Team 116

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

UNITED STATE OF AMERICA

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

WANDA MAXIMOFF
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THE UNITED STATES OF AMERICA'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT

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INTRODUCTION

On September 21, 2021, Defendant was indicted on one count of violating Title 8, United States Code, Section 1324(a)(1)(A)(iv), (v) for conspiring to knowingly encourage and induce an alien to reside in the United States. Dkt. 1. The Government alleges Defendant manufactured and sold false and fraudulent immigration papers to aliens illegally present in the United States. *Id.* The documents were for the purpose of illegally obtaining a Stetson Driver's License and an Employment Authorization Card. *Id.*

The COVID-19 pandemic significantly impacted the investigation into Defendant and the subsequent information and indictment obtained. Dkt. 3 at 50–70. As the rest of the world shut down, so did the courts in the Middle District of Florida. With the courts closing, and in-person activity posing a significant danger to the health and safety of the public, the Court suspended empaneling the grand jury. Dkt. 3 at 60–62. The Government obtained an information before the statute of limitations ran, but, the Government could not obtain an indictment because the Court ordered the grand jury not to convene. *Id.* Once the Court lifted the grand jury suspension, the Government empaneled the grand jury within six months of the grand jury regularly convening. *Id.* A true bill was found, and indictment charging Defendant was filed with this Court. *Id.*; Dkt. 2. Before the court is

Defendant's motion to dismiss. The court has asked for a briefing on two issues to decide the merits of the motion.

This Court must first determine first whether a new indictment returned after the expiration of the applicable period is saved from the bar of limitations provided under 18 U.S.C. §§ 3298 and 3299 when returned within six months of the grand jury regularly reconvening by an Administrative Order by the Court due to decreasing danger posed by the COVID-19 pandemic. The Court must also decide whether the COVID-19 pandemic is a sufficiently extraordinary circumstance that warrants equitable tolling when an indictment is found for violating 8 U.S.C. § 1324(a)(1)(A)(iv) and (v), where an offender preyed upon fellow immigrants for her financial gain. The Government respectfully requests this Court answer both questions affirmatively. If the Court answer the first question affirmatively, it need not answer the second question regarding equitable tolling. However, if the Court disagrees with the applicability of the savings clause, it may still answer the second question in the affirmative. Either conclusion will support the Government's requested relief denying Defendant's motion to dismiss.

STATEMENT OF FACTS

Defendant Wanda Maximoff spent three years preying on immigrants who initially sought legal assistance in obtaining their legal status. Dkt. 9. Beginning May 31, 2007 through July 24, 2010, Defendant conspired to encourage and induce

aliens to continue illegally residing in the United States for the purpose of private financial gain. Dkt. 2. In 2007, Defendant started working for Agatha Harkness, an immigration attorney. Dkt. 9 at 3, 6. She continued working for Harkness until 2010. Dkt. 9 at 3, 6. This time period directly corresponds with the time in question when Ms. Harkness's clients were targeted. Of the forty client cases Defendant worked on, the Department of Homeland Security confirmed that at least eight individuals were induced to stay in the United States through false and fraudulent immigration paperwork. Dkt. 2. With the investigation complete, the Government was ready to indict when reports of the pandemic emerged.

The COVID-19 pandemic spread across the country like wildfire. In early March, the entire State of Florida began shuttering its doors. The Florida Court system followed suit and suspended all grand jury panels on March 23, 2020. Dkt. 3 at 61–62. As a result, the Government was forced to institute an information to charge Defendant with violating 8 U.S.C. § 1324(a)(1)(A)(iv) and (v). Dkt. 1. Although the Government requested the information be dismissed, the filing of the information satisfied the applicable statute of limitations. Dkt. 3 at 50–60. The district court dismissed the information without prejudice. Dkt. 1. The Government had to wait until the grand jury suspension was lifted to empanel a grand jury. Dkt. 3 at 50–60. The suspension was lifted on March 29, 2021, and the Government sought an indictment within six months as required by statute. *Id.* Subsequently, on

September 21, 2021, a grand jury indicted Defendant for conspiring to encourage and induce illegal entrants to unlawfully reside in the United States by manufacturing and selling false and fraudulent papers to those illegal entrants between May 31, 2007, and July 24, 2010. Dkt. 2. On September 23, 2021, Special Agent Jimmy Woo, along with other officers with the United States Department of Homeland Security, arrested Defendant. Dkt 4.

