CASE NO.: 1:21-cr-36

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

UNITED STATES OF AMERICA,

Plaintiff,
v.

WANDA MAXIMOFF, a/k/a "Scarlet," an individual,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

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INTRODUCTION

Plaintiff, the United States of America ("Government"), hereby submits its opposition to Defendant's motion to dismiss an indictment, dated September 21, 2021, ("Indictment") on grounds that the filing of the Indictment was not time-barred pursuant to 18 U.S.C. § 3288 or, in the alternative, pursuant to the doctrine of equitable tolling. Both positions are supported by the Memorandum of Law, below, and, accordingly, Defendant's motion should be denied.

STATEMENT OF ANTICIPATED FACTS

On September 23, 2021, Special Agent Jimmy Woo of the United States Department of Homeland Security ("DHS") executed an arrest warrant issued on probable cause that, between May 31, 2007, and July 24, 2010, Defendant, Wanda Maximoff, a/k/a "Scarlet," ("Defendant"), committed multiple violations of 8 U.S.C. § 1324(a)(1)(A)(iv) and (v) by manufacturing and selling false and fraudulent Orders of Supervision ("OSUP")[1] to aliens illegally present in the United States. Supplemental Declaration of Agent Woo ("Supp. Decl.") ¶ 1.

a. August 10, 2018, Agent Woo's Investigation

On August 10, 2018, Agent Woo opened an investigation file regarding Defendant. Declaration of Agent Woo ("Decl.") ¶ 9. That investigation revealed that, from May 31, 2007, to July 24, 2010, Defendant conspired with at least eight former

[1] An OSUP authorizes aliens ordered removed from the United States pursuant to a final order of removal, but who could not be removed due to qualifying reasons, to be released into the community and to apply for and receive a Stetson Driver's License and an Employment Authorization Card. Indictment ¶¶ 2, 3.

clients of the Law Office of Agatha Harkness to provide them with forged OSUP's. From 2007 to 2010, Harkness employed Defendant, who appeared as counsel of record or as a "certified legal intern" on forty cases. Decl. ¶ 28.

Agent Woo investigated all forty former clients, and successfully interviewed twenty-four of them. Decl. ¶¶ 28, 29. Agent Woo determined that fifteen of the remaining former clients were unavailable because of death or likely deportation and that some, if not all of those fifteen former clients had also paid Defendant for forged documentation. Decl. ¶ 31.

Two events prompted Agent Woo's investigation. First, on or about May 3, 2018, the Westview Sheriff's Office arrested S.P., who advised Agent Woo that she and her husband, H.P., had obtained Stetson Driver's Licenses and Employment Authorization Cards using forged immigration documents purchased from a woman named "Scarlet." Decl. ¶¶ 5, 7. Second, on August 10, 2018, H.P. advised Agent Woo that he and other aliens in his neighborhood, all clients of Harkness, had paid a woman named "Scarlet" to obtain fraudulent OSUP's. Decl. ¶ 7.

On May 23, 2008, H.P. and S.P. found a note in paperwork that Defendant was helping them to prepare, which had a phone number for "Scarlet" and advised that "Scarlet" could assist them with obtaining immigration paperwork "like an OSUP" so that they could apply for a Stetson Driver's License and an Employment Authorization Card. Decl. ¶¶ 10, 11. H.P. called the phone number and spoke to an unidentified man, who instructed H.P. to leave $10,000 in H.P.'s mailbox. Decl. ¶ 12. After doing so, H.P. found fraudulent OSUP forms in his mailbox and used them to obtain Stetson Driver's

Licenses and Employment Authorization Cards. Decl. ¶ 13.

From August 15, 2019, to February 14, 2019, Agent Woo was assigned to an undercover task force and, upon resuming the investigation, commenced knock-and-talk interviews with other residents of H.P.'s neighborhood. Decl. ¶¶ 17, 18.

On or about February 19, 2019, Agent Woo conducted a non-custodial interview with R.B., who provided a materially similar story to that of H.P. Decl. ¶ 19. The note R.B. received included a disconnected telephone number that the Law Office of Agatha Harkness had used as a staff "emergency contact." Decl. ¶¶ 20, 22, 23.

b. March 18, 2019, Agent Woo's Subpoenas Defendant's Records

On March 18, 2019, Agent Woo subpoenaed Defendant's phone, financial, and flight records and created a summary exhibit reflecting Defendant's bank accounts and present balances. Decl. ¶¶ 25, 26; Supp. Decl. ¶ 9. From 2007 to 2010, Defendant received 24 substantial cash deposits and made numerous wire transfers to two joint bank accounts in Germany and Switzerland. Decl. ¶¶ 26, 33.

