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

UNITED STATES OF AMERICA,

Prosecution,

CASE NO. 1:21-cr-36

v.

WANDA MAXIMOFF

Defendant.

UNITED STATES' MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

/s/ 108
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Counsel for United States

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INTRODUCTION

One of the purposes of federal prosecutions is to initiate prosecution in a way that "promote[s] the reasoned exercise of prosecutorial discretion." DOJ Manual 9-27.110. In this case, Wanda Maximoff deliberately assisted immigrants with filing illegal work documents, and now fights prosecution because a global pandemic has prolonged her court proceedings. In the wake of COVID-19, the United States of America has properly exercised its discretion against Ms. Maximoff in a timely and diligent fashion, in accordance with all relevant law.

This Memorandum discusses that the indictment filed by the United States of America was timely returned in consideration of 18 U.S.C. §§ 3298 and 3288, and, alternatively, the United States is entitled to equitable tolling of the criminal statute of limitations. For the reasons set forth below, this Court should deny Defendant's Motion to Dismiss the Indictment.

STATEMENT OF FACTS

On 22 July 2020, the Government filed an information charging Defendant Wanda Maximoff ("Movant") with conspiring to encourage and induce aliens to continue residing in the United States knowing that such residence would be in violation of the law and for the purpose of commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv), (v) between 31 May 2007 and 24 July 2010. R. at 5. The Government moved to dismiss the 22 July 2020 Information pursuant to Federal Rule of Criminal Procedure 48. This Court granted the Government's motion to dismiss without prejudice on 23 July 2020. R. at 2. Due to the COVID-19 pandemic, this Court suspended the operation of grand juries from 23 March 2020 to 29 March 2021. R. at 11, lines 60-65**.** Subsequently, the Government filed a materially identical indictment against Movant on 21 September 2021 (the "21 September 2021 Indictment"). R. at 4. At a hearing before this Court on 23 September 2021, Movant made a motion to dismiss the 21 September 2-21 Indictment as untimely. R. at 10-11, lines 45-52. On 23 September 2021, this Court ordered memoranda of law from both parties regarding Movant's Motion to Dismiss the 21 September 2021 Indictment and the Government's request for equitable tolling of the statute of limitations. R. at 17.

ARGUMENT

I. The 21 September 2021 Indictment was timely under 18 U.S.C. § 3298 as it was filed within the statutory period and under § 3288 because the 22 July 2020 Information was dismissed without prejudice and an indictment was filed within six months of grand jury reinstatement.

Felony offenses must be prosecuted by an indictment. U.S. CONST. amend. V.; Fed. R. Crim. P. 7(a). Although vital, an indictment is not the exclusive filing component to a felony prosecution. Movant was charged with felony violations of 8 U.S.C. § 1324(a)(1)(A)(iv) and (v) (2021). The entirety of 8 U.S.C. § 1324 has been incorporated into the Immigration and Nationality Act, so the following statutory limitation must be considered:

> No person shall be prosecuted, tried, or punished for any non-capital offense or conspiracy to commit a non-capital offense under section . . . of this title or under section 274(a) of the Immigration and Nationality Act unless the indictment is found *or the information is instituted* not later than 10 years after the commission of the offense.

18 U.S.C. § 3298 (2021) (emphasis added). The language of § 3298 makes clear there are two filing mechanisms in a prosecution for any of the listed offenses: the indictment or the information. However, the indictment and information are not equally sufficient to prosecute, try, or punish someone for any of the listed offenses in § 3298, because an indictment is required to prosecute a felony.

However, neither Fed. R. Crim. P. 7(a), nor any decisions by this Court, address the effect of an "instituted" information as allowed in § 3298. Caselaw in

other federal jurisdictions interpreting identical statutory language to § 3298 find that an "instituted" information and an indictment have two distinct meanings. An indictment is sufficient to prosecute while an *instituted* information is sufficient to toll the statute of limitations. Accordingly, the filing of the 22 July 2020 information tolled the statute of limitations, and thus the 21 September 2021 Indictment was timely returned under § 3298.

Further, 18 U.S.C. § 3288 provides for additional filing protections when an indictment or information is dismissed after the period of limitations and following certain extenuating circumstances:

> [w]henever 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 . . . within six calendar months of the date of the dismissal. . . 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. This section 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 . . .

