "the Indictment is found or the information is instituted not later than 10 years after the

commission of the offense.” Based on the conspiracy alleged in the indictment, the statute of limitations for this offense expired on July 24, 2020.

In an attempt to toll the statute of limitations, the Government filed an information against Ms. Maximoff on July 22, 2020. Just one day after filing the information, the Government moved to dismiss the information and all other matters pertaining to the case against Ms. Maximoff pursuant to Fed. R. Civ. P. 48. On July 23, 2020, the United States District Court for the District of Stetson Westview Division granted the Government’s motion and dismissed the information without prejudice. During Ms. Maximoff’s initial appearance, the Government asserted that it was “forced” to file its motion to dismiss after the court, in Administrative Order No. 20-019, suspended the Grand Jury four months earlier because of COVID-19. Further, the Government argued that within six months of the Court lifting the suspension on March 29, 2021, in Administrative Order No. 21-008, they sought and returned a grand jury indictment against Ms. Maximoff, in compliance with 18 U.S.C. § 3288. In an attempt to justify the blown statute of limitations, the Government also contended that, in light of the “unprecedented pandemic,” there is an argument for equitable tolling of the statute of limitations.

ARGUMENT

I. THE GOVERNMENT REATURNED THE INDICTMENT AGAINST MS. MAXIMOFF IN VIOLATION OF THE STATUTE OF LIMITATIONS FOR THIS OFFENSE AND SHOULD BE DISMISSED WITH PREJUDICE.

Title 18, U.S.C. § 3298 requires that “the Indictment is found or the information is instituted not later than ten years after the commission of the offense.” Relying on the dates specified in the single-count conspiracy charge alleged in the Indictment, the statute of limitations for this offense expired on July 24, 2020. The Government returned its Indictment against Ms. Maximoff on September 21, 2021, nearly 14 months after the expiration of the statute of limitations. The Indictment filed against Ms. Maximoff is therefore invalid and the pending indictment naming Ms. Maximoff should be dismissed.

Title 18 U.S.C. § 3288, one of two sections cited by the Government as grounds for the proper filing of the Indictment, does not apply to the facts in this case. On September 23, 2021, in response to the Defense’s *ore tenus* motion to dismiss the Indictment, the Government contended that 18 U.S.C. § 3288 saves its untimely filed Indictment. The appropriate provision of § 3288 states:

Whenever 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 in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final, or, 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. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

Section 3288 allows for an indictment to be returned within six calendar months of the date of when the next grand jury is convened, regardless of the statute of limitations that applies to the charge, when no regular grand jury is in session in the appropriate jurisdiction at the time the indictment or information is dismissed. The Defense agrees that there was no regular grand jury convened at the time of the dismissal of the Information, and further concedes that was the result of the pandemic's effect on the court system. However, § 3288 is not applicable for another reason. This statute requires that for a new indictment to be returned after the expiration of the applicable statute of limitations, the indictment or information charging a felony must be dismissed *after* the period prescribed by the applicable statute of limitation has expired. In this case, the information was dismissed on July 23, 2020, one day before the applicable statute of limitations expired on July 24, 2020. Because the information was dismissed before the expiration of the statute of limitations, § 3288 is not applicable.

II. THE COVID-19 PANDEMIC DID NOT CREATE THE CIRCUMSTANCES NECESSARY FOR THE GOVERNMENT TO RELY UPON EQUITABLE TOLLING AS A MEANS TO SAVE THE UNTIMELY COUNT IN THE INDICTMENT AGAINST WANDA MAXIMOFF.

During their response to the Motion to Dismiss, the Government argued that even if their untimely filing of the indictment violated the statute of limitations, they were nonetheless entitled to an equitable tolling of the statute of limitations in light of the COVID-19 pandemic.

The Supreme Court has required two elements to support equitable tolling. The first element requires that the litigant has been pursuing its rights diligently. *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 756 (2016) (quoting *Holland v. Florida*, 560 U.S. 631 (2010)). Some federal courts have held that some kind of wrongful conduct on the part of the defendant must have prevented the plaintiff from asserting its claim. *See Alvarez-Machain v. United States*, 96 F.3d 1246, 1251 (9th Cir.), opinion amended and superseded, 107 F.3d 696 (9th Cir. 1996). The second element of equitable tolling requires that some “extraordinary circumstance” stood in the litigant’s way of filing its claim, and, subsequently, prevented timely filing. *Menominee Indian Tribe of Wisconsin*, 136 S. Ct. at 756. *See also Capital Tracing, Inc. v. United States*, 63 F.3d 859 (9th Cir.1995).

