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

U.S. GOVERNMENT **Case No.** 1:21-cr-36

vs.

WANDA MAXIMOFF
a/k/a "Scarlet"

Defendant.
_____/

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION OF

DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

INTRODUCTORY STATEMENT

This Court is asked to deny Defendant's Motion to Dismiss the Indictment as Untimely because it was timely returned pursuant to 18 U.S.C. § 3289 after the court dismissed an information when the grand jury was suspended. Alternatively, the indictment was timely returned due to the statute of limitations' equitable tolling during the unprecedented coronavirus pandemic.

I. Defendant Wanda Maximoff, hereinafter "Defendant," has filed a Motion to Dismiss the Government's Indictment as Untimely. The Government filed the indictment after an information was dismissed during the applicable statute of limitations. When the information was dismissed, the grand jury was suspended due to the coronavirus (COVID-19) pandemic, and the Government was forced to file an indictment when the grand jury next convened after the statute of limitations had run. Such circumstances fall squarely within the protections of 18 U.S.C. § 3289. Thus, the Government's indictment was timely, and the Court should deny Defendant's motion to dismiss.

II. Alternatively, the indictment was timely returned due to the statute of limitations' equitable tolling during the unprecedented coronavirus pandemic. Equitable tolling requires a diligent pursuit of rights and an extraordinary circumstance that prevented filing, both of which are present in this case. As a policy matter, equitable tolling should apply in this case.

STATEMENT OF FACTS

On May 4, 2018, S.P., a Guatemalan citizen, faced an interrogation with Special Agent Jimmy Woo. Aff. Jimmy Woo ¶¶ 5, July 22, 2020. During the interview, S.P. admitted that she had purchased forged immigration documents from a woman named "Scarlet" for a total of $10,000. Aff. Woo at ¶ 5. Over the next few years, many other confessions echoed S.P.'s, referring to forged immigration documents from the contact "Scarlet" for the sum of $10,000. Aff. Woo at ¶ 12, 19, 29. These confessions ultimately would lead to the unmasking and arrest of "Scarlet," Ms. Wanda Maximoff. Aff. Woo at ¶ 29.

Leading up to her arrest, Ms. Maximoff, hereinafter "Defendant," ostensibly worked as a "certified legal intern" or counsel of record for Stetson immigration attorney Agatha Harkness. Aff. Woo at ¶ 10; Aff. Monica Rambeau 2, Sept. 24, 2021. Progressing through law school as a law clerk and ultimately becoming an immigration lawyer herself, Defendant conspired with both Ms. Harkness's clients and her own clients—for her signature sum of $10,000—until her employment with Ms. Harkness was terminated in 2010. Aff. Woo at ¶ 29. In fact, from May 2007 to her termination in late 2010, Defendant conspired with at least eight (8) of twenty-four (24) illegal aliens to help them avoid detection for their unlawful presence in the United States. Aff. Woo at ¶ 29. Specifically, Defendant facilitated the forgery of a legal document called an Order of Supervision ("OUSP"), which allows illegal aliens to be released into the community and offers the ability to apply for a Stetson

Driver's License and Employment Authorization Card, among other things. Aff. Woo at ¶ 4, 11-18.

On March 23, 2020, the Court suspended the grand jury because of the unprecedented coronavirus (COVID-19) pandemic. Hr'g Tr. 3: 55-65, Sept. 23, 2021, No. 1:21-cr-36. After concluding an extensive, years-long investigation into Defendant's crimes, the Government filed an information on July 22, 2020. Hr'g Tr. 3: 58. Pursuant to Fed. R. Crim. P. 48, the Government moved to voluntarily dismiss the Information. Order Granting Pls.' Mot. Dismiss 1. The court granted this motion and dismissed the information without prejudice on July 23, 2020. Order Granting Pls.' Mot. Dismiss 1. This occurred one day before the applicable statute of limitations ran on July 24, 2020. 18 U.S.C. § 3298. After the Court lifted the suspension of the grand jury on March 20, 2021, the Government properly sought an indictment that the grand jury submitted on September 21, 2021. Hr'g Tr. 3: 44-52.

ARGUMENT

I. This court should deny Defendant's Motion to Dismiss because the indictment was timely returned under 18 U.S.C. § 3289 following the dismissal of information and COVID-19 grand jury suspension.

18 U.S.C. § 3288 and § 3289 exist to protect the government in cases where "a new indictment is returned after a prior indictment [or information] has been dismissed because of an error, defect, or irregularity with respect to the grand jury, or because it has been found otherwise defective." *United States v. Charnay*, 537 F.2d 341, 354 (9th Cir. 1976) (quoting S. Rep. No. 1414, 2 U.S. Code Cong. and Admin. News 3257-58 (1964)). Under § 3289, whenever an "indictment or information charging a felony" is dismissed for any reason before the applicable statute of limitations expires, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of dismissal. 18 U.S.C. § 3289 (1994). If no grand jury is in session when the information is dismissed, a new indictment may be returned within six months of the date the next regular grand jury is convened. *Id*. 18 U.S.C. § 3288 provides the same protections for information and indictments dismissed after the statute of limitations has run. *Id.* § 3288 (1988).

