

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

UNITED STATES OF AMERICA, )

CASE NO. 1:21-cr-36

)

)

)

)

v. )

**MEMORANDUM IN  
OPPOSITION OF  
DEFENDANT’S MOTION TO  
DISMISS**

)

WANDA MAXIMOFF, )

Defendant. )

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## **INTRODUCTION**

NOW COMES the United States of America to file this Memorandum in Opposition to Defendant Wanda Maximoff's Motion to Dismiss pursuant to 18 U.S.C. § 3288 and 18 U.S.C. § 3298. The United States (hereinafter the "Government") is entitled to the six (6) month extension of the statute of limitations set forth in 18 U.S.C. § 3288 because under 18 U.S.C. § 3298 the original Information instituted proper filing that allows the superseding Indictment to relate back to before the prescribed ending of statute of limitations. Additionally, the statute of limitations should be equitably tolled due to the COVID-19 pandemic. The Government respectfully asks that this Honorable Court enter into an order denying Defendant's Motion to Dismiss.

## **STATEMENT OF FACTS**

The statute of limitations for an Immigration and Nationality Act (hereinafter "INA") offense is no later than "10 years after the commission of the offense." 18 U.S.C. § 3298. The statute of limitations expired on July 24, 2020. This case was originally dismissed without prejudice on July 23, 2020, by the Honorable Judge Bradley. This Court lifted the suspension of grand juries on March 23, 2021. An Indictment was brought within six (6) months to comply with 18 U.S.C. § 3288, and Wanda Maximoff (hereinafter "Defendant") was indicted in September 2021 for violating 8 U.S.C. § 1324 (a)(1)(A)(iv), (v). Defendant was

indicted for incidents between May 31, 2007, and July 24, 2010, for conspiring to knowingly encourage and induce an alien to reside in the United States, knowingly and in reckless disregard of the fact that such residence is in violation of the law, namely by manufacturing and selling false and fraudulent Order of Supervisions (hereinafter “OSUP”) to aliens illegally present in the United States who did not qualify to receive an OSUP.

## **ARGUMENT**

### **I. The Information is valid under 18 U.S.C. § 3288.**

Under the Federal Rules of Criminal Procedure, an offense must be prosecuted by an indictment if it is punishable by death; or by imprisonment for more than one (1) year. FED. R. CRIM. P. 7(b). However, whenever an indictment or information charging a felony is dismissed because a grand jury is not in session, a new indictment or information can be filed within sixty (60) days of the date of the dismissal. 18 U.S.C. § 3288.

Rule 7(b) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3288 interpreted together render the Indictment valid. When a previous information is dismissed without prejudice, and no grand juries were empaneled due to COVID-19, the superseding indictment relates back to the timely filing of the information.

Furthermore, “No person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found, or the information is instituted

within five (5) years after such offense shall have been committed.” 18 U.S.C. § 3282. The Government contends there is no material difference between 18 U.S.C. § 3282 and 18 U.S.C. § 3298. Determining the definition of the word ‘instituted’ as it works in conjunction with Rule 7(b) of the Federal Rules of Criminal Procedure is a two (2) pronged inquiry. First, whether filing an information in district court is sufficient to ‘institute’ the information as the language is used in the statute of limitations in 18 U.S.C. § 3288; Second, whether the subsequent filing of the indictment and dismissal of the information after the period of limitations has run, satisfies the statute of limitations. *United States v. Rosecan*, No. 20-CR-80052, 2021 WL 1026070, at \*3 (S.D. Fla. Mar. 17, 2021) (citing *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998)).