From January 2017 to the present, Defendant made almost weekly cash withdrawals of precisely $1,650 when she was not traveling abroad, totaling more than $200,000, which could not be accounted for. Decl. ¶ 34.

Defendant's flight records revealed substantial international travel in the last twenty years and Agent Woo created a summary exhibit of Defendant's international flight records from July 2017 to the present. Supp. Decl. ¶ 9; Decl. ¶ 27.

c. March 23, 2020, this Court Suspends the Grand Jury

On March 23, 2020, this Court issued Administrative Order No. 20-019,

suspending the grand jury in response to the COVID-19 pandemic. Initial Appearance Transcript ("IAT") ln. 60.

On July 22, 2020, the Government filed an information ("Information"), under seal, against Defendant with this Court. IAT 60.

On July 23, 2020, this Court granted, under seal and without prejudice, the Government's motion for voluntary dismissal of the Information. Order p. 1.

d. March 29, 2021, this Court Lifts the Grand Jury Suspension

On March 29, 2021, this Court issued Administrative Order No. 21-008, lifting the suspension of the grand jury. IAT 62.

On September 21, 2021, the Government filed the Indictment. IAT 62.

On September 23, 2021, Agent Woo arrested Defendant at 2800 Sherwood Drive, Westview, Stetson, explained to Defendant that the indictment was under seal, and described to Defendant the nature of the charge. Supp. Decl. ¶¶ 1, 4. Defendant admitted to possessing a bag containing Defendant's United States passport, $2,000 cash, 3.5 grams of marijuana, and an Argentinian National Identity Card ("DNI") and advised Deputy Ross that she had been preparing to take a flight to Buenos Aires, planned to return by Tuesday, and that the DNI had been provided to her by her employer in June 2019. Supp. Decl. ¶¶ 5, 7.

MEMORANDUM OF LAW

I. LEGAL STANDARD

"A motion to dismiss on statute of limitations grounds should not be granted where resolution depends . . . on construing factual ambiguities in the complaint in

defendants' favor" because the "statute of limitations is an affirmative defense, and the burden for proving an affirmative defense is on the defendant." *Lesti v. Wells Fargo*, 960 F. Supp. 2d 1311, 1316 (M.D. Fla. 2013) (citing *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1292 (11th Cir. 2005), *overruled on other grounds by Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010)).

In considering a motion to dismiss an indictment, "the Court's role is limited to determining whether the indictment is legally sufficient." *United States v. Holland*, 396 F. Supp. 3d 1210, 1237 (N.D. Ga. 2019). The Eleventh Circuit has repeatedly made the point that unlike the procedural rules governing civil cases, the Federal Rules of Criminal Procedure contain no mechanism for a pre-trial determination of the sufficiency of the evidence, and motions seeking such relief in criminal cases are improper. *Id*. at 1238. The Eleventh Circuit reads an indictment as a whole and gives it a "common sense construction" because the indictment's "validity is to be determined by practical, not technical, considerations." *United States v. Jordan*, 582 F.3d 1239 (11th Cir. 2009) (citing *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984); *United States v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976)).

II. BECAUSE THE INFORMATION WAS TIMELY INSTITUTED WITHIN THE MEANING OF § 3298 AND THE STATUTE OF LIMITATIONS WAS EFFECTIVELY TOLLED UNDER § 3288, THE CURRENT ACTION IS NOT TIME-BARRED AND THIS COURT SHOULD DENY THE DEFENDANT'S MOTION TO DISMISS.

Under 18 U.S.C. § 3298, "No person shall be prosecuted . . . 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. Under § 3288:

> Whenever an indictment or information charging a felony is dismissed for any reason after the . . . applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information.