Notably, the Court in *Menominee Indian Tribe of Wisconsin* held that these elements should be considered together when evaluating whether equitable tolling

is appropriate. The court explained that “we have expressly characterized equitable tolling’s two components as ‘elements,’ not merely factors of indeterminate or commensurable weight.” *Menominee Indian Tribe of Wisconsin*, 136 S. Ct. at 750.

First, and most obviously, Ms. Maximoff did not prevent the government from asserting its claims. The Government does not assert, nor do the alleged facts suggest that Ms. Maximoff prevented the government from asserting its claim. *United States v. Atiyeh*, 402 F.3d 354, 354 (3d Cir. 2005) (finding that held that because the defendant’s actions did not “induce” the Government’s breach of the statute of limitations, the statute of limitations was not tolled). There, the court distinguished that it “has never applied equitable tolling to rescue a government indictment filed after the statute of limitations has lapsed.” *Id.* at 367. Because the Government fails to allege any conduct by Ms. Maximoff that prevented the Government from timely filing of charges against her, the doctrine of equitable tolling does not apply under the first set of circumstances outlined by the court in *Alvarez-Machain*, requiring that the defendant prevent the filing party from filing its claim.

Another factor to consider in determining whether a statute of limitation may be tolled, is whether the litigant pursued its rights diligently. *Menominee Indian Tribe of Wisconsin*, 136 S. Ct. at 750. Recently, the Supreme Court of Kentucky, in *Williams v. Hawkins*, held that the mere existence of the COVID-19 pandemic alone would not support a claim for equitable tolling. *Williams v. Hawkins*, 594 S.W.3d

189 (Ky. 2020). There, the court found that due diligence was a key factor in applying the equitable tolling doctrine. *Id.* Specifically, the court held that “[e]quitable tolling pauses the running of, or tolls, a statute of limitations when a litigant has pursued his rights diligently, but some extraordinary circumstance prevents him from bringing a timely action.” *Id.* at 193. Subsequently, equitable tolling only applies if there is proof that the plaintiff diligently pursued his or her rights, but that some extraordinary circumstance beyond the plaintiff’s control prevented timely filing. *Id.* at 194.

In this case, the Government did not pursue its rights diligently. The Government was aware of Ms. Maximoff’s alleged participation in the conspiracy as early as May 3, 2008, when the Westview Sheriff’s Office detained a Guatemalan citizen for driving under the influence. Officers learned that the individual, identified as S.P. in the Indictment, did not have authority to reside in the United States. However, S.P. possessed an expired Stetson Driver’s License, which was issued to her on June 2, 2008. Agent Jimmy Woo of the Department of Homeland Security interviewed S.P. regarding the Stetson Driver’s License. S.P. told Agent Woo that her husband, identified as H.P., purchased forged immigration documents from a woman named “Scarlet” for \$10,000. S.P. and H.P. thereafter used those documents to obtain their Drivers’ Licenses and Employment Authorization Cards. When the couple’s licenses expired in 2015, H.P. attempted to locate “Scarlet,” but failed to

connect with her. Agent Woo spoke by telephone with H.P., who told him the following information: H.P. and S.P. retained an immigration attorney Agatha Harkness after entering the United States in April 2008 to assist them in applying for lawful, temporary residence status so they would not be deported; during a conference in Harkness's office, Harkness introduced the couple to law clerk Wanda Maximoff; in May 2008, H.P. and S.P. found a note in their paperwork with a phone number for a woman named "Scarlet." The note read that "Scarlet" could assist them with obtaining immigration paperwork so that they could apply for a state Driver's License and an Employment Authorization Card; H.P. called "Scarlet" and an unidentified male voice told H.P. that he could get them "what they needed" for \$10,000 in cash, to be left in their mailbox the next day at 11:40 p.m.; H.P. left the money in the mailbox and the following day he found a fraudulent OSUP form, which the couple used to obtain Stetson Drivers' Licenses and Employment Authorization Cards; after they obtained the documents, H.P. advised other aliens in his neighborhood to obtain fraudulent documents from "Scarlet" until 2010.

After hearing a similar story from another alien, Agent Woo opened the investigation into Ms. Maximoff as "Scarlet." The investigation revealed eight co-conspirators who received forged documents between 2007 and 2010. Further, flight records revealed substantial international travel by Ms. Maximoff in the last twenty years. Agent Woo believes this travel was, at one time, funded by the proceeds of

the underlying illegal activity. This allegation led Agent Woo to believe that Ms. Maximoff had committed a violation of 8 U.S.C. § 1324(a)(1)(A)(iv),(v).

