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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JORDAN M. JUCUTAN, Defendant-Appellant.	No. 16-10452 D.C. No. 1:15-cr-00017-ARM-1 MEMORANDUM*

Appeal from the United States District Court
for the District of the Northern Mariana Islands
Alex R. Munson, District Judge, Presiding

Argued and Submitted October 11, 2018
Honolulu, Hawaii

Before: WARDLAW, BERZON, and BENNETT, Circuit Judges.

Jordan M. Jucutan appeals the district court's denials of his motion to dismiss the indictment. We have jurisdiction pursuant to 28 U.S.C. §§ 1291, 1294 and 48 U.S.C. §§ 1821, 1824. We review the district court's denials of Jucutan's motion to dismiss for plain error because Jucutan did not previously raise his current arguments below. *See United States v. Yijun Zhou*, 838 F.3d 1007, 1010

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Exhibit A

(9th Cir. 2016); *see also* Fed. R. Crim. P. 52(b). We review any factual findings underlying the denials for clear error. *See United States v. Jenkins*, 633 F.3d 788, 797 (9th Cir. 2011). We affirm the district court's denials of Jucutan's motion to dismiss the indictment.

The district court correctly concluded that the criminal indictment against Jucutan was not barred by the generally applicable five-year statute of limitations period provided in 18 U.S.C. § 3282(a). The court did not plainly err by concluding that the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287, applied to toll the five-year limitations period. The government demonstrated that the offenses charged were "committed in connection with the . . . performance . . . of any contract, subcontract, or purchase order which is . . . directly connected with or related to the authorized use of the Armed Forces," satisfying the third prong of the WSLA's offense clause. 18 U.S.C. § 3287. The district court correctly found that Document and Packaging Broker, Inc. (Docupak) contracted with the Army Reserve to administer its recruiting assistance program, AR-RAP. The Army Reserve used task orders to request funding for AR-RAP from the National Guard's "umbrella contract" with Docupak. Docupak invoiced the Army Reserve for reimbursement pursuant to those task orders.

The government also sufficiently demonstrated that AR-RAP was "directly connected with or related to" the United States' use of the Armed Forces pursuant

to either the Authorization for Use of Military Force Against Iraq Resolution of 2002 (AUMFAI) or the Authorization for Use of Military Force (AUMF). The AUMFAI authorized the President to "defend the national security of the United States against the continuing threat posed by Iraq," including "Iraq's ongoing support for international terrorist groups." AUMFAI, Pub. L. No. 107-243, preamble, §§ 3(a), 3(b), 116 Stat. 1498. The AUMF authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

The Army Reserve implemented AR-RAP to "transition[] from a stand-by reserve to an operational reserve," in light of remaining "challenges for the Global War on Terror (GWOT) and for manning the [Army Reserve]." Through AR-RAP, the Army Reserve hired more personnel to meet their "end-strength" goals as the global war on terror drew reservists into active operations. Thus, the district court correctly concluded that AR-RAP had a direct connection with or

relationship to the use of the Armed Forces pursuant to the AUMF or the AUMFAI to combat international terrorism.[1]

AFFIRMED.

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[1] The district court had both authorizations before him, but did not specify on which "authorized use of the U.S. military in wartime" he relied in denying Jucutan's motion to dismiss the indictment. In any event, Jucutan waived any objection to the district court's reliance on either the AUMF or the AUMFAI by failing to raise such arguments before the district court. *See Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) ("Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so.").

United States v. Jucutan, No. 16-10452

BERZON, Circuit Judge, dissenting:

I respectfully dissent. In my view, the district court plainly erred in concluding that the Wartime Suspension of Limitations Act ("the Act") applies to the wire fraud and aggravated identity theft charged against Jordan Jucutan.

As relevant to this case, the Act applies only to criminal offenses "committed in connection with the . . . performance . . . of any contract . . . which is . . . directly connected with or related to [a congressionally] authorized use of the Armed Forces"; it does not apply to "military actions not specifically authorized by Congress pursuant to the War Powers Resolution." S. Rep. No. 110-431, at 4 (2008). The Supreme Court has repeatedly counseled that the Act "should be 'narrowly construed' and 'interpreted in favor of repose.'" *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (quoting *Bridges v. United States*, 346 U.S. 209, 216 (1953)).

