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

UNITED STATES OF AMERICA
for the Estate of CARNELL WARREN, deceased

****UNDER SEAL****

Plaintiff,

CASE NO. 1:20-cr-24

v.

WANDA MAXIMOFF
LISA ANN SHILLING, R.N.;
CATHY MARIE POPE, R.N.;
DAVID JOSEPH KIHM, R.N.;
Jointly and severally,

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS ORAL ARGUMENT REQUESTED

Defendant.

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PLAINTIFF'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO DIMISS ORAL ARGUMENT REQUESTED

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INTRODUCTION

The present case is an example of the chaos that COVID-19 left in its wake. Due to this tragic, global pandemic, many different types of business had to halt worldwide. It just so happens that the grand jury was susceptible to this halt as well. In an effort to protect members of the grand jury, its work was suspended for an entire year. Because of the suspension, indictments with the grand jury could not be filed during this time period. Thus, the United States had to wait until the grand jury resumed to file its indictment against Defendant Wanda Maximoff.

Defendant has moved to dismiss this Indictment, arguing that it was filed outside of the statute of limitations that is found within 18 U.S.C. 3298. However, the United States initially filed for an indictment by July 2020, which was within 10 years from July 24, 2010. This case includes a multitude of facts that will illustrate that the United States did in fact act within the ten-year statute of limitations. Agent Woo's investigation into Defendant was lengthy, leading to the crimes not being discovered immediately. Most importantly, once the dismissal of the indictment occurred, the grand jury was suspended, thus making it impossible for the United States to refile.

Therefore, the United States responds to Defendant's motion to dismiss by outlining the unique procedural history of this case and illustrating that the United States did act within the statute of limitations. Alternatively, should the court find that the United States did not timely file, the United States is still eligible for equitable tolling and

dismissal of the indictment would remain inappropriate. Therefore, the United States asks that this court does not grant Defendant's Motion for Dismissal.

STATEMENT OF FACTS

Defendant, Wanda Maximoff, is a naturalized United States citizen who is currently residing in Westview, Steston. *Indictment pg. 2*. Defendant Maximoff induced several aliens to reside within the United States, despite the fact that she was aware that this residence would be a violation of the law. *Indictment pg. 2.* Particularly, Defendant Maximoff manufactured and sold fake Orders of Supervision to these previously mentioned aliens. *Indictment pg. 2.* This act is in violation of 8 U.S.C. § 1324(a)(1)(A)(iv). *Ct. Transcript line 34.*

On July 22, 2020, the United States filed an information against Defendant Maximoff. Court Transcript line 56-58. However, Judge Bradley dismissed this Information without prejudice shortly after. *Ct. Transcript line 59-60.* The United States intended to file again within the six months post dismissal, as allowed by 18 U.S.C. §3288, but COVID-19 caused a suspension of the grand jury from March 23, 2020 through March 29, 2021. *Ct. transcript lines 60-63.*

During Defendant Maximoff's initial appearance, she did not have the right to a preliminary examination hearing because an indictment finding probable cause had already been returned against her. *Ct. transcript line 38-42*. At this point, counsel for Defendant Maximoff moved to dismiss the Indictment because, to his belief, it had been filed outside the statute of limitations set forth by 18 U.S.C. §3298. Ct Transcript lines 44-47. However, the Government countered, providing more information about the

procedural history, particularly the suspension of the jury due to COVID-19. *Ct Transcript line 55.*

ARGUMENT

I. THE UNITED STATES TIMELY FILED ITS INDICTMENT AGAINST DEFENDANT PURSUANT TO 18 U.S.C. §3298 AND §3288 BECAUSE THE EXTENUATING CIRCUMSTANCES CAUSED BY COVID-19 PROVIDED AN AUTOMATIC FILING EXTENSION.

18 U.S.C. §3298 provides that "no person shall be prosecuted, tried, or punished for any non-capital offense . . . under §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." However, an exception to this section of the statute is housed within 18 U.S.C. §3288. This portion of the code provides that if an indictment or information is dismissed after the statute of limitations has run, a new indictment may be filed within six months afterwards.