18 U.S.C. § 3288. If "no regular grand jury is in session . . . when the indictment or information is dismissed," a new indictment filed "within six months of the date when the next regular grand jury is convened" . . . "shall not be barred by any statute of limitations." *Id.*

The § 3288 exception does not apply if the reason for dismissal was "failure to file within the prescribed period, or some other reason that would bar a new prosecution." *Id.*

Here, this Court should deny the Defendant's motion to dismiss the Indictment because (A) the Government properly instituted the Information pursuant to § 3298 by timely filing it and (B) because the new, materially identical Indictment was proper under § 3288 when it was returned within six months from the date the grand jury reconvened.

A. The Plain Language, Legislative Intent, and Policies Underlying 18 U.S.C. § 3298 All Support a Finding that an Information Is Instituted When It Is Filed.

"The starting point for all statutory interpretation is the language of the statute itself." *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). The inquiry ends where the language of the statute is unambiguous, *United States v. St. Amour*, 886 F.3d 1009, 1013 (11th Cir. 2018), and "only when a statute's text is ambiguous [may a

court] turn to other tools of statutory interpretation to help clarify the ambiguity." *New York v. Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87, 95 (2d Cir. 2020). Although no courts have specifically addressed the definition of the term "institute" under § 3298, several courts have considered the same language of § 3282(a), which states "no person shall be prosecuted, . . . unless . . . the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282(a).

Here, this motion turns upon the interpretation of the definition of "institute" as it is used in § 3298. Because (1) the plain language of § 3282 indicates that an information is instituted when it is filed; (2) Congress removed the express language of § 3288 requiring a waiver of prosecution by indictment to accompany an information and (3) the underlying policy concerns are not applicable to this case, the Information was properly instituted under § 3298, and its subsequent dismissal effectively tolled the statute of limitations under § 3288.

1. The Plain Language of § 3298 Unambiguously States that an Information Is Instituted When It Is Filed.

"[T]he filing of an information is sufficient to institute it . . . ." *United States v. Burdix-Dana*, 149 F.3d 741, 743 (7th Cir. 1998). The vast majority of courts to have addressed this issue held that, "the words 'prosecution' and 'instituted' are not equivalent, and an information is instituted when it is properly filed, regardless of the waiver." *United States v. Briscoe*, No. CR RDB-20-0139, 2020 WL 5076053, at *2 (D. Md. Aug. 26, 2020). *See also United States v. Stewart*, 425 F. Supp. 2d 727, 731-35 (E.D. Va. 2006) (following *Burdix-Dana*, 149 F.3d at 741).

Challengers to this plain language interpretation argue that, based on Rule 7(b), ("a [felony] may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment," Fed. R. Crim. P. 7(b), to "institute" an information requires the ability to proceed with prosecution, so an information is not instituted until a valid waiver accompanies it. *Burdix-Dana*, 149 F.3d at 742. *See also United States v. Machado*, 2005 U.S. Dist. LEXIS 26255, at *5-6 (D. Mass. Nov. 3, 2005).

Here, as in § 3282, the terms "prosecuted" and "instituted" have unambiguous meanings and are not equivalent within the meaning of § 3298. *See also Burdix-Dana*, 149 F.3d at 743 (finding that "nothing in the statutory language . . . that suggests a *prosecution* must be instituted before the expiration of the [statutory] period; instead[,] the statute states that the *information* must be instituted."). Thus, the Information was properly "instituted" within the meaning of § 3298 when it was timely filed with the court.

2. Even If This Court Finds the Plain Language of § 3298 Ambiguous, the Legislative History and Intent of § 3288 Support a Finding That a Waiver-Less Information Can Toll a Statute of Limitations.

When a statute's language is ambiguous, a court "must look beyond the text and determine the legislative intent." *DBB, Inc.*, 180 F.3d at 1282. In 1964, Congress amended § 3288 to read, "[w]henever an . . . information *filed after the defendant waives in open court prosecution by indictment* is found otherwise defective . . . ." 18 U.S.C. § 3288 (1964), *amended by* 18 U.S.C. § 3288 (1988) (emphasis added). In 1988, the 100th Congress amended § 3288 to read, "Whenever an . . . *information charging a felony* is

dismissed for any reason . . . ." 18 U.S.C. § 3288 (amending 18 U.S.C. § 3288 (1964)) (emphasis added).

