

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

UNITED STATES OF AMERICA,

CASE NO.: 1:20-CR-24

v.

WANDA MAXIMOFF,

Defendant.

**PLAINTIFF'S MEMORANDUM
OF LAW IN SUPPORT OF PLAINTIFF'S
RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

/s/110

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	5
I. The Prayer for Dismissal Should Be Denied Because the Indictment Was Timely Returned In View of §3288, 3298.....	5
A. The Timely Filing of Waiver-Less Information Satisfies the Statute of Limitations.....	6
B. The dismissal order coupled with the Absence of Grand Juries provided a six-month tolling period.....	9
II. The Government is Entitled to Equitable Tolling of the Statute of Limitations of 8 U.S.C. §1324(a) (1) (A) (iv) and (v)	11
A. The Government Showed Reasonable Diligence To Protect Their Rights Through The Filing Of An Information Before The State Of Limitations Expired and By Following The Plain Language of 18 U.S.C. 3289.....	11
B. The COVID-19 Global Pandemic Meets The Standard of An Extraordinary Circumstance Because It Was Beyond the Government’s Control And Caused the Pleading To Be Untimely Filed.....	13
III. CONCLUSION.....	15

IV. SIGANATURE BLOCK 16

TABLE OF AUTHORITIES

Cases

Baldayaque v. United States,
338 F.3d 145, 153 (2d Cir. 2003)12

Connolly v. Howes,
304 Fed. Appx. 412, 417 (6th Cir. 2008)11

Hanger v. Abbott,
73 U.S. 532, 542 (U.S. 1867)14

Harper v. Ercole,
648 F.3d 132, 138 (2d Cir. 2011)11, 12, 13

Holland v. Florida,
560 U.S. 631, 649 (U.S. 2010)11

Kingdomware Techs., Inc. v. U.S.,
136 S. Ct. 1969, 1976 (U.S. 2016.)6

McCreary v. Nicholson,
19 Vet. App. 324, 332 (Vet. App. 2005)13

Seattle Audubon Soc. V. Robertson,
931 F.2d 590, 597-98 (9th Cir. 1991)14

Torres-Santiago v. United States,
865 F. Supp. 2d 168, 176 (D. P. R. 2012)11, 12

U.S. v. Briscoe, CR RDB-20-0139,
2020 WL 5076053 *2 (D. Md. 2020)7, 8

U.S. v. Palacio, 21-20301-CR,
2021 WL 3518143 *3 (S.D. Fla. 2021.)9

U.S. v. Rosecan, 20-CR-80052,
2021 WL 1026070 *4 (S.D. Fla. 2021.)7

United States v. Brown,
580 F. Supp. 2d 518, 520 (W.D. Va. 2008)7

United States v. Burdix-Dana,
149 F.3d at 741, 742 (7th Cir. 1998.)6

<i>United States v. Matta</i> , 937 F.2d 567, 568 (11th Cir. 1991)	9
<i>Valverde v. Stinson</i> , 224 F.3d 129, 133 (2d Cir. 2000)	11
Statutes	
8 U.S.C. §1324(a) (1)(A)(iv), (v).....	5
18 U.S.C. §3288	5
18 U.S.C. §3289.....	5
18 U.S.C. § 3298.....	5
18 U.S.C. § 3282.....	6
Fed. R. Crim. P. 7(b).....	7
Fed. R. Crim. P. 48.....	9

INTRODUCTION

The Government respectfully requests this Court to deny the defense's motion to dismiss the indictment against Wanda Maximoff because the information was timely filed within the ten-year statute of limitations period, which instituted the information pursuant to U.S.C. §3298. The Government contends that when an information is instituted or an indictment is filed and subsequently dismissed, the statute of limitations period should be tolled (extended) for six months from the dismissal or, if no grand Jury is in session, for six months after the grand Jury is reconvened. 18 U.S.C.A. §§ 3288-89.

Furthermore, due to the COVID-19 pandemic, grand juries were suspended on March 23, 2020, and did not resume until March 29, 2021. Therefore, the Government filed an indictment on September 21, 2021, which was within the six-month tolling period prescribed by statute, following the dismissal of an information on July 22, 2020. Furthermore, even if the Court decides the information was not timely filed, the Government is entitled to equitable tolling because the Government was reasonably diligent in pursuing their rights to file charges against Maximoff, and the extraordinary circumstance of COVID-19 directly caused an untimely filing. Based on the foregoing, the Government respectfully requests the defendant's motion for dismissal be denied.