Section 274(a) of the Immigration and Nationality Act is housed within 8 U.S.C §1324. *Light v. United States*, 2021 WL 1520729 at *3(S.D. Fla. 2021). Therefore, a charge falling under §1324(a)(1)(A)(IV) will be subject to the ten-year statute of limitations that is set forth within §3298. *Id.*

The United States concedes that §3298 is no longer applicable because the original filing of the indictment fell withing the ten-year statute of limitations and is not the subject of this dismissal. Therefore, the issue becomes whether the United States re-filed its charge within the six months following the dismissal of the original indictment as required by §3288.

A. The United States re-filed its charge of indictment within the six months following the original dismissal because the time in which the grand jury was suspended cannot be counted within the six months.

The United States could not have re-filed its charge of indictment because the grand jury was suspended for the entire six months that would normally be considered under §3288; however, the United States filed within the six months after the suspension was lifted.

If an irregularity exists, the statute of limitations can be extended. In *U.S. v. Moriarty*, a persuasive case out of Wisconsin, motions to dismiss were filed in four cases on the grounds that "it was based solely or substantially on evidence inadmissible at trial by reason of the hearsay rule and the best evidence rule, while direct testimony and the best evidence were readily at hand." 327 F.Supp. 1045, 1046 (E.D. Wis. 1971). A grand jury indicted the defendants, but those indictments were later dismissed upon the government's motion. *Id.* at 1047. The government argued that the "statute of limitations is extended 18 U.S.C. §3288 'whereas in the instant case, there has been an irregularity with respect to the grand jury proceedings.'" *Id*. The court held that no irregularity existed and therefore, the motion to dismiss was proper. *Id*. at 1048.

The grand jury must be in session to allow filing. In *U.S. v. Durkee Famous Foods*, the grand jury returned an indictment during its April term. *Id.* at 70. This indictment was quashed. 306 U.S. 68, 70 (1939). In the same term, the grand jury returned another indictment against the same person. *Id.* The court in this case held that he could not be reindicted until the grand jury was back in session. *Id.*

In contrast to *U.S. v. Moriarty*, where the court held that no irregularity existed, it is clear that the opposite is true in the case at hand. COVID-19 caused a shutdown like our country has never seen before. Because of this shutdown, the grand jury was suspended. This was an irregularity as it led to the United States being unable to re-file its indictment. Because of this irregularity, this court should reach an outcome opposite of the one in Moriarty and deny Defendant's motion to dismiss.

Similar to *United States v. Durkee Famous Foods*, where an indictment was allowed to be re-filed when the grand jury was next in session, the same should be true in the present case. While this does involve a different provision of the code and different rules, it would be sensical to apply similar reasoning to the situation at bar. The shutdown caused by the COVID-19 pandemic is unprecedented and it should be treated as such.

No reasonable court could conclude that an irregularity did not exist here. Therefore, it is only right to hold that the indictment was timely filed under 18 U.S.C. §3288.

B. Should this Court find that the indictment was not timely filed, the properly filed information still warrants denial of Plaintiff's Motion to Dismiss because it was timely filed and the Federal Rules of Criminal Procedure Rule 7 wavier is unnecessary

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. Under the Federal Rules of Criminal Procedure, "An offense . . . must be prosecuted by an indictment if it is punishable . . . by imprisonment for more than one year. FED. R. CRIM. P. 7(a). An offense punishable by imprisonment for more than one year 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). Except as otherwise expressly provided by law, no person shall be prosecuted . . . unless the indictment is found, or the information is instituted within five years after such offense shall have been committed. 18 U.S.C. § 3282. This section has been modified by law in 18 U.S.C. § 3298, to extend the statute of limitations from five years to ten years for violations of 8 U.S.C. § 1324.

