

CASE NO. 1:20-cr-24

**UNITED STATES DISTRICT COURT
DISTRICT OF STETSON
WESTVIEW DIVISION**

UNITED STATES OF AMERICA

v.

WANDA MAXIMOFF

**PROSECUTION MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS THE INDICTMENT IN VIOLATION
OF THE STATUTE OF LIMITATIONS**

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INTRODUCTORY STATEMENT

The Prosecution respectfully asks that this court deny the Defendant's Motion to Dismiss the Indictment.

I. The Prosecution asks that the Defendant's Motion to Dismiss the Indictment be denied as it is procedurally deficient. The procedural handling of the Indictment was both proper and necessary in light of the COVID-19 pandemic. The government in this case, properly filed materially identical information on July 22, 2020, and subsequently filed a motion to dismiss the information because no grand jury was convened at the time. This Indictment was filed on September 21, 2021, within six months of the date when the new grand jury was convened on March 23, 2020. Rule 48(a) of the Federal Rules of Criminal Procedure allowed the government to motion for the dismissal of the information with the leave of court. The motion was properly granted by the district court after review and the defense has not overcome the presumption of good faith given by the court. Section 3288 allows for a new indictment to be returned in the appropriate jurisdiction whenever the original indictment or information is dismissed for any reason when no grand jury is in session, within six months of the date when a new grand jury is convened. Therefore, this Court should deny Defendant's Motion to Dismiss the Indictment as it is procedurally deficient

II. Alternatively, the Prosecution seeks to have the criminal statute of limitations equitably tolled. In light of the Pandemic, the Prosecution's actions were reasonably diligent as grand juries was suspended at the Prosecution originally was seeking the Indictment. Additionally, the COVID-19 pandemic is an extraordinary circumstance that stood in the way of seeking a timely indictment. Therefore, if this Court should find the procedural history unconvincing, the Government should still be entitled to equitable tolling of the criminal statute of limitations.

STATEMENT OF THE FACTS

Defendant, Ms. Wanda Maximoff is charged with a violation of Title 8, United States Code, Section 1324(a)(1)(A)(iv), (v). Indictment ¶ 8. Allegedly, between May 31, 2007 and July 24, 2010, the defendant conspired to knowingly encourage and induce an alien to reside in the United States, despite knowing and in reckless disregard of the fact that such residence is and will be in violation of law. Indictment ¶ 7. Allegedly, she manufactured and sold false and fraudulent OSUPs to aliens 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. Indictment ¶ 7.

The defendant was arrested on September 23, 2021 and that same week a grand jury returned an Indictment against her on the charge. Woo Aff. ¶ 2. For the charge, the defendant faces a maximum term of imprisonment up to ten years, a maximum term of supervised release of up to three years, a \$250,000 fine, and a special assessment. I.A. ¶ 9. However, the ten-year statute of limitations for the charge expired on July 24, 2020. I.A. ¶ 12.

The Government filed materially identical Information filed to the Indictment on July 22, 2020. I.A. ¶ 13. The Government then filed a Motion for Order of Dismissal. I.A. ¶ 13. The Government requested that the Information and all other matters pertaining to this case be dismissed pursuant to Federal Rule of Criminal

Procedure. I.A. ¶ 13. Judge Bradley granted the order dismissing the Information without prejudice on July 23, 2020. I.A. ¶ 13.

The Information was filed after the Court suspended the grand jury in Administrative Order No. 20-019 because of COVID-19 as of March 23, 2020. I.A. ¶ 13. When the Court lifted the suspension on March 29, 2021, in Administrative Order No. 21-008, the Government sought an Indictment by the grand jury within six months of the suspension being lifted. I.A. ¶ 13.

LAW AND ARGUMENT

The defendant's motion to dismiss the Indictment is procedurally deficient. 18 U.S.C. Section 3288 allows for the filing of this Indictment beyond the period prescribed in the Federal Criminal Code. Not only was the procedural handling of this matter proper, but the handling was also necessary considering the court's recent guidelines. Therefore, dismissal of this case is not warranted. However, if this court should find the procedural history unconvincing, the Government should still be entitled to equitable tolling of the criminal statute of limitations prescribed in this case. The Government should be entitled to equitable tolling as it acted with reasonable diligence and extraordinary circumstances were present, namely, a worldwide pandemic that stood in the Government's way of seeking a timely indictment.