STATEMENT OF FACTS

Wanda Maximoff is a former Socialist Federal Republic of Yugoslavia national and a naturalized United States citizen, residing in Westview, Stetson. Indictment ¶ 5. Maximoff attended Law School in 2008 and worked as a law clerk with immigration attorney Agatha Harkness. Woo Aff. ¶ 10; Darcy Decl. ¶ 2. Maximoff was later admitted to the Stetson Bar and began practicing as an associate attorney with Harkness' firm. Woo Aff. ¶ 19. On May 3, 2018, Jimmy Woo, a Special Agent with the United States Department of Homeland Security, received a phone call from the Westview Sheriff's Office regarding the expired driver's license of an individual, who did not have the authority to reside in the United States. Woo Aff. ¶ 5. Woo conducted an interview of the owner of the expired driver's license and discovered that the owner and her husband retained an immigration attorney, Agatha Harkness. Woo Aff. ¶ 7. After leaving Harkness's office, the owner and her husband discovered information in their case paperwork about a woman named "Scarlet" who could assist them in obtaining forged immigration documents. Woo Aff. ¶ 7. After this initial interview, Woo began a formal investigation on August 10, 2018, into fraudulent immigration paperwork that was distributed to clients of Harkness' law firm by Harkness' employees including Wanda Maximoff. Woo Aff. ¶ 13,14. This investigation has been ongoing since August 10, 2018, except for a brief period from August 15, 2018, through February 14, 2019, where Woo was conducting a separate investigation. Woo Aff. ¶ 17. This investigation produced information from numerous interviews of former clients of Maximoff, who said they were given contact information for "Scarlet." One specific client was told that "Scarlet"

could assist them in obtaining immigration paperwork in order to apply for a state Driver's License and Employment Authorization Card for a payment of \$10,000. Woo Aff. ¶ 7. Based on the evidence discovered, Woo began an investigation into Maximoff as the individual referred to as "Scarlet". Woo Aff. ¶ 24. Woo then conducted interviews of 24 former clients of Maximoff, where at least 8 clients disclosed that Maximoff provided them with a forged Order of Supervision (OSUP). Woo. Aff. ¶ 29. The earliest known payment made to Maximoff for obtaining illegal documents occurred on May 31, 2007, and the last payment was made on July 24, 2010. Woo Aff. ¶ 29. During this investigation, the COVID-19 pandemic began in the United States.

On July 22, 2020, the Government filed an information under seal regarding the allegations arising from the investigation of Wanda Maximoff. Order. ¶ 2, July 23, 2020. On July 23, 2020, the Government moved for this information to be dismissed. Order. ¶ 2, July 23, 2020. Subsequently, Elijah Bradley, United States District Judge for the District of Stetson, Westview Division dismissed the information without prejudice. Order. ¶ 2, July 23, 2020. Due to this unforeseen circumstance of COVID-19, Administrative Order No. 20-019 suspended the grand jury from March 23, 2020, to March 29, 2021. (Trial Tr., 61)

On September 21, 2021, following the reconvening of grand juries, an indictment for Wanda Maximoff, a/k/a "Scarlet", was returned. Indictment ¶ 5. The indictment charged Maximoff with engaging in a conspiracy; in pertinent part in that

"Between May 31, 2007, and July 24, 2010, knowingly encouraging and inducing 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, 8 U.S. C. §1324(a)

(1)(A)(iv), (v), namely by manufacturing and selling false and fraudulent OSUP's to aliens illegally present in the United States who did not qualify to receive an OSUP." Indictment ¶ 5.

The statute of limitations period of this offense is 10 years after the commission of the offense. (Trial Tr., 51). Therefore, since the last alleged payment to Maximoff was July 24, 2010, the statute of limitations period ends on July 24, 2020. (Trial Tr., 52)

Based on the indictment returned by the Grand Jury, Woo executed an arrest warrant on September 23, 2021, of Maximoff at her permanent residence. Woo Supp. Decl. ¶ 1. Maximoff asked to review the indictment but declined to answer any questions about the charges against her. Woo Supp. Decl. ¶ 4, 6. The Government relied on 18 U.S.C. §3288 when filing the September 21st indictment because the statute required the indictment to be filed within six months of the reinstatement of the grand jury which took place on March 29, 2021. Trial Tr., 62-3. Therefore, the six-month time frame expired on September 23, 2021.