This issue before the Court comes from Defendant moving to dismiss for lack of a proper charging instrument. *Id.* The Court ordered briefing on the motion to dismiss on September 23, 2021. *Id.*

ARGUMENT AND AUTHORITIES

I. THE COURT SHOULD DENY THE MOTION TO DISMISS BECAUSE THE INDICTMENT WAS TIMELY RETURNED.

The government may prosecute, try, or punish an individual for conspiracy to commit a non-capital offense under the Immigration and Nationality Act so long as "the indictment is found or the information is instituted no[] later than 10 years after the commission of the offense." 18 U.S.C. § 3298. The information was timely filed, and sufficient to institute the proceedings against Defendant. The indictment relates back to the original information and falls within the six-month grace period of 18 U.S.C. §§ 3288 and 3289. This Court should deny the motion to dismiss.

A. Although the Government Did Not File the Indictment Within Ten Years of the Alleged Offense, the New Indictment Was Permissible Because It Was Returned Within Six Months of the Grand Jury Reconvening After the Court Lifted the Suspension.

The statute of limitations for violating 8 U.S.C. § 1324(a)(1)(A)(iv) and (v) is ten years from commission of conspiring to encourage and induce aliens to continue illegally residing in the United States for financial gain. *See* 18 U.S.C. § 3298. Ten years is measured from the last overt act committed to further the conspiracy. *Grunewald v. United States*, 353 U.S. 391, 396–97 (1957). A conspiracy charge is not barred by the statute of limitations if the conspiracy's central illegal objectives have not been fulfilled over ten years before the indictment was filed. *See id.* The Government filed the information within ten years of the charged offense. That document was sufficient to meet the Government's obligation to institute charges within the applicable statute of limitations.

1. Filing the information with the Court instituted the information within the meaning of the statute of limitations.

Defendant moves to dismiss the indictment based on faulty logic that the information filed within ten years of the charged offense was insufficient to satisfy the statute of limitations. She is wrong. Her argument is based on a misreading of the applicable statutes, case law, and Federal Rules of Criminal Procedure.

The limitations period expired for the conspiracy (May 31, 2007–July 24, 2010) on July 24, 2020. *See* 18 U.S.C. § 3298; Dkt. 1. The information was filed by July 22, 2020, seeing as the information was dismissed on July 23, 2020, and Agent Woo's affidavit in support of the information was signed July 22, 2020. Dkt. 9; Dkt. 1. The Government filed an information because the Court, in Administrative Order No. 20-019, suspended the grand jury. Dkt. 3 at 60–61. The information was instituted before the applicable statute of limitation ran.

The Eleventh Circuit's "case law makes it abundantly clear that the filing of a timely [charging document] [satisfies] the statute of limitations for purposes of a superseding or new indictment if the subsequent indictment does not 'broaden or substantially amend the original charges.'" *United States v. Farias*, 836 F.3d 1315, 1324 (11th Cir. 2016) (citing *United States v. Italiano,* 894 F.2d 1280, 1282 (11th Cir. 1990)). A new indictment that replaces a timely charging document relates back to the original document and inherits its timeliness. *Id.* Further, it explains, "the central policy underlying the statute of limitations is to give notice to the defendant" and if the allegations are substantially the same in both documents, notice is presumed. *Id.* Regardless if the original charging document was sealed, both the original and new indictment may be sealed beyond the statute of limitations and notice is still valid. *Id.* (quoting *United States v. Edwards*, 777 F.2d 644, 647 (11th Cir. 1985)).