18 U.S.C. § 3288 (2021). The Government alternatively argues that the 21 September 2021 Indictment was also timely returned under § 3288.

A. <u>The 22 July 2020 Information was timely under 18 U.S.C. § 3298 and tolled the ten-year statute of limitations, thus the 21 September 2021 Indictment was timely filed.</u>

Numerous federal courts hold an information is successfully "instituted" when it is filed, and it tolls the statute of limitations. Opinions interpreting 18 U.S.C. § 3282 provide guidance, as § 3282 uses almost identical language to § 3298. Under § 3282, no one shall be punished under the listed offenses "unless the indictment is found or the information is instituted within five years." 18 U.S.C. § 3282 (2021). In *United States v. Burdix-Dana*, the court interpreted § 3282 to mean "the filing of an information [is] sufficient for statute of limitations purposes." *United States v. Burdix-Dana*, 149 F.3d 741, 743 (7th Cir. 1998); *see also United States v. Rosecan*, 2021 U.S. Dist. LEXIS 49939 (S.D. Fla. 2021) ("the plain language of section 3282 only requires that the 'information' be 'instituted' to satisfy the statute of limitations."). Similarly, in *United States v. Stewert*, the court held that under § 3282, filing a waiverless criminal information with the clerk's office successfully "institutes" it for the purposes of tolling the statute of limitations. *United States v. Stewert*, 425 F. Supp. 2d 727 (E.D. Va. 2006).

In this case, the language of § 3298 provides that no person be punished under the listed offenses "unless the indictment is found *or the information is instituted* not later than 10 years after the commission of the offense." 18 U.S.C. § 3298. This is identical language to § 3282 and should be interpreted to equate the filing of an information sufficient to institute it and toll the statute of limitations. Furthermore, the filing dates in this case follow similarly to those in which federal

courts have held an instituted information tolls the applicable statute of limitations.

In *Burdix-Dana*, the U.S. Attorney filed an information against the defendant on 20 February 1997 for offenses committed on 24 February 1992 and the statute of limitations was five years. *Burdix-Dana*, 149 F.3d at 742. An indictment, however, was not returned against the defendant until 4 March 1997, more than five years from the date of the offense. *Id*. The court held although the indictment was not filed within the statute of limitations, the institution of the information was sufficient to toll the statute of limitations. *Id.* at 743.

Here, the Government alleged Movant committed violations of 8 U.S.C. § 1324(a)(1)(A) between 31 May 2007 and 24 July 2010, and the applicable statute of limitations is ten years. The 22 July 2020 Information was instituted within ten years, thus satisfying § 3298. Although the 21 September 2021 Indictment was filed after the ten-year statutory period, the 22 July 2020 Information tolled the statute of limitations. Just as the information in *Burdix-Dana* tolled the statute of limitations despite the indictment being filed past the statutory period, the 21 September 2021 Indictment in this case was timely filed because the 22 July 2020 Information tolled the statute of limitations.

In *United States v. Machado*, the court rejected the proposed distinction between "prosecution" and "institution of charges" and the equation of "institution" with "filing." *United States v. Machado*, 2005 U.S. Dist. LEXIS

26255 (D. Mass. 2005). The court reasoned that "prosecution" and "institution" were commonly used to describe the commencement of a criminal action. *Id*. In the court's view, "because an information is the functional and constitutional equivalent of an indictment only when accompanied by a valid waiver of indictment, no reason exists why that rule should not apply in the statute of limitations context." *Id*.

The *Machado* court's interpretation is wrong for two reasons. First, the government in *Machado* had "inexplicably allowed the case to languish for nearly four years . . ." *Id.* at 2. This is simply not the case here. The statute of limitations provided by § 3289 is ten years, and the 22 July 2020 Information was filed squarely within that time frame. Secondly, the *Machado* court employs a semantics argument that is self-defeating. The *Machado* court reasoned that "prosecution" and "institution" are equivalent but then explained they are different because one requires a waiver. *Id*. at 7-8. Neither of the supporting cases, the text of § 3289, nor the Government's argument in this case suggest the filing of an information is sufficient to *prosecute* an individual. *See Burdix-Dana* at 743 (the government "could not have held Burdix-Dana to answer for a felony solely on the basis of the information."); *Rosecan* at 9 ("[t]he terms 'prosecuted' and 'instituted' are not equivalent, and an information is 'instituted' when it is properly filed . . .").