I disagree with the majority's conclusion that the government has provided evidence showing that the Army Reserve – Recruiting Assistance Program ("AR-RAP") was "directly connected with or related to" either the Authorization for Use of Military Force Against Iraq Resolution of 2002 ("AUMFAI") or the Authorization for Use of Military Force ("AUMF") passed in response to the September 11 attacks.

The majority implies that the AUMF and the AUMFAI broadly authorize the use of the Armed Forces to "combat international terrorism." Neither authorization is so capacious.

The AUMFAI, passed on October 16, 2002, authorized the President to:

> use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—
>
> > (1) defend the national security of the United States against the continuing threat posed by Iraq; and
> >
> > (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

Pub. L. No. 107-243, 116 Stat. 1501.[1] The AUMF, passed on September 18, 2001, authorized the President to:

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, 115 Stat. 224. To reiterate, the AUMF twice states that the authorization is limited to "those nations, organizations, or persons [the President]

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[1] The majority quotes language from the AUMFAI noting "Iraq's ongoing support for international terrorist groups." This language appears in the preamble to the joint authorization, as part a sentence explaining why "it is in the national security interests of the United States and in furtherance of the war on terrorism that all relevant United Nations Security Council resolutions be enforced." Pub. L. No. 107-243, 116 Stat. 1500. But the preamble is not the operative language of the document, which authorized only the use of force directed at "the threat posed by Iraq" and "regarding Iraq."

determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Id.*

The government relies on a work statement for AR-RAP to show that program is directly connected with or related to the AUMF or the AUMFAI. That work statement states that:

> as the Army Reserve (AR) transitions from a stand-by reserve to an operational reserve there still remains challenges for the Global War on Terror (GWOT) and for manning the AR. The current strength of the Selected Reserve (SELRES) is just under 195K; missing end-strength goal by 10K.

But this language cannot expand narrow authorizations contained in the AUMFAI and the AUMF.[2] The government has made no effort to show that the need to recruit 10,000 more Army Reserve troops was "directly connected with or related to" the ongoing conflict in Iraq, or efforts targeting the nations, persons, and organizations that orchestrated the September 11 attacks, as opposed to other potential missions related to the Global War on Terror.

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[2] I note that both authorizations also state that the President has independent "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Pub. L. No. 107-40, 115 Stat. 224; Pub. L. No. 107-243, 116 Stat. 1501. The executive exercise of such authority may constitute part of the Global War on Terror, but only congressionally authorized uses of force trigger the Act's suspension of limitations periods.

I would therefore hold that the government has not met its burden of showing that the Act applies, and that the statute of limitations had run before this prosecution began.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,
Plaintiff,
v.
JORDAN M. JUCUTAN,
Defendant.

Case No. 1:15-CR-00017

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Before the Court is Defendant's Motion to Dismiss for Prosecution of Acts Beyond Statute of Limitations and Lack of Standing to Prosecute Case Due to Lack of Any Alleged Criminal Act Committed Against the United States of America (ECF No. 34). The Government filed an Opposition (ECF No. 60), and Defendant filed a Reply (ECF No. 66). The motion was heard on May 11, 2016. After argument by counsel, the Court denied the motion. This Order memorializes the reasons for that ruling.

II. BACKGROUND

Defendant is charged with four counts of wire fraud, in violation of 18 U.S.C. § 1343, and four counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A. The Second Superseding Indictment (SSI, ECF No. 57) alleges that Defendant schemed to defraud a private company, Docupak, "to obtain money from Docupak by materially and falsely claiming that he personally recruited certain soldiers despite knowing that such representations were false and fraudulent when made." (SSI ¶ 15.)

The United States hired Docupak to administer the Army Reserve Recruiting Assistance Program (AR-RAP). (SSI ¶ 2.) The AR-RAP was designed to assist the Army Reserve in meeting its recruitment goals by offering financial incentives to Recruiting Assistants (RA) to personally recruit family and friends. (SSI ¶ 6.) An AR would nominate a potential recruit by entering personal identification information into an online account on Docupak's website. (SSI ¶ 9.) The information would be transmitted to Docupak's Alabama headquarters, where management would verify its authenticity. (SSI ¶ 10.) For every enlistee, a $1,000 payment would be directly deposited in the RA's account by wire from Docupak's Alabama bank account; if the enlistee went to basic training, an additional $1,000 payment would be wired. (SSI ¶¶ 11, 12.) Docupak submitted invoices each month to Army Reserve's Contracting Officer Representative, who would review them and reimburse Docupak for verified enlistments. (SSI ¶ 13.)