Here, the timeline is self-evident. There is no dispute the information was filed within the statute of limitations. Dkt. 1. As the statute indicates, an information satisfies the requirement of instituting an action within the applicable statute of limitations. *See* 18 U.S.C. § 3298. Both the original information and the new indictment charged Defendant with violations of the same statute, using the same underlying facts. Dkt. 1; Dkt. 2. The conspiracy charged in the indictment does not broaden or substantially amend the original charges in the information. *Id.* Thus, the indictment relates back to July 23, 2020 when the original information was filed. While the central goal of the statute of limitations is to give notice, notice is presumed from the information even though it was sealed. Defendant argues further that this Court should dismiss the indictment because the sealed information did not give notice. Dkt. 3, 71–78. But notice is presumed even if the charging documents are sealed, and it is legally permissible for those documents to be sealed after the limitations period has ran, as occurred here. The information was neither null nor defective due to being filed under seal as claimed by Defendant. The information was instituted within the meaning of the statute of limitations and was filed before the period ran.

A prosecution is generally deemed to have been commenced for the purposes of the limitation, when an indictment is found by the grand jury, an information is filed by the prosecutor, or when an arrest warrant or other process is issued. “Rule

7(b) concerns itself with the requirements that the government must satisfy before it proceeds with a prosecution" and does not affect the statute governing limitations periods. *United States v. Rosecan*, No. 20-CR-80052, 2021 WL 1026070, at *3 (S.D. Fla. Mar. 17, 2021) (quoting *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998)). The statute, on the other hand, merely requires that an information must be instituted for statute of limitations purposes. *See* 18 U.S.C. § 3298. Rule 7(b) solely describes the steps necessary for a prosecution to be instituted. The Rule does not prohibit filing an information absent a waiver of indictment by Defendant.

Defendant argues that, because she never consented to prosecution by information nor waived her right to an indictment, the information is a nullity. But the *Rosecan* court rejected that argument because a waiver of indictment is not required by the plain language of Federal Rule of Criminal Procedure 7. Under the Rule's plain language, a timely filed information satisfied the statute of limitations despite the Defendant not waiving their right to indictment under Rule 7(b). *Rosecan*, 2021 WL 1026070, at *4. And, as here, the superseding indictment while filed outside the limitations period, was nonetheless valid. *Id.* (citing *Italiano*, 894 F.2d at 1282; *Farias*, 836 F.3d at 1324). This interpretation is mandated by the cannons of statutory interpretation. *See, e.g.*, *United States v. Holmes*, No. 18-cr-00258, 2020 WL 6047232, at *8 (N.D. Cal. Oct. 13, 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).

Defendant's argument seeks to link two distinct statutes when they address different issues. The plain language of Rule 7(b) relates to the specific steps required for a prosecution and § 3298 addresses timing. *See* 18 U.S.C. § 3298. Neither references the other: the statute does not require waiver and the Rule does not relate to tolling the statute of limitations.

2. The subsequent filing of the indictment and dismissal of the information after the period of limitations had run, nonetheless satisfies the statute of limitations because of the savings clause in §§ 3288 and 3289.

Although the Government dismissed the information, it nonetheless remains the point in time used for statute of limitations purposes because of the savings clause provided in 18 U.S.C. §§ 3288 and 3289. The statutes expressly allow for correction of a charging document after or before the statute of limitations has expired when an indictment or information is dismissed for any error, defect, grand jury irregularity, or is found otherwise defective or insufficient for any cause. *See* 18 U.S.C. §§ 3288–3289; *United States v. Miller*, 471 U.S. 130 (1985). The operative language of both statutes is identical; thus, case law analyzing either statute is equally applicable and controlling. *See United States v. Lytle*, 658 F.

