No. 1:20-CR-24

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

WANDA MAXIMOFF.

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Team 117
Counsel for Defendant

Oral Argument Requested

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DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS

Defendant, Wanda Maximoff, by and through her attorneys and pursuant to 18 U.S.C. §3298, moves to dismiss the indictment as untimely in her favor with prejudice to Plaintiff's complaint in its entirety for the reasons set forth below.

INTRODUCTION

Plaintiff, United States of America, alleges in its sole charge in the Indictment that Defendant did conspire to knowingly encourage and induce an alien to reside in the United States, knowing and in reckless disregard of the fact that such residence is and will be in violation of law, namely by manufacturing and selling false and fraudulent OSUPs to the alien illegally present in the United States who did not qualify to receive an OSUP for the purpose of illegally obtaining a Stetson Driver's License and an Employment Authorization Card. However, Defendant moves to dismiss the indictment as untimely with prejudice to the Plaintiff's Complaint for failure to comply with 18 U.S.C. §§ 3298, 3288 and the government of the United States is not entitled to any equitable tolling of the criminal statute of limitations.

STATEMENT OF THE FACTS

On May 3, 2018, Special Agent Jimmy Woo who works with the United States Department of Homeland Security ("DHS"), received a call from Sergeant Stanley Nielson about an arrest by the Westview Sheriff's Office for driving under the influence. R. 23, 24. He informed Special Agent Woo that the individual, S.P., was in custody and is a Guatemalan citizen and did not have authority to reside in the United States but was

concerned because she was in possession of an expired Stetson Driver's License, issued to her on June 2, 2008. R. 24. When Special Agent Woo went to interview S.P., she confirmed that she is a Guatemalan citizen who entered the United States unlawfully in April of 2008. R. 25. She explained that her husband had purchased forged immigration documents from a woman named "Scarlet" for a total of 10,000 dollars. R. 25. Immediately after, she and her husband used those documents to obtain their driver's licenses and employment authorization cards. R. 25. After speaking with S.P., Special Agent Woo spoke by telephone H.P., S.P.'s husband. R. 25. He refused to answer any questions without consulting his attorney. R. 25.

On August 10, 2018, Special Agent Woo received a call from H.P. who said that he was concerned that he could not get in touch with his immigration attorney Agatha Harkness, who he attempted to reach after the initial call. R. 25. H.P. said that he and his wife retained Harkness to assist them in applying for lawful temporary residence status so they would not be deported. R. 25, 26. H.P. explained that when he met with Harkness, she introduced him to her law clerk, Maximoff. R. 26. H.P. also explained that on May 23, 2008, as H.P. and S.P. were leaving Harness's office, they found a note in their paperwork with a phone number for a woman named "Scarlet." R. 26. The note advised the reader that "Scarlet" could assist them with obtaining immigration paperwork "like an OSUP " so that they could apply for a state Driver's License and an Employment Authorization Card. R. 26. H.P. called the number and complied with the directions and the next morning on May 24, 2008, he opened his mailbox to find fraudulent OSUP forms, which they used to obtain Stetson Driver's Licenses and Employment

Authorization Cards. R. 26. H.P. advised Agent Woo that other aliens in his neighborhood had paid "Scarlet" to obtain fraudulent immigration paperwork until 2010 and they were all clients of Harkness. R. 26.

Special Agent Woo opened an investigation file and attempted to contact Harkness at her office to no avail. R. 27. Agent Woo attempted to locate Harkness; however, he tabled this investigation from August 15, 2018, through February 14, 2019. R. 27. Agent Woo conducted a non-custodial interview of R.B., a resident, on February 19, 2019. R. 27. He provided a materially similar story to H.P. and obtained a forged OSUP. R. 28. R.B. provided the telephone number he had for Scarlet to Agent Woo. R. 28. Agent Woo subpoenaed phone records for the telephone number and found that it was an emergency contact for the law Office of Agatha Harkness. R. 28. Upon consideration of the evidence, Agent Woo opened an investigation into Maximoff as "Scarlet" for the alleged offense of encouraging or inducing aliens to reside in the United States. R. 28.