Following these events, a hearing was held to conduct an initial appearance and inform Maximoff of the charges against her. Trial Tr., 24. Due to unforeseen circumstances, the Court ordered both parties to file a memorandum addressing the questions of (1) whether the indictment was timely returned in view of §3288 and 3298 and (2) whether the Government is entitled to equitable tolling of the criminal statute of limitations. Order. ¶ 2-3, September 23, 2020.

ARGUMENT

I. The prayer for dismissal should be denied because the indictment was timely returned in view of § 3298

The Government maintains that this prosecution should not be dismissed because the filing occurred within the statute of limitations period. Ms. Maximoff is in violation of “bringing in and harboring certain aliens, by abetting them by actively “engaging in a conspiracy” to provide falsified documentation. 8 U.S.C. § 1324 (West). This crime is governed by a ten-year statute of limitations period based on statutory language which indicates an indictment must be found, or the information must be instituted “not later than ten years after the commission of the offense.” 18 U.S.C. § 3298 (West).

Statutory law allows for tolling periods which extend the statute of limitations in certain circumstances. 18 U.S.C.A. §§ 3288-89. According to 18 U.S.C. § 3288, dismissing an information or indictment *after* the statute of limitations period, tolls the period for six months from the dismissal or six months after the next grand jury convenes. 18 U.S.C. § 3288. Similarly, 18 U.S.C. § 3289 asserts that the dismissal of information *before* the statute of limitations period, tolls the period for six months from the dismissal or, if no grand jury is in session, six months after the grand jury returns. 18 U.S.C. § 3289. The only difference in the language of these statutes is that § 3288 is used when the dismissal occurs *after* the limitations period has expired and § 3289 is used *before* the limitations period has expired. 18 U.S.C.A. §§ 3288-89. Both parties agree the statute of limitations period expired on July 24, 2020, and the dismissal of the information occurred on July 23, 2020. Therefore, since the plain language of § 3288

governs a dismissal which occurs *after* the statute of limitations has expired, the Government is of the belief that § 3289, which deals with dismissals *before* the expiration of the statute of limitations, is the applicable statute. The overall effect of the statutes is identical, therefore, applying either statute would produce the same result. 18 U.S.C.A. §§ 3288-89. However, this issue is unequivocally in line with the plain language of § 3289, so it should be applied.

The Government maintains that (a) the statute of limitations was met when there was a timely filed waiver-less information and that (b) beginning on March 29, 2021, the statute of limitation was tolled pursuant to 18 U.S.C. § 3289, for a total of six months following the grand jury resuming after it had been suspended due to the Covid-19 pandemic.

A. The Timely Filing of Waiver-Less Information Satisfies the Statute of Limitations.

When construing any statutory construction, you are required to begin with the plain language of the statute, “and if the statutory language is unambiguous, the inquiry ceases.” *Kingdomware Techs., Inc. v. U.S.*, 136 S. Ct. 1969, 1976 (U.S. 2016). The governing law for statute of limitations unambiguously illustrates that a person cannot be punished, prosecuted, or tried for any offense unless there is the timely filing of instituted information, or an indictment is found within the provided time limit within the applicable statute of limitations. 18 U.S.C. § 3282. Furthermore, it has been explicitly stated that timely filed information--absent a waiver of indictment—is sufficient to institute the information within the meaning of 18 U.S.C. § 3282. *United States v.*

Burdix-Dana, 149 F.3d 741, 742 (7th Cir. 1998). For instance, a defendant’s motion to dismiss because he did not consent to prosecution by information or waive his right to an indictment was denied because a superseding indictment may relate back to a timely filed information. *U.S. v. Rosecan*, 20-CR-80052, 2021 WL 1026070, *4 (S.D. Fla. 2021).