The Government alleges that Defendant falsely took credit for enlisting four individuals by stealing their personal identification information and submitting it through Docupak's online portal.

II. DISCUSSION

Defendant is charged with offenses that were allegedly committed between August 25, 2007, and June 6, 2009. The prosecution commenced on December 10, 2015, when the grand jury returned the initial indictment (ECF No. 1). If the five-year statute of limitations for most federal crimes applies, then this prosecution appears to have commenced outside the limitations period and would be barred. The Government asserts that the five-year limitations period, set forth at 18 U.S.C. § 3282, has been suspended by the Wartime Suspension of Limitations Act (WSLA), which reads:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the

> War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

18 U.S.C. § 3287. Defendant has not disputed that the United States is at war within the meaning of the WSLA and has not maintained that hostilities terminated more than five years before the offense conduct occurred. Defendant asserts that the WSLA does not apply to him because he is not charged with offenses that meet any of the three conditions.

The first condition, fraud against the United States or a federal agency, is easily satisfied when defrauding the United States of money or property is an element of the alleged offense. *See Bridges v. United States,* 346 U.S. 209, 221 (1953) (holding that fraud must be of a pecuniary nature); *United States v. Grainger,* 346 U.S. 235, 241 (1953) (stating that fraud against the United States is an "essential ingredient of the offenses charged"). Fraud against the United States is not a statutory element of the charges against Defendant – wire fraud and aggravated identity theft. Nor does the Government directly allege that Defendant defrauded the United States. The fraud victim, as recited in the Second Superseding Indictment, is Docupak: "the defendant . . . devised a scheme to defraud Docupak, and to obtain money from Docupak by materially and falsely claiming that he personally recruited . . ." (SSI ¶ 15). The Government has not argued that Docupak, a private contractor, was a federal agency for purposes of the WSLA. In order to return a guilty verdict on any of the counts, the jury need not find that the United States was defrauded. On its

face, then, the first possible condition to apply the WSLA is not met.

The second condition – that the offense was committed in connection with the handling of federal property – cannot be determined without the taking of evidence on whether the United States had an ownership interest in the money disbursed to Defendant. In other cases arising from Docupak's administration of recruiting assistance programs, that determination has waited until the close of evidence at trial. *See United States v. Constantino,* Crim. Case No. 15-00029, 2016 WL 1170940 (D. Guam Mar. 23, 2016); *United States v. Osborne,* No. 13-00125, 2016 WL 1366681 (M.D. Tenn. Apr. 5, 2016). Deferral of ruling on a pretrial motion is proper in those circumstances, because the issue raised is "not entirely segregable from the evidence to be presented at trial . . ." *United States v. Shortt Accountancy Corp.,* 785 F.2d 1448, 1452 (9th Cir. 1986) (holding that determination of motion must be deferred when pretrial claim is "substantially found upon and intertwined with" evidence concerning alleged offense).

However, the third condition – that the offenses were committed in connection with the performance of a contract related to the authorized use of the Armed Forces – is not substantially intertwined with evidence concerning the charges and may be determined prior to trial. Indisputably, Docupak administered the AR-RAP program for the Army Reserve, and recruiting assistance relates to the authorized use of the U.S. military in wartime. For that reason, the Court finds that the third condition is satisfied. The three conditions listed in the WSLA are separated by the word "or," whose "ordinary use is almost always disjunctive[.]" *United States v. Woods,* __ U.S. __, 134 S.Ct. 557, 567 (2013). Thus, only one of the conditions need be met for the second prong of the WSLA analysis to be met. Because the first prong (wartime authorization of use of the Armed Forces) and third prong (non-termination of hostilities) are unchallenged, the WSLA applies to the offenses charged against Defendant.

IV. CONCLUSION

For the aforestated reasons, Defendant's Motion to Dismiss is DENIED.

SO ORDERED: May 17, 2016

ALEX R. MUNSON
Senior Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 16 2019

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U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JORDAN M. JUCUTAN, Defendant-Appellant.	No. 16-10452 D.C. No. 1:15-cr-00017-ARM-1 District of the Northern Mariana Islands, Saipan ORDER

Before: WARDLAW, BERZON, and BENNETT, Circuit Judges.

Judge Wardlaw and Judge Bennett vote to deny Defendant-Appellant's petition for rehearing. Judge Berzon votes to grant the petition for rehearing. The panel has voted to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

Exhibit C