A. Since the information was dismissed before the statute of limitations ran and no regular grand jury was in session, the indictment was timely under § 3289 when it was filed soon after the grand jury reconvened.

The court has long held that § 3288 and § 3289 allow the government to correct a dismissed information or indictment by extending the period in which a new indictment may be returned. *United States v. Garcia*, 412 F.2d 999, 1000 (10th

Cir. 1969). This concept entered the courts as early as the 1938 case *United States v. Strewl*, where the court held that it could give a judgment after examining the full record of indictments, including dismissed indictments, without regard to errors or defects "which do not affect the substantial rights of the parties." *United States v. Strewl*, 99 F.2d 474, 477 (2d Cir. 1938). Since the 1960s, the statutes were triggered by either a dismissed indictment or information. See *Charnay* at 354.

Although courts have recognized the "saving function" of § 3288 and § 3289, modern courts have emphasized the importance of strictly construing the statutes' language when actually applying them to a set of facts. See *Charnay* at 354-55; *Strewl* at 477. For example, the court has held that the phrase "for any reason" in the statutes should be construed literally: "§ 3288 [and § 3289] was meant to apply whenever the first charging paper was vacated for any reason whatever," including deficiencies or irregularities with the grand jury. *United States v. Horowitz*, 756 F.2d 1400, 1403 (9th Cir. 1985) (quoting *United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976)). The court in *United States v. Horowitz* further specified that § 3288—and, by proxy, § 3289—are triggered even by dismissals for legal defects. *Id*. Likewise, an information or indictment dismissed before the statute of limitations expires falls under § 3289 according to the language of the statute itself. See *United States v. Spanier* 744 Fed. Appx. 351, 354 (9th Cir. 2018).

In the present case, the language of § 3289 clearly applies. The Government's first information was dismissed on July 23, 2020, one day before the applicable

statute of limitations ran on July 24, 2020. *See* 18 U.S.C. § 3298. This timeline fits squarely within the purview of § 3289. When the information was dismissed, the grand jury was suspended due to COVID-19. Under the statute, then, the Government had a full six calendar months after the regular grand jury convened to return a subsequent indictment. After the grand jury reconvened on March 29, 2021, the subsequent indictment was returned on September 21, 2021, far in advance of the six-month deadline. Thus, the Government has more than satisfied § 3289, and the September 21, 2021 indictment was indeed timely.

B. As a policy matter, applying § 3289 is consistent with past judicial interpretations and legislative intent.

The courts have not hesitated to apply § 3288 and § 3289, and in fact favor their use in cases where the charges in the new indictment closely mirror those of the dismissed information or indictment. In *United States v. Spanier*, for example, the court held that the tolling provisions of § 3288 and § 3289 applied because the government may rely on a prior indictment when the subsequent indictment does "not broaden or substantially amend the charges in the prior indictment." *Spanier* at 354. The Supreme Court has allowed for an even broader application, holding that if an indictment is dismissed without prejudice, "a prosecutor may of course seek—*and in a great majority of cases will be able to obtain*—a new indictment, even if the period prescribed by the applicable statute of limitations has expired" under § 3288 (emphasis added). *Zedner v. United States*, 547 U.S. 489, 499 (2006).

While the courts commonly look to other judicial interpretations when applying § 3289, they have also emphasized the importance of legislative intent in applying § 3289 and its counterparts. *See United States v. Wilsey*, 458 F.2d 11, 11 (9th Cir. 1972). Analyzing a substantially similar statute, the court in *United States v. Rabb* called for an eye toward Congressional intent by examining the "surrounding statutory landscape." The court in *United States v. Wilsey* held that legislative intent should guide judicial interpretation of § 3288 and § 3289, exploring the legislative purpose of both sections to "protect the government in securing correction of [an information or indictment] by assuring that the continued running of the statute will not permit the defendant to escape through technicality before correction can be secured." *Wilsey* at 11.