Here, although the legislative history of § 3288 through 1964 appears to suggest that a dismissed information can only toll the statute of limitations when accompanied by a valid waiver, *see United States v. B.G.G.*, 20-cr-80063-DMM, at *18 (S.D. Fla. 2020) (holding that "the legislative history demonstrates that Congress intended §§ 3288 and 3289 to toll the limitations period at § 3282 for dismissed informations where those informations comported with Rule 7(b)"), reviewing the complete history through its 1988 amendment suggests otherwise. Thus, because Congress removed the express language requiring a waiver-less information be dismissed to trigger § 3288, now, filing an information, with or without a waiver—just as the Government did here—institutes that information and tolls the statute of limitations.

3. Even If This Court Finds the Plain Language and Legislative Intent Unpersuasive, the Public Policy Concerns Supporting a Finding Against Those Interpretations Do Not Apply Here.

The policy argument that "by equating 'instituted' with 'filed' and then applying § 3288, we have allowed prosecutors to file an information, wait indefinitely, then present the matter to a grand jury well beyond the statute of limitations but within six months of the dismissal of the information," is better presented to Congress than the courts because the statutory language does not compel this interpretation. *Burdix-Dana*, 149 F.3d at 743. But the government "is not free to file 'a complaint at a time when it does not have its case made' [unable to prosecute] simply to extend the time within which it may act." *Jaben v. United States*, 381 U.S. 214, 215-16 (1965).

Here, first, the concerns that the Government can file an information, and wait indefinitely, would only apply if the Information were left pending to avoid triggering the extension by dismissal. The Government, however, voluntarily dismissed the information, which immediately triggered the extension.

Additionally, concerns that the Government might file a waiver-less information at a time when it does not have its case made to extend the limitations period also do not apply because the Government had its case made on July 22, 2020, and, but for the suspension of the grand jury, would have filed an indictment. *See also Jaben*, 381 U.S. at 219-20 (finding that "the statute . . . was intended to deal with the situation in which the Government has its case made within the normal limitation period but cannot obtain an indictment because of the grand jury schedule."). Thus, the Government used the tolling provision of § 3288 in alignment with the very reasons it was created. *See also United States v. Briscoe*, No. CR RDB-20-0139, 2020 WL 5076053, at *3 (D. Md. Aug. 26, 2020) ("the Government was not able to obtain an Indictment during a significant portion of the statute of limitations period" due to "the COVID-19 pandemic, not . . . any deliberate tactical maneuvering.").

B. <u>The New, Materially Identical Indictment Was Timely and Proper Under § 3288 Because the Information Was Properly Dismissed When the Grand Jury Was Suspended.</u>

Section 3288 triggers when any information is dismissed "for any reason," except those informations dismissed as time-barred, "or [for] some other reason that would bar a new prosecution." When "a valid indictment could have been brought in a timely fashion; the six-month grace period [under § 3288] merely allows the government to do

what it had a right to do in the first place." *United States v. Clawson*, 104 F.3d 250, 252 (9th Cir. 1996). When an information is dismissed when "no regular grand jury is in session," a new indictment may be returned "within six calendar months" of the date the grand jury reconvenes. § 3288. Finally, "an untimely indictment can only be saved by the section 3288 exception if it does not broaden or substantially amend the original charges 'tolled' by the previous indictment." *United States v. Grady*, 544 F.2d 598, 602 (2d Cir. 1976).

Here, first, because the record establishes that the Information was timely filed before the statute of limitations expired on July 24, 2020, and voluntarily dismissed without prejudice while the grand jury was suspended, the statute of limitations period was extended until September 29, 2021, six months after the grand jury reconvened pursuant to § 3288. Second, because, but for the suspension of the grand jury on March 23, 2020, the Government could have brought a timely and valid indictment, the § 3288 grace period "merely allow[ed] the government to do what it had a right to do in the first place. *Id.* Finally, because the record establishes that the Indictment is materially identicial to the Information, the § 3288 six-month grace period applies to the Indictment.

In conclusion, the Government properly instituted the Information within the meaning of § 3298 by timely filing it with the court. Further, because that same information was timely and properly dismissed without prejudice when no grand jury was in session, the new, materially identical indictment returned within six months of the date the next grand jury convened, was proper under § 3288. Therefore, this Court should deny the Defendant's motion to dismiss.