On March 23, 2020, pursuant to Administrative Order No. 20-019, the Court suspended the grand jury because of Covid-19. R. 11. On July 22, 2020, the information was filed under seal. R. 2. On July 23, 2020, the United States District Court for the District of Stetson Westview Division granted the Government's motion to dismiss the case without prejudice. R. 2. On September 21, 2021, an indictment was entered against Defendant for a violation of Title 8, United States Code, Section 1324(a)(1)(A)(iv, (v). On September 23, 2001, Defendant made her initial appearance and indicated her intent to motion for dismissal because the indictment was returned in violation of the statute of limitations. R. 10. In an order by this Court, Chief Judge Valentina Allegra de

Fontaine directed the parties to file memoranda of law addressing whether the Indictment was timely returned in view of §§ 3288, 3298 and whether the government is otherwise entitled to any equitable tolling of a criminal statute of limitations. R. 17, 18.

ARGUMENT

1. The Indictment Was Untimely In View of §3288 and §3298

Defendant, Wanda Maximoff, asks this court to dismiss the indictment on its face because it was returned in violation of the Statutes of Limitations. Under 18 U.S.C. § 3298, "No person shall be prosecuted, tried, or punished for any non-capital offense or conspiracy to commit a non-capital offense under... section 274(a) of the Immigration and Nationality Act [8 USCS §1324(a), unless the indictment is found, or the information is instituted not later than 10 years after the commission of the offense." Trafficking-related offenses, 18 USC § 3298. As a result, "an offense under 8 U.S.C. § 1324(a)(1)(A)(iv) is subject to a ten-year statute of limitations." *Fitzgerald Light v. United States*, No. 19-23244-CIV-LENARD/HUNT, 2021 U.S. Dist. LEXIS 45660, at *9 (S.D. Fla. Mar. 11, 2021).

Here, Defendant is being charged under 8 USC Section 1324(a)(1)(A)(iv) for manufacturing and selling false and fraudulent OSUPs to the aliens illegally present in the United States who did not qualify to receive an OSUP for the purpose of illegally obtaining a Stetson's Drive License and an Employment Authorization Card. R. 5, 6. Under Count One, the sole charge in the indictment, the government alleges that between May 31, 2007 and July 24, 2010, Defendant conspired to encourage and induce aliens to continue residing in the United States knowing that such residence would be in violation

of the law. R. 10. Established law provides that “the statute of limitations starts to run on the date of the last overt act alleged to have caused the complainant injury.” *United States v. Charnay*, 537 F.2d 341, 354 (9th Cir. 1976). Here, Defendant was indicted by the grand jury on September 21, 2021. R. 6. When comparing the date on the indictment and the last alleged overt act relating to the crime, 11 years has passed. Consequently, the indictment does not conform with the provisions of §3298 because it had to be instituted not later than 10 years after the commission of the offense. Thus, the indictment was not timely returned in view of §3298.

The Government contends that the indictment complies with 18 U.S.C. § 3288, however, its argument is flawed and unsound. 18 U.S.C. §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... if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations. Indictments and Information Dismissed After Period of Limitations, 18 USC § 3288.

The Supreme Court held that "when doubt exists about the statute of limitations in a criminal case, the limitations period should be construed in favor of the defendant." *United States v. Gilbert*, 136 F.3d 1451, 1454 (11th Cir. 1998) (citing *United States v. Habig*, 390 U.S. 222, 226- 27 (1968)). Further, the Supreme Court reasoned that “such a

limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970).

The statute's plain language clearly indicates that there are two elements that must be met for the government to receive a six-month extension. First, the indictment or information charging a felony is dismissed *after* the period prescribed by the applicable statute of limitations. Second, the statute 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. In the case at bar, the information was filed into court on July 22, 2020. R. 2. The government moved for an order of dismissal on July 23, 2020. R. 1, 2. Judge Elijah Bradley granted the government's dismissal order and dismissed the case without prejudice. R. 2. Based on the government's conspiracy of the events, the statute of limitations expired on July 24, 2020. R. 11. Under the § 3288, the information must have been dismissed after the running of the statute of limitations. Therefore, it is evident that the government cannot satisfy the requirements under 18 U.S.C. §3288 because the information was dismissed prior to the running of the statute of limitations.

The government further contends that it was forced to file the Information last summer because of Administrative Order No. 20-019. R. 11. That order suspended the grand jury because of Covid-19 on March 23, 2020. R. 11. That order was lifted on March 29, 2021. R. 11. Afterwards, the government claims that it sought an indictment

by the grand jury within six months to comply with 18 U.S.C. § 3288. R. 11. This argument is flawed, and the government cannot use § 3288 to extend the statute of limitations.