Supp. 1321, 1324 (N.D. Ill. 1987) (indicating § 3288 and § 3289 are paired statutes which contain identical savings provisions); *United States v. Serubo*, 502 F. Supp. 288, 289 n.1 (E.D. Pa. 1980) (showing operative language in both statutes are the same).

The Eleventh Circuit explained under § 3288 the savings clause will cure an untimely indictment if the allegations in the new indictment are substantially the same as those in the original information. *Italiano*, 894 F.2d at 1283. The Eleventh Circuit teaches that the crucial inquiry is the substantially same factual basis of the charging instruments. 894 F.2d at 1285. To relate back to a timely but dismissed information, the Government must file a new indictment within six months of that dismissal, unless the grand jury is not regularly convening. *United States v. Muteke*, 718 F. App'x 854, 857 (11th Cir. 2017). The charging document in *Muteke* was filed before the statute of limitations ran, was dismissed, and a new indictment was filed that was substantially the same as the original. *Id.* Filing the original charging document, even though dismissed, was sufficient. *Id.* at 856. The original document related back because the factual basis remained consistent between the two charging instruments, even though the original was dismissed. *Id.* at 856–58.

Defendant's argument ignores that the suspension of the grand jury allows for tolling the limitations period. Here, the indictments are based on the same facts—

the new indictment is simply a different charging document. The indictment that replaced the information alleges nothing new or different in terms of what Defendant said or did like the charging documents in *Muteke*. Similarly, the original information was dismissed without prejudice, as it was in *Muteke*. Dkt. 1. The Government sought a new indictment once the Court lifted the grand jury suspension on March 29, 2021. Dkt. 3 at 60–61. Count one of the new indictment was returned on September 21, 2021, less than six months after the Court lifted the grand jury suspension due to declining rates of COVID-19. No. 1:21-cr-36, Dkt. 2; AO No. 21-008; Dkt. 3 at 60–65. The indictment was found within the statutory requirements of § 3288, thus the subsequent filing relates back to the filing of the information. The new indictment will not be barred by any statute of limitations because no regular grand jury was in session in the Middle District of Florida before the expiration of the applicable statute of limitations, and within six calendar months when the next regular grand jury convened the indictment was found. *See* §§ 3288, 3289.

Congress enacted the six-month extension to the statute of limitations so a defendant indicted under a defective charging document would "not escape because the fault was discovered too late to indict him again." *United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976); *see United States v. Wilsey*, 458 F.2d 11, 12 (9th Cir. 1972) ("[T]he continued running of the statute [of limitations] will

not permit the defendant to escape through technicality before correction can be secured."). When a valid indictment could have been brought promptly but for a legal error in the charging instrument or other extenuating circumstance with the grand jury, the six-month savings provision allows for just punishment. *See United States v. Charnay*, 537 F.2d 341, 354 (9th Cir. 1976) ("Allowing a second indictment to remedy legal deficiencies present in the first is the very purpose for which § 3288 was enacted."). This is the best and most reasoned approach to prosecuting offenders who would otherwise escape litigation but for the limited extension of the statute of limitations.

The savings clauses have gone through various Congressional iterations and the most recent changes support an expansive reading of the savings clause. The previous language in both statutes allowing for reindictment when dismissal was due to "any error, defect, or irregularity with respect to the grand jury" was replaced with language imposing the six-month period where the dismissal was "for any reason." Pub. L. No. 100-690, Title VII, § 7081(a), (b), 102 Stat. 4407. Then Senator Biden, Chairman of the Senate Judiciary Committee, explained: "The reason a charge is dismissed should not determine whether the government is given additional time to bring a new prosecution." 134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988). Today the statute's amended forms apply where

dismissal of the first indictment is due to a legal defect besides when it results from defects or irregularities in the grand jury. *Charnay,* 537 F.2d at 355.