The Federal Rules of Criminal Procedure Rule 7 does not forbid filing an information without a wavier, which permits an information to be properly instituted during the statute of limitations period in 18 U.S.C. § 3282 . *U.S. v. Burdix-Dana*, 149 F.3d. 741, 742-43 (7th Cir. 1998). On February 20, 1997, Burdix–Dana was charged with filing a false, fictitious, or fraudulent claim in violation of 18 U.S.C. § 287. *Id*. at 742. The information alleged that the violation took place on or about February 24, 1992. *Id*. On March 4, 1997, a federal grand jury returned an indictment against Burdix–Dana charging her with the same offense committed on the same date as asserted in the information. *Id.* On March 13, 1997, the government moved to dismiss the information. *Id.* On March 20, 1997, Burdix–Dana moved to dismiss the indictment because it had not been returned within the statute of limitations period. *Id*. The Court declined to equate "institute" with the ability to proceed with a prosecution, such that information is not "instituted" until the defendant has waived her right to an indictment and prosecution may proceed on the information. Instead, the Court stated that it does not believe that the absence of the 7(b)

waiver makes the filing of an information a nullity. *Id.* Because the information was thus properly instituted, it also satisfies the statute of limitations. *Id*. at 743.

The plain language of 18 U.S.C. § 3282 only requires that the "information be "instituted" to satisfy the statute of limitations. *United States v. Rosecan,* No. 20-CR-80052, 2021 WL 1026070 (S.D. Fla. Mar. 17, 2021).[1] June 26, 2020, the Government filed an information charging Rosecan with fourteen counts of health care fraud. *Id.* at 1. The five-year statute of limitations for the latest offense would have expired on August 24, 2020. *Id.* On April 9, 2020, Rosecan signed a Statute of Limitations Tolling Agreement with the Government. *Id*. The statute of limitations extended to a new expiration date of November 24, 2020 under the Tolling Agreement. *Id.* The parties attempted to reach an agreement but were unable to, and on January 6, 2021, Dr. Rosecan filed the instant Motion to Dismiss. *Id.* On February 4, 2021, a federal grand jury returned a superseding indictment, which was identical to the information in all material respects. *Id.* The Court followed the Seventh and Eleventh Circuit Court by stating, the terms "prosecuted" and "instituted" are not equivalent, and an information is "instituted" when it is properly filed, regardless of the defendant's waiver. *Id*. at 3.

A majority of federal district courts have come to this same conclusion, that an information is "instituted" when it is "filed with the clerk of the court" and does not require the defendant to have waived prosecution by indictment. *See, e.g.,* *United States v. Holmes*, No. 18-cr-00258, 2020 WL 6047232, at *8 (N.D. Cal. Oct.

[1] While *Rosecan* is an unpublished case, the opinion has persuasive value on the material issue present in the current case.

13,2020). *Briscoe*, 2020 WL 5076053 at *2; *United States v. Marifat*, No. 2:17-0189 WBS, 2018 WL 1806690, at *1-2 (E.D. Cal. Apr. 17, 2018); *United States v. Stewart*, 425 F. Supp. 2d 727, 729 (E.D. Va. 2006); *United States v. Hsin-Yung*, 97 F. Supp. 2d 24, 28 (D.D.C. 2000); *United States v. Watson*, 941 F. Supp. 601, 603 (N.D. W. Va. 1996).

Defendant Maximoff attempts to use the same argument put in front of the Court by both *Rosecan* and *Burdix-Dana*. The argument to "equate 'institute' with the ability to proceed with a prosecution". Defendant Maximoff uses this argument to conclude that an information is not 'instituted' until the defendant has waived her right to an indictment, and at that point, the prosecution may proceed on the information. The Court has already decided that this is not accurate. This can be seen in the language of the statutes and rules:

The Federal Rules of Criminal Procedure Rule 7 states, "An offense punishable by imprisonment for more than one year may be *prosecuted by information* if the defendant . . . waives prosecution by indictment." This language, as the Court as already explained, means that in order for a defendant to be prosecuted – 'prosecuted' is a verb, meaning to pursue a criminal action against a person – the defendant has to provide a waiver. Thus, in order to commence the actual act of prosecution, the wavier is necessary. The rule does not state that the defendant needs to provide a waiver for the initial filing of the information.

18 U.S.C. § 3282 expressly states, "Except as otherwise expressly provided by law, no person shall be *prosecuted* . . . unless the indictment is found, or the information is *instituted*". This same emphasized language is also used in 18 U.S.C. § 3298. The word

prosecution is used in the same manner here as it is in FRCRP Rule 7. As the Court as already confirmed, information is "instituted" when it is properly filed, regardless of whether a defendant waived prosecution by indictment.