Therefore, the distinction between an indictment on charges and an instituted

information must prevail. Accordingly, the 21 September 2021 Indictment was timely filed because the 22 July 2020 Information tolled the statute of limitations, and the Government filed an indictment to comply with the felony mandate.

B. The 21 September 2021 Indictment was also timely filed in light of 18 U.S.C. § 3288.

Under the Federal Rules of Criminal Procedure, the Government is permitted, with leave of court, to dismiss an indictment or information. Fed. R. Crim. P. 48(a). As mentioned, § 3288 governs the dismissal of indictments and information after the prescribed period of limitations and provides for extended filing during certain circumstances.

As a threshold issue, § 3288 only applies to a "dismissed" indictment or information." 18 U.S.C. § 3288 (2021); *see United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976) ("[] § 3288 was meant to apply whenever first charging paper was vacated for any reason whatever, including lack of jurisdiction."). Here, the 22 July 2020 Information was dismissed without prejudice on 23 July 2020. R p. 2. It is a well-recognized principle that "when an indictment is dismissed without prejudice, the prosecutor may of course seek – and in the great majority of cases will be able to obtain – a new indictment." *Zedner v. United States*, 547 U.S. 489, 498 (2006). Thus, the Government should be awarded the refiling protections of § 3288 as the 22 July 2020 Information was dismissed without prejudice.

Secondly, § 3288 provides that a new information or indictment may be filed

"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 . . ." 18 U.S.C. § 3288 (2021). If an indictment is filed within six months of a grand jury reinstatement, the refiled indictment is considered timely and "not barred by any statute of limitations." *Id.* Here, grand juries were suspended in the District of Stetson as of 23 March 2020 due to COVID-19. R. at 11, lines 60-65. Grand juries were reinstated on 29 March 2021, and the Government sought an indictment within six months. R. at 11, lines 60-65. Thus, the 21 September 2020 Indictment was timely filed under this provision of § 3288.

Lastly, § 3288 "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." 18 U.S.C. § 3288 (2021) (emphasis added). As mentioned, the 22 July 2020 Information was filed squarely within the ten-year statute of limitation. Thus, the protections of § 3288 apply here because the reason for the 23 July 2020 Dismissal was not based on the Government's failure to file within the statute of limitations.

Under § 3298, the Government timely filed the 22 July 2020 Information which tolled the statute of limitations and allowed for the timely filing of an indictment. Alternatively, in consideration of § 3288, the Government timely

returned the 21 September 2021 Indictment as the 22 July 2020 Information was dismissed without prejudice and the 21 September 2021 Indictment was filed within six months of grand jury reinstatement.

II. The Government is entitled to the equitable tolling of the criminal statute of limitations because COVID-19 was a circumstance beyond its control, and the Government diligently pursued its rights given the circumstances of this case.

Equitable tolling is a doctrine under which a court will justifiably pause the statute of limitations. It is a doctrine that is recognized when at the time of filing, the circumstances that arose preventing timely filing of a case were so far out of the litigant's control that it warranted equitable action. *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560–61 (6th Cir. 2000). The Government bears the burden of proving it is entitled to equitable tolling based on the extraordinary circumstances involved which prevented timely filing of the case and the diligence of the Government's efforts in the meantime. *Fenley v. Wood Grp. Mustang, Inc.*, 170 F. Supp. 3d 1063, 1076 (S.D. Ohio 2016). The decision to invoke equitable tolling is solely within the discretion of the trial court, as Congress has not removed the ability of courts to authorize equitable tolling for themselves. *Id.* at 1076.

A. The Government is Entitled to Equitable Tolling Because the COVID-19 Pandemic was a Circumstance Beyond its Control.

Equitable tolling applies when circumstances which prevent timely filing

arise that are beyond the litigant's control. 209 F.3d at 561. When seeking equitable tolling, a litigant must establish first that said litigant has been diligently pursuing his or her rights, and second that some extraordinary circumstance stood in the way of timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). The statute of limitations is the period of time within which a claimant must bring an action. *Lozano v. Alvarez*, 572 U.S. 1, 14 (2014).