Not only has the court defined the protective purpose of § 3289, but it has also explored its practical procedural purpose of avoiding repeat offenses and wasting court resources. See *United States v. Durkee Famous Foods, Inc.*, 306 U.S. 68, 71 (1939) (holding that a substantially similar act had a protective purpose); *Strewl* at 477. Echoing the court in *Strewl*, the court in *United States v. Macklin* stated that "the purpose [of the statute is] to extend the statute of limitations, so that a person who had been indicted under an indictment which, as it turned out, would not support a conviction, should not escape because the fault was discovered too late to indict him again." *Macklin* at 193. While the courts have been clear in recognizing the importance of the statute of limitations, they have been equally diligent in

providing protections for government actors who do not intentionally delay filing information or indictments. *Id.*

The policy provisions of § 3289 are applicable to Defendant's indictment. The only reason the Government delayed in submitting an indictment is because of the COVID-19 pandemic, which left grand juries suspended and no other option forward for prosecution. These unprecedented circumstances trigger the legislative purpose of § 3289 outlined in both *Macklin* and *Strewl*: to prevent an accused person to walk free before the Government has a chance to correct or revise its information, especially since the Government did not intentionally delay in filing the information. Allowing the statute to fulfill its purpose here also aligns with past judicial interpretations, which have been largely in favor of using § 3289 to correct defects of any kind. Finally, notwithstanding judicial proclivity to recognize the saving power of § 3289, the statute's language clearly applies as discussed above and requires very little court intervention at all. Thus, the Defendant's indictment clearly falls under both the practical and policy provisions of § 3289.

C. Even a nullified information dismissed before the statute of limitations expires satisfies § 3289.

Under Fed. R. Crim. P. 7(b), an offense punishable by imprisonment for more than one year may be prosecuted by information only if the defendant waives prosecution by indictment in open court, after being advised of the nature of the charge and of the defendant's rights. Fed. R. Crim. P. 7(b). If the government

proceeds with prosecution on an information without attaining the required waiver, that information may be nullified. *Stirone v. United States*, 361 U.S. 212, 215-16 (1960). But it is important to note that an information charging a felony is not always—or even usually—nullified when the government files it before an indictment in a case where waiver is required. See *United States v. Hawkinson*, 210 Fed. Appx. 527, 529 (7th Cir. 2006) (holding that a sealed information can satisfy the statutory period even when waiver is required); *United States v. Burdix-Dana*, 149 F.3d 741, 742 (7th Cir. 1998) (holding that the absence of waiver does not make the filing of an information "a nullity"); *United States v. Thompson*, 287 F.3d 1244, 1250-51 (10th Cir. 2002) (confirming *Burdix-Dana* in its own reading of Rule 7).

In fact, merely filing an information with the court when waiver is required does not make the information null and void, nor does it bar application of § 3288 or § 3289. *U.S. v. Burdix-Dana*, 149 F.3d 741, 742 (7th Cir. 1998). In *U.S. v. Burdix-Dana*, prosecutors filed an information before the expiration of a five-year statute of limitations in a case where waiver was required, but did not return an indictment until after the statutory period expired. *Id.* at 740-42. The defendant argued that the government failed to satisfy the statute of limitations and requirements of § 3288 by filing a "null" information rather than the required indictment under Fed. R. Crim. P. 7. *Id*. The court held that filing the information was "within meaning of the statute of limitations," stating that it "d[id] not believe that the absence of [a] waiver

makes the filing of an information a nullity." *Id*. at 742. The court further held that when the information was dismissed after the statute of limitations ran, its subsequent indictment qualified under § 3288. *Id*. at 743. The court in *Macklin* affirmed this latter concept in its own reading of § 3288 and § 3289, where it held that § 3288 and § 3289 "overruled *Hattaway v. United States*, 304 F.2d 5 (5 Cir. 1962), which had held that where the paper filed (an information) was a nullity because the defendant could be prosecuted only by indictment, the saving clause did not apply." *Macklin* at 193 (citing *Hattaway v. United States*, 304 F.2d 5, 5 (5th Cir. 1962)).

Here, it remains clear that the Government's information was not null and void when filed before the indictment without a waiver. As the court in *Burdix-Dana* held, filing the information without a waiver did not in and of itself nullify the information or preclude it from meeting the statute of limitations. As such, the Government's subsequent indictment would also fall under the protections of § 3289, since the information was validly filed and dismissed before the applicable statute of limitations ran. Further, even if the Government's information was somehow found to be nullified, this case could easily fall under the *Macklin* ruling, where the court held that even a null information can open the gateway to the saving statutes § 3288 and § 3289. Thus, again, the Government's subsequent indictment would qualify for the protections of § 3289.

II. This court should grant equitable tolling due to the extraordinary circumstance of the COVID-19 pandemic.

A statute of limitations establishes a period of time when a claim must be brought in order to help eliminate stale claims. *Rotella v. Wood,* 528 U.S. 549, 560 (2000). Equitable tolling is a long-established feature of American jurisprudence derived from "the old chancery rule." *Holmberg v. Armbrecht,* 327 U.S. 392 (1946). Courts presume that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute. *Young v. United States,* 535 U.S. 43, 49-50 (2002). The doctrine of equitable tolling has two elements. *Holland v. Florida*, 560 U.S. 631 (2010). First, the party seeking equitable tolling must have been pursuing their rights diligently. *Id*. Second, an extraordinary circumstance has stood in the way, preventing timely filing. *Id*.