I. The Court Should Deny the Defendant's Motion to Dismiss the Indictment as the Government's Handling of the Indictment was Procedurally Proper and Necessary

The Fifth Amendment to the United States Constitution states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. The United States Criminal Code, in furtherance of the Fifth Amendment, provides for a prescription period of no more than ten years to file an indictment or institute information to prosecute, try, or punish anyone for trafficking-related offenses. 18 U.S.C. Section 3298. However, the criminal code also recognizes certain situations

that may arise in which there may be a need for an extension beyond the prescribed period. One such situation can be seen from Section 3288. Section 3288 allows for a new indictment to be returned in the appropriate jurisdiction whenever the original indictment or information is dismissed for any reason when no grand jury is in session, within six calendar months of the date when a new grand jury is convened. 18 U.S.C. Section 3288. Thus, with the situation at hand, it was both procedurally proper to take the actions that the government did in this situation, and it was necessary considering the court's current guidelines.

A. The Filing was Proper Given the Procedural History Surrounding the Indictment

When the main issue in a case is one of statutory interpretation, the court must begin with the text at issue. *See United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). When the language of the statute is unambiguous, the inquiry is complete. *United States v. St. Amour*, 886 F.3d 1009, 1013 (11th Cir. 2018). The plain language of Section 3298 provides that the statute of limitations, under which it would generally be proper to bring an indictment for the crimes perpetrated by the defendant in this case, would have expired on July 24, 2020. However, due to the COVID-19 pandemic, the grand jury of this jurisdiction was suspended on March 23, 2020. Therefore, it is proper to continue this inquiry and read the plain language of Section 3288.

The government in this case, properly filed the information on July 22, 2020, and subsequently filed a motion to dismiss the information because no grand jury was convened at the time. This Indictment was filed on September 21, 2021, within six months of the date when the new grand jury was convened on March 23, 2020. Considering the plain language of Section 3288, it was procedurally proper for the Government to take the actions described above since no grand jury was convened at the time of the filing.

The Federal Rules of Criminal Procedure provide that “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 the indictment.” Fed.R. Crim. P. 7(b). In the Seventh Circuit case, *United States v. Burdix-Dana*, the defense attempted to equate “institute” with the ability to proceed with prosecution from Rule 7 of the Federal Rules of Criminal Procedure. 149 F.3d 741 (7th Cir. 1998). However, the court in *Burdix-Dana* declined to follow the defense’s argument, stating that “Rule 7(b) does not forbid filing an information without a waiver; it simply establishes that prosecution may not proceed without a valid waiver.” *Id.* In coming to this decision, the court followed the holding from *United States v. Cooper*, a 10th Circuit decision, which held that Rule 7(b) only proscribes prosecution without waiver, not the filing of an information. 965 F.2d 960, 962-63 (10th Cir. 1992).

The defendant is arguing that the handling of this case was not procedurally proper since the defendant did not have an opportunity to waive the right to an indictment since she did not know about the investigation. The defendant's argument is based on Rule 7(b) of the Federal Rules of Criminal Procedure. This argument is flawed. Following the holdings from *Burdix-Dana* and *Cooper*, Rule 7(b) is clearly not applicable to the filing of information. In other words, the defendant is not entitled to waiver of the filing of information under Rule 7(b), she is only entitled to waiver of prosecution. Thus, the defendant's knowledge of the investigation against her at the time of the filing of information is irrelevant since she did not have the right to waive the filing.

The text of 18 U.S.C. Section 3288 is clear: if no regular grand jury is in session when the indictment or information is dismissed, a new indictment may be returned within six months of the date the next regular grand jury is convened. The government filed this Indictment within the six months of the current regular grand jury's commencement as required by Section 3288. Thus, it was procedurally appropriate. Further, Rule 7(b) of the Federal Rules of Criminal Procedure is irrelevant in this situation. Rule 7(b) is not applicable to the filing of information. Thus, the defendant's lack of knowledge about the federal investigation is not an issue since she did not have the right to waive the filing.