Accordingly, Rule 7(b), §§ 3298, 3288, 3289 permit this prosecution to move forward. The superseding indictment was timely filed, related back to the original information, and cured the procedural issues with instituting the prosecution. To dismiss the alleged conspiracy acts would grant Defendant the particular windfall that Congress intended §§ 3288 and 3289 to avoid. The majority of courts support this Court in denying the motion to dismiss.

B. Alternatively, the Statute of Limitations Was Equitably Tolled by the Court's Suspension of the Grand Jury Due to the COVID-19 Pandemic.

The doctrine of equitable tolling allows a court to consider the merits of a claim when it would otherwise be barred by a statute of limitations. While this Court has no power to extend or modify statutes of limitations, the common law doctrine of equitable tolling applies to the statute of limitation here because of the pandemic. The conventional understanding regarding a statutory limitation period is that it is subject to equitable tolling. Equitable tolling is a doctrine that provides, in exceptional circumstances, a statute of limitations may be extended for equitable reasons not acknowledged in the statute creating the limitations period. *United States v. Duval*, 957 F. Supp. 2d 100 (D. Mass. 2013). Florida and the country at large are currently in the most critical stage of the pandemic with the onset of the

Delta variant. Death tolls are rising daily and vaccinations have not yet reached a critical mass. Because of the ongoing rise in COVID-19 cases and deaths, the public interest was best served by the Court in Administrative Order No. 20-019, when it suspended the grand jury because of COVID-19 as of March 23, 2020. Dkt. 3 at 61–62. While the Court has lifted the suspension as of March 29, 2021, in Administrative Order No. 21-008, this Court is still wading through the fallout of the pandemics effects on the justice system.

The Eleventh Circuit has indicated that equitable tolling is an extraordinary remedy that should be limited to rare and exceptional circumstances. *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009). To warrant application, the Court must find that the Government pursued the case diligently and that some extraordinary circumstance stood in its way to filing the superseding indictment within the statute of limitations. *See Holland v. Florida*, 560 U.S. 631, 649 (2010).

1. The pandemic was an extraordinary circumstance beyond the Government and Court's control.

Equitable tolling allows the courts the flexibility to ensure justice in extraordinary circumstances, like the pandemic. The pandemic's acute health and economic impacts are not over. As of July 22, 2021, the University of Washington Institute for Health Metrics and Evaluation ("IMHE") projected total deaths from COVID-19 in the United States will reach nearly 667,000 by November 1, 2021. *See* IMHE, *COVID-19 Projections, USA*, https://covid19.healthdata.org/united-

states-of-america?view=total-deaths&tab=trend (last visited July 26, 2021). The pandemic's economic fallout will outlast the acute health emergency acknowledged by this Court when it shuttered grand juries. Recognizing that the Court has an interest in avoiding the spread of COVID-19, and that the impacts from the COVID-19 emergency are likely to last much longer than the time the grand jury was suspended, underscores why this is appropriate reasoning to apply equitable tolling. Nothing in the text of § 1324 or in any other statute rebuts the presumption that equitable tolling is available. Beyond the suspension of convening a grand jury, the administration of justice was impeded by the pandemic. The cascading effect of closing the courts has led to unparalleled congestion. It should not also lead to an unparalleled level of offenders fleeing prosecution. Defendant's attempt to undercut the appropriateness of equitable tolling due to the pandemic underscores their weakness on the merits.

Courts in the Middle District have acknowledged how the pandemic has caused difficult circumstances for all facets on life. *See Livingston v. Sec'y, Fla. Dep't of Corr.*, No. 3:20-CV-357-J-34MCR, 2020 WL 1812284, at *1 (M.D. Fla. Apr. 9, 2020). The State of Florida first established a COVID-19 response protocol and declared a public health emergency on March 1, 2020. *See* State of Florida, Office of the Governor, *Executive Order Number 20-51 (Establishes Coronavirus Response Protocol and Directs Public Health Emergency)* (Mar. 1, 2020), https://

www.flgov.com/covid-19-executive-orders. Administrative Order No. 20-019, suspended the grand jury because of COVID-19 as of March 23, 2020. Dkt. 3 at 61–62. There was no rational way for the Government to anticipate when the Court would suspend the grand jury nor when they would resume. This Court would be supported in applying equitable tolling by other jurisdictions across the country. New York,[1] California,[2] Delaware,[3] Georgia,[4] Massachusetts,[5] and Texas[6] have all specifically ordered tolling for limitations purposes.