When determining which extraordinary circumstances allow for equitable tolling under the *Holland* rule, extraordinary means "going far beyond the ordinary degree, measure, limit, etc.; very unusual; exceptional; remarkable." *Webster's New World Dictionary of the American Language*, 516 (1966). Coronavirus (COVID-19) swept the globe in a matter of two months from first being introduced in January 2020 to being declared a pandemic in March 2020. *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020. 19 March 2020, the first state in the US issued a state-wide stay-at-home order. By 6 April 2020, forty-five states had issued stay-at-home orders, with forty-two of them being state-wide. By 28 May 2020, COVID-19 claimed the lives of more than 100,000 people and by 10 June 2020, there were over 2 million confirmed COVID-19 cases in the United States. *Id.* As of August 2021, the COVID-19 death rate is approaching four and a half million. At its peak in July 2020, hospitals were

overflowing, men and women were quarantined for weeks at a time, and citizens were required to wear a face mask that completely covered the nose and the mouth to enter public places. *Tracking Coronavirus in Virginia: Latest Map and Case Count*, N.Y. TIMES (August 27, 2021), https://www.nytimes.com/interactive/2021/us/virginia-covid-cases.html. In the District of Stetson, grand juries were suspended from 23 March 2020 to 29 March 2021 due to COVID-19. R. at 11, lines 60-65. This was an unprecedented time in both American and world history and a circumstance far beyond the Government's control.

In *Brown v. Davis*, the court held that equitable tolling of the statute of limitations was proper because of the extraordinary circumstances surrounding the filing date. *Brown v. Davis*, 482 F. Supp. 3d 1049, 1060 (E.D. Cal. 2020). The petitioner was convicted of first-degree murder, sodomy, and rape and sentenced to death. *Id.* The petitioner was not represented by counsel when the statute of limitations for filing a writ of habeas corpus expired. Once the petitioner became aware that the limitations period had expired, he immediately began actively seeking counsel. However, the COVID-19 pandemic limited the petitioner's ability to find counsel by limiting visiting time with family and meetings with attorneys. *Id*. The court considered those factors, noting that it was not the petitioner who caused the delay in submitting the writ. The court therefore allowed equitable

tolling specifically due to COVID-19's impact on not only petitioner's daily life but also its effect on his ability to retain and communicate with counsel. *Id*.

In *Menominee Indian Tribe of Wisconsin v. United States*, the court held that the combination of an extraordinary circumstance and that circumstance being beyond the petitioner's control, comprise the single prong. *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 257 (2016). In *Menominee*, the petitioner argued that the extraordinary circumstances that prevented timely filing of its case pertaining to the tribe's health care included the fact that there would be significant risk and expense associated with litigating the issue. *Menominee* at 258. In *Menominee*, the court denied the petitioner's equitable tolling request because of the risk of defeat in a court proceeding and expenses of litigation are not extraordinary circumstances but rather of a "garden variety" of situations and worries in any court proceeding. *Id.* at 257-58.

Like in *Brown*, this case came to a head amidst a peak in COVID-19 infections, which caused state-sanctioned restrictions on in-person contact and court proceedings. *Brown* at 1060. In both cases, these restrictions largely reduced the petitioners' ability to comply with ordinary statutes of limitation. For example, COVID-19 restrictions resulted in the suspension of evidence review, limits on claim-related discovery, and the elimination of all in-person meetings, depositions, and interviews. *Id.*

Additionally, in *Brown* the court justified equitable tolling by stating that COVID-19 was an ongoing emergency. *Brown* at 1060. COVID-19 is still claiming the lives of thousands of people, both young and old, across the nation. *Id.* Although the court did not issue a blanket approval of equitable tolling in all cases during the COVID-19 pandemic, the court did consider the tangible restrictions COVID-19 placed on the petitioner in *Brown* to be an "extraordinary circumstance" under *Holland*. *Id*. Since COVID-19 has affected the Government in the same extraordinary fashion, the Government is deserving of equitable tolling.

This case is distinguishable from *Menominee Indian Tribe*. Unlike in *Menominee Indian Tribe* where the petitioner argued that the extraordinary circumstances justifying equitable tolling included the significant risk of defeat if the case was tried at that time and the ongoing expenses of trial, the extraordinary circumstances in this case have nothing to do with cost of litigation or risk of defeat, but instead has everything to do with the limited ability of the Government to initiate a case in the midst of the restrictions caused COVID-19. *Menominee* at 257. COVID-19's insurgence was entirely beyond the Government's control. It was and continues to be an unprecedented and extraordinary circumstance affecting no two people the same, yet affecting each and every person in some significant way.