B. The Government's Actions Were Necessary Due to the Court's Guidelines at the Time of the Filing of Information.

The Federal Rules of Criminal Procedure allow for the government to dismiss an indictment, information, or complaint with leave of court. Fed. R. Crim. P. 48(a). The reason Rule 48(a) has the “leave of court” requirement is to protect a defendant against prosecutorial harassment. *Rinaldi v. United States*, 434 U.S. 22, 29 n. 15 (1977). Prosecutorial harassment is defined as the “charging, dismissing, and subsequently commencing another prosecution at a different time or place deemed more favorable to the prosecution.” *United States v. Salinas*, 693 F.2d 348, 351 (5th Cir. 1982). Finally, when the court is determining whether to permit the motion to dismiss, the government is entitled to a presumption of good faith. *United States v. Dyal*, 868 F.2d 424, 428 (11th Cir. 1989). If the defendant wishes to overcome this presumption of good faith, the defendant must show: (1) the dismissal was in bad faith or (2) the defendant has been prejudiced in his ability to attack the prosecutor’s motives. *Id.* Therefore, if a district court does not think prosecutorial harassment occurred, and the defense does not overcome the presumption of good faith, then a prosecution’s motion to dismiss should be granted.

Since the grand jury was suspended in July of 2020, the government was forced to file a Motion for Order of Dismissal after filing the information because they would not have been able to prosecute the case. The District Court for the District of Stetson took the surrounding circumstances into consideration on July 23, 2020 and properly granted the Motion for Order of Dismissal. If the district court

had assumed the government was engaging in prosecutorial harassment, the court would have dismissed the government's motion. However, this was not the case. Rather, the court properly presumed the Government was in good faith. Not only did the court properly grant the motion of dismissal, but the defense also has not shown that the presumption made by the court was made in bad faith or the defense was prejudiced in any way. The presumption of good faith given by the district court must stand.

Rule 48(a) of the Federal Rules of Criminal Procedure allowed the government to motion for the dismissal of the information with the leave of court. The motion was properly granted by the district court after review and the defense has not overcome the presumption of good faith given by the court. Thus, the district court's actions were necessary considering the court's guidelines at the time of the filing of information.

II. The Court Should Deny the Defendant's Motion to Dismiss the Indictment as the Government is Entitled to Equitable Tolling of the Statute of Limitations due to the District's Suspension of the Grand Jury During the COVID-19 Pandemic

Equitable tolling allows for district courts to extend the statute of limitations beyond the expiration date if necessary to avoid "inequitable circumstances." *Goodman v. Port Authority of New York and New Jersey*, 850 F. Supp. 2d 363 (S.D.N.Y. 2012). Accordingly, equitable tolling is only allowed when there are circumstances outside of the party's conduct which would make it "unconscionable

to enforce the limitation against the party and gross injustice would result.” *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (en banc). As seen in this case, criminal statutes of limitations are also subject to equitable tolling. *United States v. Midgley*, 142 F.3d 174, 178 (3d Cir.1998); *United States v. Levine*, 658 F.2d 113, 119–121 (3d Cir.1981). For equitable tolling to apply, the party seeking it must prove (1) they exercised reasonable diligence in pursuing their rights, and (2) some extraordinary circumstance stood in their way and prevented timely filing of the action. *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Bates v. United States*, No. ELH-13-512, 2019 WL 427321, at *3 (D. Md. Feb. 4, 2019).

A. The Government Exercised Reasonable Diligence in Pursuing the Indictment as They were Forced to File it Late Due to the Court Ordered Suspension of the Grand Jury

For the first requirement for equitable tolling to apply, the party seeking it must prove they acted with reasonable diligence throughout the time period they seek to have tolled. *Holland*, 560 U.S. at 653; *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996); *Belot v. Burge*, 490 F.3d 201, 205 (2d Cir. 2007). When determining whether the party has exercised reasonable diligence, a subjective test is used, meaning it must be considered in light of the facts of each particular case. *Ross v. Varano*, 712 F.3d 784, 799 (3d Cir. 2013).

In the instant case, the Government exercised reasonable diligence as it filed materially identical information to the indictment against the defendant on July 22, 2020 with an order signed by Judge Bradley dismissing the information without

prejudice. The Government was forced to file the information at that time because Administrative Order No. 20-019 suspended the grand jury on March 23, 2020 due to the COVID-19 pandemic. When the suspension was lifted on March 29, 2021, the Government sought an indictment within 6 months of the grand jury's reconvention. In light of the COVID-19 pandemic, including the Administrative Order, the Government was unable to seek the indictment in a timely manner as grand juries were suspended at the time originally attempted.