Section § 3288 is "sometimes referred to as the "savings clause," [and] applies when an indictment is dismissed because of defects in the indictment or other errors." *United States v. Benjamin*, No. 2016-0021, 2019 U.S. Dist. LEXIS 173202, at *18-19 (D.V.I. Oct. 5, 2019); *See United States v. Korey*, 614 F. Supp. 2d 573, 579 (W.D. Pa. 2009). Specifically, courts have interpreted Section 3288 to mean whenever "an indictment or an information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, 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, 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. *United States v. Davis*, 714 F. Supp. 853, 863 (S.D. Ohio 1988). In addition, the legislature in Senate Report 1414 referenced the 1964 Amendment to Section 3288. Specifically, it stated that "the amendment would therefore permit reindictment in similar cases where an information was filed after the defendant waived in open court prosecution by indictment." S. Rep. No. 88-1414, at 1 (1964).

Thus, the only option the government would have had in this case would have been to prosecute the Defendant by information. However, according to Rule 7 of the Federal Rules of Criminal Procedure, "an 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. Rules Crim. Proc. R. 7. Here, Defendant did not waive her right to open court prosecution by indictment because she did not know that she was under investigation for a federal crime until she was arrested on September 23, 2021. R. 10, 11. Therefore, the government did not conform with the requirements within 18 U.S.C. Section 3288 and thus is not entitled to a six-month extension of the statute of limitations. For that reason, Defendant's Motion to Dismiss should be granted and the Plaintiff's complaint dismissed with prejudice.

2. The Government Is Not Entitled to Any Equitable Tolling Of A Criminal Statute Of Limitations

In the alternative, the government contends they are entitled to equitable tolling of the statute of limitations, but that argument is meritless as well. The doctrine of equitable tolling "is most typically applied to limitation periods on civil actions," *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998); *see also Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) and the Circuit Courts are seemingly split as to whether equitable tolling applies to criminal statute of limitations. While some Courts have observed equitable tolling in criminal statutes *United States v. Levine*, 658 F.2d 113, 119-121 (3d Cir. 1981), others have chosen not to foreclose that possibility. *United States v.*

Atiyeh, 402 F.3d 354, 367 (3d Cir. 2005). What is clear, however, is that federal courts have chosen to extend the doctrine "only sparingly." *Irwin*, 498 U.S. at 96. Indeed, equitable tolling may only be appropriate if "(1) the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 753 (3d Cir. 1983). In more simple terms, equitable tolling will not be granted absent "intentional inducement or trickery by the defendant," or in the "rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." *Alvarez-Machain v. United States*, 96 F.3d 1246, 1251 (9th Cir. 1996). In the case at bar, there has been no "intentional inducement or trickery" and the interests of justice weigh heavily in favor of repose. Thus, the government's argument fails to show an inherent need for the equitable tolling they require.

The facts in the case at bar make clear that the government exceeded the statute of limitations by their own free will and the defendant did not mislead or trick them into doing so. A succinct timeline of the investigation shows the government had ample opportunity to investigate and indict the defendant prior to the expiration of the statute of limitations. YA began his investigation on May 3, 2018, after he received a telephone call regarding the arrest of an unlawful immigrant. R. 24, 25. On this day, YA allegedly spoke to S.P. and learned of a woman named "Scarlet" who was forging immigration documents for a group of "clients." R. 25. Despite the perceived lead, YA chose to table the investigation in favor of an undercover task force assignment. R. 27. This assignment

ran from August 15, 2018, through February 1, 2019. R. 27. On March 18, 2019, YA subpoenaed Maximoff's bank, phone, and travel records. R. 28. Finally, on October 28, 2019, YA conducted the last client interview related to the case. R. 29. As evidenced, the timeline of the investigation shows that YA had months of downtime where the investigation was either "tabled" or not advancing. YA *chose* to table the investigation for 7 months when he got another assignment. R. 25. Moreover, YA did not advance the case in any discernable way for nine months in between the conclusion of the final interview and original filing of information. R. 2, 27. The delays in the indictment can only be attributed to the Government itself. In fact, the record does not indicate that the defendant attempted to impede, trick, or intentionally induce in any way. The facts make clear that YA simply took too long and wasted too much time throughout the investigation.