Here, the Government pursued their rights diligently, beginning the work on this case on March 3, 2018. Administrative Order No. 20-019 suspended the grand jury due to COVID-19 on March 23, 2020. Hr'g Tr. 3:61-62, Sept. 23, 2021. The statute of limitations on this matter was set to expire on July 24, 2020. Hr'g Tr. 3:51-52, Sept. 23, 2021. The Government filed a motion to voluntarily dismiss under the Federal Rule of Criminal Procedure 48 in order to file materially identical information to meet the statute of limitations. Order Granting Pl.'s Mot. to Dismiss. The information was filed by the United States under seal on July 22, 2020, within the statute of limitations. Hr'g Tr. 3:56-59, Sept. 23, 2021. Due to the COVID-19

pandemic, the grand jury was not in session until March 29, 2021. Hr'g Tr. 3:62-65, Sept. 23, 2021.

The COVID-19 pandemic is an extraordinary circumstance that has stood in the way and prevented timely filing. Many parts of the country, including many legal systems, shut down at unprecedented rates for extended amounts of time during the pandemic. It was first believed that it would only be a couple of weeks; however, the time was continually extended with no real end in sight.

Lack of access to the courts due to closure is an extraordinary circumstance. In many cases, the court has allowed equitable tolling when access to the courts was restricted due to natural disasters or wars. It was previously held that equitable tolling applied when a plaintiff was held as a prisoner in Japan during World War II and was unable to access the courts. *Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947). In another instance, equitable tolling applied when the state of Louisiana was under a state of emergency due to flooding. *Murray v. Cain*, No. 15-0827-BAJ-EWD, 2019 U.S. Dist. LEXIS 54275 (M.D. La. Mar. 5, 2019). This court previously approved equitable tolling during the Civil War when courts in Arkansas were closed due to the rebellion. *Hanger v. Abbot*, 73 U.S. (6 Wall.) 532 (1868). In this case, many aspects of the courts were closed for unprecedented and unpredictable amounts of time, preventing the grand jury from convening, effectively stopping an indictment and forcing the Government to voluntarily dismiss, waiting for the grand jury to return to session.

A. As a policy matter, if this court does not find that these facts fit within established cases of equitable tolling, it should expand the rule to include limited cases which were affected by the COVID-19 pandemic to adhere to the legislative intent.

This court has repeatedly stated that whether to apply equitable tolling is "fundamentally a question of statutory intent." *Lozano v. Montoya Alvarez,* 572 U.S. 1, 10 (2014). In this unprecedented and rare global pandemic, grand juries were suspended. The courts should not allow individuals to escape accountability due to a statute of limitations expiring, during a time where the courts were non-functional in many aspects. Eliminating stale claims is one of the intentions of equitable tolling**.** *Rotella,* 528 U.S. 549 at 560. In this case, the claim was diligently investigated, information was filed, and evidence was kept. Barring the use of equitable tolling would undermine the very reason that it was created. If the court does not expand the bounds of equitable tolling to include the COVID-19 pandemic as an extraordinary circumstance, people can continue committing crimes in hopes that the statute of limitations will run out by the time they are indicted for it.

From March 2020 to June 2020, more than 200,000 US prisoners were granted expedited release from incarceration due to the COVID-19 pandemic. *Impact of COVID-19 on the Local Jail Population*, Bureau of Justice Statistics, https://bjs.ojp.gov/library/publications/impact-covid-19-local-jail-population-january-june-2020 (last visited Aug. 28) Adding more people to the prison population would put additional pressure on an institution struggling to social

distance and distribute limited personal protection equipment. Equitable tolling would allow for the health of the community to be prioritized without sacrificing the opportunity to hold people accountable. In applying this rule, the prejudice to the client would not outweigh the benefit to the community, the prison system, and the individual. The community is better protected when crimes are prosecuted using equitable tolling instead of allowing the statute of limitations to expire. The prison system is already overwhelmed, with 1 in 5 inmates contracting COVID-19. *Id*. The individual is not exposed to additional risk of infection by delaying their case until the courts reopen.

B. It is anticipated that the defense will argue that the rule should not be applied due to laches; however, laches does not apply in this case.

Laches require "proof of lack of diligence by the party against whom the defense is asserted, and prejudice to the party asserting the defense." *Costello v. United States*, 365 U.C. 265, 281 (1961). As previously stated, the Government acted diligently in this case. There is little prejudice to the party because the case is not stale, and the evidence is available. Therefore, laches do not apply in this case.

CONCLUSION

For the reasons stated above, the Government respectfully requests that the Court deny Defendant's Motion to Dismiss the Indictment as Untimely.

DATED: August 30, 2021

Respectfully submitted,

_____

Team 106
Counsel for Plaintiff