Agent Woo conducted his comprehensive investigation of Ms. Maximoff in 2018—three years before the statute of limitations for the charge was to expire, and two years before the COVID-19 pandemic. Clearly, charges against Ms. Maximoff could have been introduced anytime between 2018 and 2021. Because the Government failed to bring charges against Ms. Maximoff, even in light of a comprehensive investigation, the Government failed to exercise the requisite due diligence in bringing the charges against Ms. Maximoff. Consequently, the first element of the *Menominee Indian Tribe* test is not satisfied and does not justify the Government’s request for equitable tolling of the statute of limitations.

The second element established by the court in *Menominee Indian Tribe* requires that extraordinary circumstances stand in the litigant’s way to prevent timely filing. Here, the Government argues that the COVID-19 pandemic created extraordinary circumstances that made it impossible for them to file their Indictment within the time period prescribed by the statute of limitations. To address this issue and counter the Government’s position, we look to analogous situations where the courts (and impaneled grand juries) have been forced to close, such as wartime and other national emergencies.

When courts close due to conditions of war, statutes of limitations may be equitably tolled because of a petitioner's actual inability to file a claim. *See Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 18 L.Ed. 939 (1867) (finding that during the Civil War, both parties' rights had been suspended because the courts were closed). Similarly, when war prevents a plaintiff from gaining access to a court that has remained open, the principles of equitable tolling apply. *See Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947) (holding that a plaintiff's rights were suspended when he was held in Japan during the Second World War and unable to file his claim). In *Osbourne*, the court explained that all statutes of limitations assume that one with a good cause of action will not delay in bringing it for an unreasonable period of time; but, when a plaintiff is denied access to the courts, the basis of that assumption has been destroyed. *Id.*; *see also Seattle Audubon Soc. v. Robertson*, 931 F.2d 590, 596 (9th Cir. 1991).

The aforementioned case law addresses extraordinary circumstances in which there existed no way for plaintiffs to file their causes of actions. However, in this case, the COVID-19 pandemic did not actually prevent the Government from filing a cause of action against Ms. Maximoff. This is evidenced by the Government's own filing of the information against Ms. Maximoff on July 22, 2020—two days before the statute of limitations expired. The Government contends that it was unable to return an Indictment against Ms. Maximoff within the statute of limitations because

no grand jury was convened due to the COVID-19 pandemic. However, as the Government initially argued, 18 U.S.C. § 3288 allows for an indictment to be returned within six calendar months of the date when the next regular grand jury is convened, regardless of the statute of limitations that applies to the charge, when no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed. We agree that there was no regular grand jury convened at the time of the dismissal of the instant information, and we further recognize that that effect was the result of the pandemic on the court system. However, in order for § 3288 to apply, the movant must have filed a timely information and the court must have dismissed the information after the statute of limitations expired. Here, the Information was filed on July 22, 2020, and then the Government successfully moved to dismiss the information on July 23, 2020, one day *before* the applicable statute of limitations expired on July 24, 2020. In this case, the COVID-19 pandemic did not constitute extraordinary circumstances requisite to toll the statute because the Government was not prevented from filing a claim against Ms. Maximoff. Rather, the Government erroneously withdrew its information against Ms. Maximoff, disqualifying it from the dictates of U.S.C. § 3288.

CONCLUSION

The Government did not timely return its Indictment against Wanda Maximoff in view of U.S.C. §§ 3288, 3298. Allowing the Government to proceed

with the felony charge against Ms. Maximoff would violate her rights under the Due Process Clause and the federal statute of limitations. The Due Process Clause and the federal statute of limitations protect Ms. Maximoff from intentional and prejudicial pre-accusation delay. Specifically, the Constitution guarantees that “no person shall . . . be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. XIV. Further, it guarantees that “in all criminal prosecutions, the accused shall enjoy a speedy and public trial.” U.S. Const. amend. VI.

Further, the Government is not otherwise entitled to any equitable tolling of the applicable criminal statute of limitations. Equitable tolling is appropriate only when (1) the litigant has been pursuing its rights diligently, and (2) that some extraordinary circumstance stood in the litigant’s way and prevented timely filing. The Government did not pursue its rights diligently. Further, the COVID-19 pandemic did not constitute the “extraordinary circumstances” requisite to toll the applicable statute of limitations because a remedy for timely filing was available prior to the expiration of the statute of limitations. Because the Government did not pursue its rights with due diligence and the pandemic did not actually prevent the Government from filing its claim, the circumstances requisite to toll the statute of limitations are not present in this case.

Therefore, based on the foregoing, the defendant, Ms. Maximoff, through undersigned counsel, respectively requests that this Court grant motion to dismiss the Indictment with prejudice.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss was served on counsel for Plaintiff via electronic mail on this 30th day of August, 2021.

DATED this 30th day of August, 2021.

Respectfully Submitted,

Attorneys for Team 115