The two elements of the extraordinary circumstances prong of *Holland,* as

clarified in *Menominee*, have been established in this case. At no fault to the Government, a global pandemic is still sweeping our beloved country, causing significant delays, challenges, and hurdles within the justice system. Justice allows equitable tolling under these extraordinary circumstances.

B. The Government Pursued its Rights under the *Holland* Rule in as Diligent of a Manner as Practicable Considering the COVID-19 Pandemic.

To satisfy the second prong of the *Holland* rule, that a litigant diligently pursue his or her rights, a litigant need show only "reasonable diligence," not "maximum feasible diligence." *Holland* at 653.

Even during the COVID-19 pandemic, which was in full effect for sixteen months prior to the limitations period's expiration, the Government worked diligently to file the 22 July 2020 Information in time. Reasonable diligence in this case requires consideration of the court system in 2020. Evidence review, depositions, interrogatories, filings, and trials all functioned drastically different as a direct result of the COVID-19 pandemic. At any other point in history, a litigant pursuing his or her rights would look much different than filing an Information in July of one year and not filing again until September of the next. However, in 2020, the Supreme Court of the United States issued updated statements concerning court filings almost every single month of the year, with each being even more restrictive than the last. *COVID-19 Announcements*, U.S. Sup. Ct. (April 9, 2021), https://www.supremecourt.gov/announcements/COVID-19.aspx.

Even with the onslaught of new information and everyday life coming to a near halt, the Government exercised reasonably diligent efforts to initiate prosecution.

C. The Intent of Statute of Limitations Entitles the Government to Equitable Tolling Due to the Extraordinary Nature of the Circumstances Affecting This Case.

Section 2255 of Title 28 of the U.S.C.A. dictates the applicability of equitable tolling to a criminal limitations period. 28 U.S.C.A. § 2255 (2008). That section provides that "equitable tolling is presumed to apply if the period in question is a statute of limitations and if tolling is consistent with the statute." *Id.* The statute also states that there are no bright line rules in determining when extra time should be allotted but is instead reviewed on a case-by-case basis. § 2255. Whether equitable tolling is allowed in a particular case is a question of statutory intent. *Lozano* at 10.

Additionally, in drafting § 3288, Congress recognized that there are some extraordinary circumstances that are sufficient to toll the statute of limitations. This is evidenced by the built-in provision for periods where grand juries are unavailable. 18 U.S.C. § 3288. While Congress could foresee some circumstances in which equity would not be served by holding a severe expiration date, Congress could not contemplate all situations in which such leniency would be required. Since Congress' intent to provide for extraordinary circumstances is clear, we may apply it to this case to determine that § 3298's ten-year statute of limitation should

be extended when it is impracticable to follow it. 3288's grand jury exception indicates that Congress intended to extend the limitations period in question. The period in question was a statute of limitation of ten years, satisfying the first prong of the statute. 18 U.S.C.§ 3298. Reviewing this case in light of its distinctive circumstances complies with the second prong of the statute. 18 U.S.C. § 3288. COVID-19's placement in history cannot be ignored for this reason. COVID-19 is the first non-influenza pandemic in history. *Past Pandemics*, CTR. FOR DISEASE CONTROL, (August 10, 2018), https://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html. There have been over 200,000,000 confirmed cases of COVID-19, with upwards of four and a half million deaths in fewer than two years. There has not been a pandemic with higher death rates since the 1918 Influenza pandemic, with the numbers rising daily. *Id.* This case is quite extraordinary because at the time of the expiration of the statute of limitations, COVID-19 had existed in the United States for a maximum of six months. *Id.*

Congress is presumed to incorporate equitable tolling into federal statutes of limitations because it is in the interest of justice for all Americans. This presumption is a foundational aspect of American law under the Sixth Amendment of the United States Constitution giving citizens have the right to a fair trial. *Lozano* at 4; U.S. CONST. amend. VI. By refusing equitable tolling under the circumstances of this case, this Court sets a precedent which unfairly and

unjustifiably requires parties to potentially risk safety merely for procedural satisfaction.

CONCLUSION

For the reasons discussed herein, the Government requests this Court find the 21 September 2021 Information was timely filed and deny the Defendant's Motion to Dismiss the Indictment.

Respectfully submitted,

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