Additionally, the court held that although the absence of a valid waiver prohibits prosecution by indictment, *see* Fed. R. Crim. P. 7(b), its absence “does not deem the filing of an information a nullity.” *Id.* The waiver-less information is not a nullity because the words “prosecuted” by information and “instituted” information are not synonymous. *United States v. Briscoe*, No. CR RDB-20-0139, 2020 WL 5076053, *2 (D. Md. 2020.) Within the meaning of U.S.C. § 3282, an information is “instituted” whenever it is correctly filed, “regardless of the Defendant's waiver” whereas prosecution by information requires a waiver. *Id.* This analysis is in line with both the plain language of the law and the majority view of courts who have addressed this interpretative issue. *Id.*

When an information is timely filed, under section U.S.C. § 3282, a superseding indictment brought after the statute of limitations is still valid if it does not “broaden or substantially amend” and only relates back to the original filing. *United States v. Brown*, 580 F. Supp. 2d 518, 520 (W.D. Va. 2008). Though this rule is routinely applied to indictments, it should still be applied where there is the timely filing of an information. *United States v. Rosecan*, No. 20-CR-80052, 2021 WL 1026070, *4. For instance, a defendant's motion to dismiss for failure to indict within the statute of limitations was denied because his drug conspiracy allegations related back to a timely filed information

without broadening nor substantially amending the previous allegations. *U.S. v. Briscoe*, CR RDB-20-0139, 2020 WL 5076053, *2-3 (D. Md. 2020).

18 U.S.C. § 3298--unambiguously--says the Government is allowed to meet the statute of limitations by instituting/filing information within “10 years after the commission of the offense.” The defense argues that a subsequent indictment was outside the available statute of limitations because the filing of waiver-less information is insufficient to institute that information for prosecution and as a result the Government did not toll nor meet the statute of limitations. However, the Government contends that their actions were in accordance with the plain unambiguous language of § 3282, when they instituted information, which did not need a waiver. Since the last offense was dated July 24, 2010, the Government was within the ten-year statute of limitations period by timely filing an information on July 22, 2020. As seen in *Burdix-Dana*, this timely filed information was sufficient to institute the information regardless of its waiver-less status. Similar to *Rosecan*, the indictment found by the Grand Jury against Ms. Maximoff, following their absence due to Covid-19, is not deemed inefficient, because the timely filing of the information was not a nullity. If the court were to view the filing of waiver-less information, that was done in the wake of a global pandemic, as a nullity, we would be effectively setting the stage to allow similarly situated alleged criminals the opportunity to cut against the very fabric of the intent of the U.S.C., precedent, and the foundations of judicial process.

Similar to *Briscoe*, the subsequent indictment brought against Ms. Maximoff on September 23, 2021, did not broaden, or amend the charges articulated in the timely filed

waiver-less information which is evident because the indictment and information are materially identical. Additionally, even though the instituted information was subsequently dismissed without prejudice, the Government acted within the language outlined in U.S.C. § 3282 by only “relating back” to this preceding timely filed information. Lastly, the timely filed waiver-less information was authorized by both law and precedent and utilized properly which allowed the Government the opportunity to employ necessary judicial proceedings when they were available.

Based on the foregoing, the Government met the statute of limitations when they instituted waiver-less information within the allotted ten-year period and subsequently related back to this information to indict Ms. Maximoff.

B. The dismissal order coupled with the absence of Grand Juries provided a six-month tolling period.

The indictment pursuing Ms. Maximoff was timely returned because the Government indicted Ms. Maximoff within six months after a grand jury reconvened. Additionally, it is within the Government’s power to dismiss an information with leave of court. Fed. R. Crim. P. 48(a). Furthermore, “Rule 48(a) dismissals are [generally] without prejudice” and are appropriate when “the reason for dismissal does not go to the merits or demonstrate a purpose to harass.” *United States v. Matta*, 937 F.2d 567, 568 (11th Cir. 1991). Pursuant to the applicable U.S.C., any dismissal order without prejudice, after the institution of an information, tolls the statute of limitations for six months starting on the day of the dismissal or the date in which a grand jury resumes in the event of their absence. *U.S. v. Palacio*, 21-20301-CR, 2021 WL 3518143, *3 (S.D. Fla. 2021.) For

instance, a defendant's motion to dismiss an indictment that referenced an instituted information, which was dismissed without prejudice during the Covid-19 pandemic, was denied because there was no grand jury in session, and the Government related back to the instituted information in good faith. *Id* at 1.