III. BECAUSE THE GOVERNMENT PURSUED ITS RIGHTS DILIGENTLY AND THE COVID-19 PANDEMIC CONSTITUTED EXTRAORDINARY CIRCUMSTANCES THAT STOOD IN THE GOVERNMENT'S WAY AND WERE OUT OF THE GOVERNMENT'S CONTROL, THE APPLICABLE STATUTE OF LIMITATIONS SHOULD BE EQUITABLY TOLLED AND THIS COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS.

Alternatively, if this Court finds that the Indictment was untimely filed in view of 18 U.S.C. §§ 3288 and 3298, equitable tolling is appropriate. Equitable tolling pauses the running of, or "tolls," a statute of limitations when a litigant has pursued his rights diligently, but some extraordinary circumstance prevents him from bringing a timely action. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014).

Generally, a litigant seeking equitable tolling must show the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Additionally, the Supreme Court has said that it is mindful that it "is a court of final review and not first view," *Holland v. Florida*, 560 U.S. 631, 653-54 (2010) (quoting *Adarand Constructors, Inc. v. Mineta*, 504 U.S. 103, 110 (2001) (*per curiam*)) and recognized "the prudence, when faced with an 'equitable, often fact-intensive' inquiry, of allowing the lower courts 'to undertake it in the first instance.'" *Holland*, 560 U.S. at 654 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 540 (2005) (Stevens, J., dissenting). Thus, the Supreme Court has recognized that the lower courts, particularly those of "first view" of the evidence, such as magistrate or district courts, may be best situated to undertake an equitable tolling inquiry. *Holland*, 560 U.S. at 653-54.

Here, the Government has met both requirements of equitable tolling because (A) the Government pursued its rights diligently before and after the COVID-19 pandemic prompted this Court to suspend the grand jury and (B) that pandemic (1) constituted extraordinary circumstances that prevented timely filing of the Indictment and (2) both that pandemic and the resulting suspension were out of the Government's control.

A. The Government Pursued Its Rights Diligently Because It Acted With Reasonable Diligence Before and After the COVID-19 Pandemic Prompted This Court to Suspend the Grand Jury.

The diligence required for equitable tolling purposes is "'reasonable diligence,'" not "'maximum feasible diligence,'" *Holland*, 560 U.S. at 653 (citing *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008)). To determine whether a party "has been pursuing his rights diligently," the Supreme Court has evaluated "diligence both before and after the existence of the "'extraordinary circumstance.'" *Smith v. Davis*, 953 F.3d 582, 593 (9th Cir. 2020) (quoting *Pace*, 544 U.S. at 418-19).

In *Pace*, the Supreme Court held that failure to advance claims within a reasonable time of their availability precluded a finding of reasonable diligence. *Id.* at 418. However, the petitioner in *Pace* waited for four years, without any valid justification, to assert his claims. *Id*. at 410, 419. Thus, the "fact-intensive" determination of whether a party pursued its rights diligently considers whether that party acted with reasonable diligence before and after the extraordinary circumstances existed and considers whether there was a valid justification for any delay in pursuing those rights.

Here, before this Court suspended the grand jury, the Government spent nearly three years investigating approximately fourteen years of Defendant's actions. The

Government investigated forty of Defendant's former clients, successfully interviewed twenty-four of them, conducted knock-and-talk interviews with residents of H.P.'s neighborhood, and subpoenaed, examined, and prepared exhibits and summaries based on Defendant's phone, financial, and flight records. After the suspension of the grand jury, the Government was prevented from filing the Indictment, but, nevertheless, filed the Information to preserve its right to prosecute Defendant and, after that suspension was lifted, the Government filed the Indictment within six months to comply with 18 U.S.C. § 3288.

Here, in contrast to *Pace*, which involved a four-year delay without a valid justification, the Government spent three years actively investigating Defendant. The Supreme Court has held:

> [P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself."

United States v. Lovasco, 431 U.S. 783, 790-91 (1977) (quoting *United States v. Ewell*, 383 U.S. 116 (1966)).

Additionally, once probable cause was established, any delay was justified because Defendant was a flight risk. Defendant's financial and flight records revealed numerous international wire transfers, significant unaccounted-for funds, and frequent international travel over the preceding twenty years. On multiple occasions, this Court accepted the Government's filings under seal and issued an order granting the Government's motion to dismiss the Information, likewise, recognizing grounds for

maintaining confidentiality and preventing the details of this case from becoming public record, potentially alerting Defendant. Thus, this Court has recognized Defendant as a flight risk, and because it has the "first view" of the evidence, this Court's findings should be given particular weight in an equitable tolling inquiry.