In the present case, the Government did properly institute the information. The original information dated July 22, 2020 – one that is materially identical to the September 21, 2021 indictment – was filed timely within the statute of limitations. The Government needed only to file, to institute, the information within the statute of limitations. The statute of limitations in this case expired on July 24, 2020. The information was filed on July 22, 2020. This falls within the permissible statute of limitations timeframe. It is irrelevant that the filing of the information was two days before deadline. The only relevant fact that the Court needs to concern itself with is that the filing of the information was not past the expiration statute of limitation date.

As an additional note, the Eleventh Circuit stated, "[a] superseding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending and was timely and the superseding indictment does not broaden or substantially amend the original charges." *United States v. Italiano*, 894 F.2d 1280, 1282 (11th Cir. 1990); *see also United States v. Farias,* 836 F.3d 1315, 1324 (11th Cir. 2016). An unpublished opinion also used this logic to state, "there is no reason why a subsequent indictment cannot relate back to a preceding, valid information . . . the two forms of charging documents are treated the same for statute of limitation purposes. . . the charges in the superseding indictment are identical to the information, it relates back" *United States v. Briscoe,* No. CR RDB-20-0139, 2020 WL 5076053 at *2 (D. Md. Aug.

26, 2020). In the present case, both the July 22, 2020 Information and the September 21, 2021 Indictment are materially the same information.

Thus,

II. THE GOVERNMENT IS ENTITLED TO EQUITABLE TOLLING OF THE CRIMINAL STATUTES OF LIMITATIONS DUE TO THE EXTRAORDINARY CIRCUMSTANCES SURROUNDING THE JUDICIAL PROCESS BECAUSE OF THE COVID-19 PANDEMIC.

While the doctrine of equitable tolling is typically applied to limitation periods on civil actions, there is no reason to distinguish between the rights of civil and criminal statutes of limitations. *Powers v. Southland Corp.*, 4 F.3d 223, 233 (3rd Cir. 1993). Equitable tolling applies to criminal statutes of limitations. *U.S. v. Atiyeh*, 402 F.3d 354, 367 (3rd Cir. 2005)(*citing United States v. Midgley*, 142 F.3d 174,178 (3rd Cir. 1998))(see also *United States v. Levine*, 658 F.2d 113, 119–121 (3rd. Cir. 1981). The doctrine of equitable tolling is allowed to be invoked sparingly and under narrow circumstances. *Atiyeh*, 402 F.3d at 367 (*citing Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

The Court should grant the tolling the criminal statute of limitations, if it should disagree with the Government's timely filing under the statute of limitations. The Government has been faced with an extraordinary situation, the COVID-19 global pandemic, which as greatly hindered the judicial system in all aspects. Because of such unprecedent times, this situation amounts to one that falls under the narrow circumstances where tolling of a criminal statute of limitation is permissible.

The Court needs a convincing rationale to apply equitable tolling to a statute of limitations. *Atiyeh*, 402 F.3d at 367. In *Atiyeh*, the Federal Bureau of Investigation began an undercover investigation of Atiyeh's unlicensed sports-gambling business in 1996. *Id.* at 359. A grand jury sitting in the Eastern District of Pennsylvania returned a fifteen-count sealed indictment against Atiyeh on December 12, 2001. *Id.* Atiyeh was arrested on the indictment on December 19, 2001, and released on bail. *Id.* Atiyeh then filed a pretrial motion to dismiss some of the counts, stating they are barred by 18 U.S.C §3282. *Id*. at 360. The Government responded that on October 5, 2001, it filed an *ex parte* application to suspend the statute of limitations because evidence was being sought from foreign countries; the order was entered that same day. *Id.* at 361. The Court found it obvious that counts occurred outside statute of limitations period. *Id.* However, the Court was not persuaded by the Government's good faith reliance order suspending the statute of limitations. *Id*. at 367. Instead, the Court stated that "Atiyeh did not "induce" the Government's current situation and the principles of justice do not demand that the statute of limitations be tolled under the current circumstances". *Id.*