The Government argues that they exercised their power of dismissal by utilizing the Fed. R. Crim. P. 48(a;) which was granted without prejudice. Therefore, since the dismissal was granted without prejudice the Government rightfully yielded the opportunity to later prosecute on the same grounds, which they subsequently did. The Government further asserts that the dismissal and subsequent indictment were not to prolong adjudication nor harass Maximoff. There is no nexus between the Government's choice of judicial practices and any legal/personal harassment because no evidence of harm inflicted on Maximoff has been provided. Moreover, once given the opportunity to indict, the Government rightfully related back to the instituted information in good faith because the indictment and information were materially identical. The defense will argue that the statute of limitations ended July 24, 2020, therefore the indictment was untimely. However, pursuant to 18 U.S.C. § 3289, a six-month tolling period was granted which began on the day that grand juries resumed, on March 29, 2021. Therefore, the Government was entitled to six-months following March 29, 2021, to indict Ms. Maximoff, in which they complied. Similar to *Palacio*, the Government timely filed an indictment against Ms. Maximoff, which referenced an instituted information, within the available tolling period because the indictment occurred on September 21, 2021, which was within six-months after grand juries resumed.

The indictment pursuing Ms. Maximoff was timely returned because the Government indicted Ms. Maximoff within six months after the Grand Jury reconvened.

II. The Government is entitled to Equitable Tolling of the Statute of Limitations of 8 U.S.C. § 1324(a) (1) (A) (iv) and (v)

Even if the Court finds the above stated claim was not timely filed, the Government is entitled to equitable tolling of this statute. Equitable Tolling requires the statute of limitations period to be extended past the original date, in order to avoid inequitable circumstances. *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000). Equitable tolling must be decided on a case by case without resorting to rigid or mechanical rules of law. *Holland v. Florida*, 560 U.S. 631, 649 (U.S. 2010). In conducting an equitable tolling analysis, all circumstances beyond the control of the party which affected the timeliness of the filing must be examined. *Torres-Santiago v. United States*, 865 F. Supp. 2d 168, 176 (D. P. R. 2012). The burden rests with the movant to show equitable tolling is appropriate. *Connolly v. Howes*, 304 Fed. Appx. 412, 417 (6th Cir. 2008). For equitable tolling to be appropriate, the movant must show (1) reasonable diligence in pursuing their rights and (2) an extraordinary circumstance which prevented a timely filing from occurring. *Holland*, 224 F.3d at 649.

A. The Government Showed Reasonable Diligence To Protect Their Rights Through The Filing Of An Information Before The Statute Of Limitations Period Expired and By Following The Plain Language of 18 U.S.C. § 3289.

A party must show reasonable diligence through the period of time he sought to toll. *Harper v. Ercole*, 648 F.3d 132, 138 (2d Cir. 2011). The diligence required for equitable tolling is reasonable, not maximum feasible diligence. *Holland*, 224 F.3d at

653. Therefore, the movant must act as diligently as what could have reasonably been expected under the circumstances. *Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003). Actions which take place after the statute of limitations has expired do not show reasonable diligence. *Torres-Santiago*, 865 F. Supp. 2d at 177 (holding a defendant's actions did not amount to reasonable diligence because two of his actions occurred after the statute of limitations period expired). In *Harper v. Ercole*, a hospitalized individual was reasonably diligent when he attempted to protect his rights by submitting a letter to the court requesting additional time to file his petition. *Harper*, 648 F.3d at 138.

The Government prays for equitable tolling through the period of time when the grand jury was suspended from March 23, 2020, to March 29, 2021, due to COVID-19. During this period, the Government not only performed actions amounting to reasonable diligence to preserve their right to prosecute Maximoff but took the only actions which could have reasonably been expected under the circumstances. The Government filed an information within the statute of limitations period, the period they sought to toll. This action indicates the Government was acting to exercise their right to prosecute in the only way available at the time and were reasonably diligent in doing so. Comparable to *Harper*, if a letter sent by a citizen to the court was an action amounting to reasonable diligence, an information filed by a government agency is indicative of an entity being reasonably diligent in protecting their rights. However, conditions outside of the Government's control, mainly the COVID-19 pandemic, made a grand jury unavailable to assist them in exercising their right to prosecute. Even though different avenues of

prosecution may have been possible, the Government has the right to legally available avenues of prosecution, especially when their actions comply with statutory language.

Additionally, the strict adherence to statutory language further illustrates the amount of reasonable diligence exercised on behalf of the Government. Following the lift in the suspension of the grand jury, the Government relied on the plain statutory language of 18 U.S.C. § 3289, which gave the Government six months beginning when the next grand jury convened to file a new indictment following a dismissal. The Government adhered to § 3289 because the grand jury resumed on March 29, 2021, and the Government filed an indictment on September 21, 2021, which was before the six-month tolling period expired.