2. The Government used reasonable due diligence in pursuing an indictment.

The Eleventh Circuit has determined Defendants experiencing prison lockdowns due to the pandemic, medical conditions, and hospitalizations were not sufficiently diligent in exploring their remedies because they were not sufficiently debilitated by the condition. *See Johnson v. United States*, No. 8:14-CR-177-T-

[1] AO/87/20.

[2] https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=79611543-6A40-465C-8B8B-D324F5CAE349.

[3] https://courts.delaware.gov/rules/pdf/COVIDOrderCJS3.pdf.

[4] https://www.gabar.org/upload/Second-Order-Extending-Declaration-of-Statewide-Judicial-Emergency_issued.pdf.

[5] https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-updated-order-regarding-court-operations-under#1-prior-orders.

[6] https://81db691e-8a8c-4e25-add9-60f4845e34f7.filesusr.com/ugd/64fb99_b7fb85089d4942e1a20cd655117e4966.pdf.

27TGW, 2021 WL 1103708, at *3 (M.D. Fla. Mar. 23, 2021); *see also Lang v. Alabama*, 179 F. App'x 650, 652 (11th Cir. 2006); *Mazola v. United States*, 294 F. App'x 480, 482 (11th Cir. 2008). Ultimately, a court must conduct an equitable case by case analysis on the merits of applying equitable tolling. *See Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1228 (11th Cir. 2017).

The pandemic presents a unique situation that made convening a grand jury impossible, which was both beyond the Government's control and unavoidable even with the utmost diligence. *See Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 2000). Neither maximum feasible diligence nor reasonable diligence could have overcome the obstacles presented by the Court suspending the grand jury. *Burgess v. Inch*, No. 20-61946-CV, 2021 WL 2433958, at *4 (S.D. Fla. June 15, 2021) ("The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence."). While "due diligence . . . does not require a [litigant] . . . to exhaust every imaginable option," but instead make reasonable efforts, such as the Government did here. *See Smith v. Comm'r, Ala. Dep't of Corr.*, 703 F.3d 1266, 1271 (11th Cir. 2012) (quoting *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002)).

Courts have required parties requesting equitable tolling to explain why they were hindered from being timely. Here, the Government, as officers of the Court, serve at the pleasure of the Court's administrative orders. The Court-imposed

COVID-19 restrictions made it impossible to empanel a grand jury and find an indictment. Thus, the Government proceeded in the best way possible, with an information allowed under the statute. The Government's diligence is not only shown by their actions in instituting the information but also in following up with an indictment as soon as feasible when the suspension was lifted. Statute indicates the Government has six months to do so and they fulfilled all measures to empanel a grand jury safely. Nothing rationally overcomes the presumption in favor of equitable tolling. This Court should allow for the necessary administration of justice and deny Defendant's motion to dismiss.

CONCLUSION

This Court should deny Defendant's motion to dismiss. The indictment gives proper notice to Defendant, relates back to the information filed within the statute of limitations, and is identical to the information. Alternatively, this case presents sufficiently extraordinary circumstances to apply equitable tolling and the Government has proceeded with all necessary diligence possible under the circumstances presented due to the pandemic. Accordingly, pursuant to Federal Rule of Criminal Procedure 12(g), this Court should order Wanda detained under 18 U.S.C. § 3142.

Respectfully submitted,

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TEAM 116
ATTORNEYS FOR THE UNITED STATES