Finally, the Government's diligence is highlighted by the process of investigating and interviewing Defendant's former clients presenting two difficulties. First, their uncertain immigration status could have caused them to be reluctant to cooperate with the Government. Second, because Defendant's alleged acts occurred from 2007 to 2010, at least eight years elapsed before the interviews, which may have adversely affected the interviewees' recollections. Although these difficulties do not rise to the level of extraordinary circumstances for the purposes of equitable tolling, they are, nevertheless, relevant to whether the Government acted with reasonable diligence. Thus, because the Government investigated Defendant with reasonable diligence, acted with reasonable diligence to preserve its right to prosecute, and was reasonably diligent in timely filing the Indictment, the Government pursued its rights diligently.

B. The COVID-19 Pandemic Constituted Extraordinary Circumstances That Stood in the Government's Way of Filing the Indictment and Were Out of the Government's Control.

Whereas "the diligence prong . . . covers those affairs within the litigant's control; the extraordinary-circumstances prong, by contrast, is meant to cover matters outside its control" and "is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control." *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 257 (2020).

1. The COVID-19 Pandemic Constituted Extraordinary Circumstances That Stood in the Government's Way of Timely Filing the Indictment.

In *Buckley v. Doha Bank Ltd.*, the Southern District of New York, as the court of "first view" on the matter, denied defendant's motion to dismiss on grounds that the September 11 attacks on the World Trade Center constituted extraordinary circumstances that prevented the plaintiff from timely filing within a 90-day filing period. *Buckley v. Doha Bank Ltd.*, No. 01 CIV. 8865 (AKH), 2002 WL 1751372, at *2-3 (S.D.N.Y. July 29, 2002). The court held that, "[b]ecause the equitable tolling doctrine is based on the general principles of equity and fairness, the unprecedented circumstances of the World Trade Center disaster and subsequent Court closure warrant relief from a strict application of the 90–day statute of limitations in this case." *Id.* at *2.

Here, the COVID-19 pandemic is similarly unprecedented and, as the Southern District of New York was the court of "first view" of the September 11 attacks, this Court is a court of "first view" of that pandemic, which has affected localities across the United States, including the District of Stetson. This Court's issuance of Administrative Orders suspending, and subsequently lifting the suspension of, the grand jury was a direct result of this Court's recognition of the extraordinary nature of that pandemic. The grand jury "has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423 (1983) (citing *Pittsburg Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959); *Costello v. United States*, 350 U.S. 359, 361-62 (1956)). Thus, because it was unprecedented and prompted this Court's suspension of the grand jury, the

COVID-19 pandemic constitutes an extraordinary circumstance that stood in the Government's way of timely filing the Indictment.

2. The COVID-19 Pandemic Was Out of the Government's Control.

The Government has authority to take measures in response to the COVID-19 pandemic, including bringing its "coercive powers to bear, while others provide opportunities to coordinate, support, and supplement state and local efforts." Emily Berman, *The Roles of State and Federal Governments in a Pandemic*, 11 J. of Nat'l Sec. Law & Policy, 61, 75 (2020).

However, in *Holland*, Justice Alito observed that "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of the word," *Holland*, 560 U.S. at 659 (Alito, J., concurring), and "[w]hen an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with [the] agent's misdeeds.'" *Id*. (quoting *Baldayaque v. United States*, 338 F.3d 145, 152-53 (2d Cir. 2003)).

Here, the COVID-19 pandemic is incapable of agency, further precluding Government control, and that pandemic is adverse to the Government's interest in safeguarding its citizens.

Additionally, the responses to the COVID-19 pandemic that prevented the Government from timely filing the Indictment were out of the Government's control. The order suspending the grand jury was issued by this Court and not by the Government. Thus, either because the pandemic, itself, cannot be controlled by the Government, or because the responses to the pandemic were out of the Government's control, the

COVID-19 pandemic constituted an extraordinary circumstance that stood in the way of the Government's timely filing of the Indictment and was out of the Government's control.

CONCLUSION

For the reasons stated above, this Court should deny Defendant's motion to dismiss the Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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