Since the grand jury was suspended, the Government was forced to file a Motion for Order of Dismissal after filing the information because it would otherwise have not been able to prosecute the case in a timely manner. On July 20, 2020, the District Court for the District of Stetson considered the surrounding circumstances and properly granted the Government's motion. Had the district court judge instead assumed the Government was attempting to dismiss the charges to wait for a more favorable time to file the Indictment, the judge would have dismissed the motion. However, it was clear in this situation that given the Administrative order, the Government could not move forward with the indictment at that time and the judge properly granted the motion. Therefore, the judge clearly found by granting the motion that the Government was acting reasonably when filing its motion. The Government also swiftly sought an indictment after the suspension was lifted, a reasonable period of within six months of the grand jury being reconvened. This

action was reasonable as no grand jury was convened at the time of the original filing, making it impossible for the Government to move forward with the indictment. Therefore, given the suspension of the grand jury, the Government clearly acted with reasonable diligence when filing the motion to dismiss and the current indictment.

B. The COVID-19 Pandemic is an Extraordinary Circumstance that Stood in the Government's Way and Prevented Timely Filing of the Indictment

The second requirement for equitable tolling to apply is that there must be some extraordinary circumstance standing in the way of preventing timely filing of the action. *Holland*, 560 U.S. at 653; *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). What constitutes an extraordinary circumstance is determined on a case-by-case basis and courts must “exercise their equity powers” to determine what circumstances should be deemed extraordinary. *Holland*, 560 U.S. at 650 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)). In exercising their equity powers, courts should use flexibility and avoid mechanical rules. *Id.* (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). This flexibility should be utilized to “relieve hardships ... aris[ing] from a hard and fast adherence” to absolute legal rules. *Id.* (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).

The COVID-19 pandemic is an extraordinary circumstance which should allow for the second requirement of equitable tolling to be met. With an unprecedented effect on the court system, Administrative Order No. 20-019

suspended all grand juries, not allowing for the prosecution to file a timely indictment. Considering the difficulty this Administrative Order caused to the Government and its ability to prosecute cases, a suspension of grand juries should indeed be deemed an extraordinary circumstance. Further, enabling the Indictment to move forward by allowing equitable tolling to apply would relieve the hardships which arose from the “hard and fast adherence” to the prescription period. *Holland*, 560 U.S. at 650 (quoting *Hazel-Atlas* 322 U.S. at 248). Namely, the hardships resulting from an unfiled indictment that would have moved forward absent the pandemic. Without equitable tolling of the prescription period, the Government would have had no other avenue to bring the indictment forward.

Additionally, several courts have already deemed the COVID-19 pandemic an extraordinary circumstance. For example, *United States v. Jones* described it as an “extraordinary and compelling circumstance that justifies a reduction in the [defendant’s] sentence.” 980 F.3d 1098 (6th Cir. 2020). *United States v. Rodriguez* also described its defendant’s circumstances as presenting “extraordinary and compelling reasons to reduce his sentence ... due to the COVID-19 pandemic.” 451 F. Supp. 3d 392 (E.D. Pa. 2020). Considering the unprecedented effect the suspension of grand juries had on the Government’s ability to bring an indictment as well as several courts already noting the pandemic is an extraordinary circumstance, the COVID-19 pandemic should be deemed an extraordinary

circumstance. Since the pandemic should be considered an extraordinary circumstance, the second requirement for equitable tolling is met.

Finally, many courts have also found that the COVID-19 pandemic may justify the use of equitable tolling. *United States v. Barnes* noted that due to the unprecedented and enduring nature of the COVID-19 pandemic, potential equitable tolling was warranted. 2020 WL 4550389, at *2 (N.D. Okla. Aug. 6, 2020). *U.S. v. Haro* also stated that “the COVID-19 pandemic could—in certain circumstances—conceivably warrant equitable tolling.” 2020 WL 5653520 (D. Neb. Sept. 23, 2020). In addition to these statements, the Supreme Judicial Court of Massachusetts issued multiple orders tolling the running of the statutes of limitations in criminal cases for a period extending from March 17th to October 23rd. These orders were due to the limitation on the availability of grand juries.

Considering both requirements for equitable tolling have been met, combined with numerous courts having noted equitable tolling may apply due to the pandemic, the defendant’s motion to dismiss should be denied as the Government is entitled to equitable tolling of the statute of limitations.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court deny Ms. Maximoff's motion for dismissal. The Government's actions were procedurally proper and necessary considering the surrounding circumstances. Regardless of the procedures taken, the Government should be allowed to move forward with this Indictment since the Government meets both required prongs for the equitable tolling of a criminal statute.

DATED: August 30, 2021

Respectfully Submitted,

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