All actions taken by the Government show reasonable diligence in protecting their right to prosecute Maximoff because without an available grand jury, the Government took the only actions which reasonably could have been expected by filing an information during the statute of limitations period and by following the plain language of the law in 18 U.S.C. § 3289.

B. The COVID-19 Global Pandemic Meets The Standard of An Extraordinary Circumstance Because It Was Beyond The Government's Control And Caused The Pleading To Be Untimely Filed.

For equitable tolling to be proper, an extraordinary circumstance outside the control of the litigant must have caused the filing to be late. *Harper*, 648 F.3d at 137. The term extraordinary does not refer to the party's unique circumstances, rather it focuses on the severity of the obstacle which hinders the ability to abide by the limitations period. *Id.* In *McCreary v. Nicholson*, a hurricane rose to the level of an extraordinary circumstance

outside of the plaintiff's control. 19 Vet. App. 324, 332 (Vet. App. 2005). Equitable tolling is proper when extraordinary circumstances make timely filing impossible. *Hanger v. Abbott*, 73 U.S. 532, 542 (U.S. 1867) (holding the closure of the courts during the Civil War was an extraordinary circumstance warranting equitable tolling). When external forces, not lack of diligence from the plaintiff, account for a late filing of a claim, equitable tolling is appropriate. *Seattle Audubon Soc. V. Robertson*, 931 F.2d 590, 597-8 (9th Cir. 1991) (holding equitable tolling was appropriate when actions by the court prevented a plaintiff from raising his claims).

The COVID-19 pandemic was an external force which changed life in the United States as we knew it. This unprecedented pandemic closed down almost every aspect of “normal” life until further notice. Similar to most of the United States, COVID-19 drastically affected legal proceedings including access to grand juries, hindering ordinary proceedings. This pandemic called for immediate drastic action which included the closing of the grand jury for over a year, from March 23, 2020, to March 29, 2021, inevitably created a substantial obstacle in abiding by the limitations period. Similar to *Hanger*, where the closure of courts warranted an extraordinary circumstance, COVID-19 effectively closed grand juries, an integral proceeding for beginning prosecution. Even though courts in their entirety were not closed, a legal proceeding used to frequently bring charges against individuals was closed. The inability to access an essential aspect of our court system qualifies as an extraordinary circumstance.

Apart from the closure of courts, the COVID-19 pandemic was in itself an extraordinary circumstance. Similar to *McCreary* where a hurricane rose to the level of

an extraordinary circumstance, COVID-19 was also a force *majeure*, something not only out of the control of the Government, but completely unfathomable and impossible to circumvent. As in *Seattle*, where external forces caused a delay in filing, COVID-19 was an external force which prohibited the Government from making a timely filing. No person or government could have prepared for or expected a global pandemic which would cause a nationwide shut down. Without the extraordinary circumstance of COVID-19, the Government would certainly have been able to file an indictment with the grand jury within the limitations period and bring charges against Maximoff. This is evident because the Government filed an information before the statute of limitations expired, and the indictment filed in September of 2021 was materially identical, indicating the Government's case was prepared. Therefore, it is clear the untimely filing was strictly the result of the COVID-19 pandemic effectively shutting down the grand jury, not the lack of diligence by the Government in this case. COVID-19 is an extraordinary circumstance because it was an external force, not within the Government's control, which directly caused the filing to be untimely.

CONCLUSION

The Government respectfully requests this Court to deny the defense's motion to dismiss the indictment against Wanda Maximoff. A Grand Jury indicted Wanda Maximoff for engaging in a conspiracy; in pertinent part, for knowingly creating forged immigration documents. The Government has the right to prosecute Maximoff for her conscious decision to break the law. The Government exercised their right to bring prosecution by timely instituting an information on July 22, 2020, and strictly adhering to

the plain statutory language of 18 U.S.C. § 3288-89 by filing the indictment within six months of the grand jury resumed. Additionally, even if the Court is unwilling to rule the indictment was filed within the statute of limitations period, the Government is entitled to equitable tolling. The Government exhibited reasonable diligence when they filed an information before the statute of limitations expired and then followed the plain statutory language to pursue prosecution through the grand jury. Finally, COVID-19, a global pandemic, was an extraordinary circumstance completely outside of the control of the Government, which caused a late filing because without a global pandemic the Government could have easily filed an indictment with the grand jury before July 24, 2020.

Based on the foregoing information, the Government respectfully requests the court to deny the defense's motion for dismissal.

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