The government's tolling argument depends on if the government was prevented in an "extraordinary way" from exercising its right to prosecute on the dismissed counts. *Midgley*, 142 F.3d at 179. In *Midgley*, a federal grand jury returned an indictment against Midgley, charging six counts of controlled substance and firearms violations in September 1991. *Id*. at 175. Midgley entered into a plea agreement with the government where he agreed to plead guilty to one count in exchange for the dismissal of the remaining counts of indictment. *Id.* The agreement contained no provision for waiver of

Midgley's statute of limitations defense as to the counts to be dismissed . *Id.* In May 1996, Midgley filed a motion to vacate his sentence in light of a new Supreme Court decision. *Id.* at 176. In March 1997, the government filed a motion for the reinstatement of the dismissed counts, stating that Midgley "revoked his acceptance" of the plea agreement and the government should be free to withdraw its part of the bargain. *Id.* at 178. The Court found the government's tolling argument to be insufficient. *Id*. at 179. To the Court, this was not a "rare situation where equitable tolling is demanded by sound legal principles", and will not toll a statute because of "what is at best a garden variety claim of excusable neglect" on the part of the defendant. *Id.*

In the Government's present case against Defendant Maximoff, the Government is having to prosecute under the restrictions imposed upon it and the judicial system due to the COVID-19 pandemic. The Government was forced to file an Information last summer-last summer being July 2020-because the Court, in Administrative Order No. 20-019, suspended the grand jury because of COVID-19 as of March 23, 2020. Court Transcript 11. The Government was not able to seek an indictment until the Court lifted the grand jury suspension on March 29, 2021 in Administrative Order No. 21-008. Court Transcript 11.

Black's Law Dictionary states, the doctrine of equitable tolling constitutes a "court's discretionary extension of a legal deadline as a result of extraordinary circumstances that prevented one from complying despite reasonable diligence throughout the period before the deadline passed". The focus here is on the phrase

‘extraordinary circumstances’ within the definition. COVID-19, a global pandemic, struck the globe back in 2020. COVID-19 is an extraordinary circumstance.

Many states within the United States, including the state of Stetson, put in place numerous measures like Administrative Order No. 20-019 as a way to stop the spread of a highly contagious virus. Indictments require a grand jury’s vote. Grand juries are required to meet at a courthouse, review evidence, then decide on whether to bring criminal charges against a potential defendant. With the Court putting into effect Administrative Order No. 20-019, the grand jury process ceased. The government was unable to pursue the necessary course of action-for months-because courthouses were closed, and individuals were not coming in close personal contact with other individuals.

This case differs from the *Atiyeh* case, because the *Atiyeh* Court found it obvious that the indictment occurred outside the statute of limitations and the reason for that being was a mere waiting on evidence to be procured from foreign countries. Here, aside from the timeliness-as that is discussed about in Issue I-the government is waiting on a global pandemic to conclude. This case is also different than *Midgley*, where the counts being sought were dismissed as part of a plea agreement with no provision for waiver statute of limitations defense as said counts. Here, there is no plea agreement that dismisses counts and had a defendant serving sentence. The *Midgley* Court references the phrase a claim of ‘excusable neglect’ when analyzing the government’s tolling argument; the government had the opportunity to protect itself and insert a provision of waiver statute of limitations defense within the plea agreement, but it decided not to.

The *Midgley* and *Atiyeh* cases do not represent a "rare situation where equitable tolling is demanded by sound legal principles". The present case, however, does represent such a rare situation. While the judicial system is now slowly moving toward online alternatives, this was likely not an option when the Court implemented the order suspending grand juries in 2020. Thus, the Court should not make this type of retrospective analysis when making such determination with regards to granting equitable tolling. The Government, like everyone else, had to wait. The world is still in the midst of the COVID-19 pandemic.

Because these are still unprecedent times, this situation still amounts to one that falls under the narrow circumstances where tolling of a criminal statute of limitation is permissible, and the Court should grant the Government equitable tolling.

Conclusion

For the foregoing reasons, The United States Government asks this Honorable Court to deny Defendant's Motion to Dismiss.

Dated: September 23, 2021

Respectfully submitted,

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