Further, in comparing the facts of the case at bar to that of *Midgley*, it is evident just how high the threshold is for equitable tolling. There, Midgley entered a plea agreement for the September 3, 1991, indictment against him in exchange for dismissal of the remaining counts. *Midgley*, 142 F.3d at 175. But the foundational law of this count subsequently changed. On December 6, 1995, in *Bailey v. United States*, 516 U.S. 137 (1995), the Supreme Court held "active employment" of a firearm was required to establish it was "used." *Id. at* 150. In light of Bailey's holding, Midgley filed a motion to vacate his sentence "on May 23, 1996, some 5 years and 3 months after the commission of his offenses." *Midgley*, 142 F.3d at176. The government attempted to reinstate the dismissed counts, arguing Midgley's "breach" of a plea agreement prevented them from

exercising their right to prosecute. *Midgley,* 142 F.3d at179. But the court was unpersuaded, stating that "Midgley alone did not create the situation of which the government complains." *Id.* The Court further opined that, even though they made "much of Midgley's three-month delay in filing," and Midgley may have "frustrated the government's purpose," he did not reach the threshold necessary to require equitable tolling. *Id.* The facts of *Midgley* are distinguishable from the case at bar. Where Midgley was willing to delay his filing and frustrate the governments intent, the Defendant here has done nothing of the sort. The delay can only be attributed to the governments self-imposed setbacks. Thus, the government cannot make out the threshold showing of intentional inducement or trickery necessitating equitable tolling of the criminal statute of limitations.

Nor can it be said that equitable tolling is demanded by sound legal principles or the interests of justice. The Courts have long held that "criminal limitation statutes are to be liberally interpreted in favor of repose." *Toussie,* 397 U.S. at 115 (quoting *Habig*, 390 U.S. at 227). That is because the limits were designed to protect the vital interests of our nation. They mark "a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced," *United States v. Marion*, 404 U.S. 307, 322 (1971) and "encourage law enforcement officials promptly to investigate suspected criminal activity," *Toussie*, 397 U.S. at 115. While "the very existence of a statute of limitations entails the prospect that wrongdoers will benefit," *United States v. Gaither*, 926 F. Supp. 50, 54 (M.D. Pa. 1996) the clear and unambiguous rule afforded by

the criminal statute of limitations is preferable to a shifting standard based on the perceived equity of the defendant's conduct. *Midgley at* 180.

The government now seeks this shifting standard to remedy their mistake. But the Courts do not "appl[y] equitable tolling to rescue a Government indictment filed after the statute of limitations has lapsed," and the government offers no convincing rationale to do so. *Atiyeh*, 402 F.3d at 367. Moreover, Congress could implement new provisions for equitable tolling during a pandemic if there was an overwhelming need or desire. But when they had the opportunity to do just that, the proposed laws were denied. Indeed, the remedy the government seeks was proposed by the DOJ in 18 U.S.C. § 3302, titled "Emergency Suspension of Limitations."[1] The proposal called for a tolling of "all federal offenses during a period of nationwide emergency." But this proposal was summarily turned down in a rare showing of bipartisan force.[2] The overwhelmingly negative reaction to that proposal exemplifies just how valued the unambiguous rules of our criminal statute of limitations are, even in the face of this pandemic. Thus, the government cannot legitimately argue that sound legal principles or the interests of justice would permit equitable tolling in the case at bar, and the government's arguments for equitable tolling should be dismissed.

[1] The complete legislation proposed by the DOJ is located at http://int.nyt.com/data/documenthelper/6835-combed-doj-coronavirus-legisla/06734bbf99a9e0b65249/optimized/full.pdf

[2] The article containing various reactions of the Congress is located at https://www.axios.com/report-doj-seeksemergency-powers-criticized-9703e85b-cc22-4899-a17c-1deefa378cdf.html

CONCLUSION

In sum, Plaintiff fails to meet its burden of proving that the indictment was timely in view of §3288 and §3298 and is not entitled to any equitable tolling of a criminal statute of limitations. For this reason, Defendant's Motion to Dismiss should be entered in favor of Wanda Maximoff.

WHEREFORE, Defendant respectfully requests that this Court enter Defendant's Motion to Dismiss in her favor, dismissing the indictment in its entirety with prejudice and grant is such other relief as is just and proper.

Respectfully submitted,
Wanda Maximoff

By: _____
One of Defendant's Attorneys