In *Rosecan*, the Government filed an information on June 26, 2020, charging the defendant with fourteen (14) counts of health care fraud. *Rosecan*, 2021 WL 1026070, at \*1. The earliest offense date alleged was April 13, 2015, and the latest offense date alleged was August 24, 2015. *Id.* Based on these dates, the statute of limitations would have expired on August 24, 2020. *Id.* After the filing of the information on June 26, 2020, defendant appeared in court on July 17, 2020. On January 6, 2021, defendant filed a Motion to Dismiss claiming that the Government did not file an indictment within the statute of limitations. *Id.*

However, on February 4, 2021, a federal grand jury returned a superseding indictment which was identical to the information filed on June 26, 2020. *Id.*

The *Rosecan* defendant argued the information filed by the Government is a “legal nullity which fails to legally charge defendant under both the United States Constitution, and the Federal Rules of Criminal Procedure.” *Id.* The defendant believed that without a waiver of indictment, the prosecution failed to charge the defendant within the statute of limitations. *Id.* at 2. The *Rosecan* court adopted the logic of the Seventh Circuit Court of Appeals in *Burdix-Dana* because it is grounded in the plain language of § 3282 which requires that the “information” be “instituted” to satisfy the statute of limitations. *Id.* Regardless of the defendant’s waiver, the terms “prosecuted” and “instituted” are not equivalent, and an information is “instituted” when it is properly filed. *Id.*

Comparing *Rosecan* to this case, the Government’s filing of an Information against Defendant was properly instituted when filed on July 22, 2020. R-58. Even though dismissed, the plain reading of Rule 7(b) of the Federal Rules of Criminal Procedure allows an information to institute a proper filing to satisfy the statute of limitations.

If the Information was timely filed under § 3282, the superseding indictment brought after the statute of limitations expired was valid so long as the original indictment or information is still pending, and was timely, and the superseding

indictment or information does not broaden or substantially amend the original charge. *Id* at 4.

The Government filed the original Information against Defendant within the statutory limitations set forth in § 3298 on July 22, 2020. R-58. However, the Indictment filed after grand jury proceedings resumed was identical to the original Information. R-62. This shows that the Information, and superseding Indictment, did not substantially change or broaden the charges against Defendant.

Therefore, the original Information was instituted correctly under Rule 7(b) of the Federal Rules of Criminal Procedure and the following Indictment fell within the meaning of 18 U.S.C. § 3298.

## **II. The Indictment filed is valid because no grand juries were empaneled.**

18 U.S.C. § 3288 explains how to file an indictment and information after the statute of limitations. The exceptions are quite exhaustive, but for the purposes of this Motion, the focus will be if the Government can file an indictment after the statute of limitations passes due to the inability to empanel a grand jury.

18 U.S.C. § 3288 states, “If no regular grand jury is in session in the appropriate jurisdiction when the indictment is dismissed, (the prosecution can re-file the indictment), within six (6) calendar months of the date when the next regular grand jury is convened, no new indictment shall be barred by *any* statute of limitations.” *Id*. The purpose of the statute of limitations is to protect individuals

from having to defend themselves against charges when facts could be too obscure because too much time has passed. *United States v. Clawson*, 104 F.3d 250, 252 (9th Cir. 1996) (citing *Toussie v. United States*, 397 U.S. 112, 114–15 (1970)). Dismissing an indictment that falls within the six (6) month grace period of § 3288 is not the aim of the statute of limitations. If so, any small technical defect that occurs near the end of the statute of limitations would bar prosecution all together. *United States v. Clawson*, 104 F.3d 250, 251 (9th Cir. 1996). The purpose of § 3288 is to allow a second indictment that is properly and timely filed to relate back to the initial pleading, and inherit its timeliness as long as the later indictment does not materially broaden, or substantially amend the original charges. *United States v. Sorcher*, 498 F. Supp. 2d 603, 607–08 (E.D.N.Y. 2007).

Courts throughout the United States have determined the meaning of materially broadening or substantially amending the original charge. In *United States v Hill*, the original indictment charged defendant with tax evasion. 494 F. Supp. 571, 574 (S.D. Fla. 1980). Due to a technical error, a superseding indictment was filed, and instead of tax evasion, the Government charged defendant with attempting to evade taxes. *Id.* The court held that the discrepancy was not substantial enough to bring the second indictment out of the purview of § 3288. *Id.* It is the facts underlying the indictment, not the specific charge alleged in determining whether the indictment is proper. *Id.*

The Indictment of Defendant falls within the meaning of § 3288. The charge was not too obscure or filed after a substantial amount of time. The Information acts as the first indictment and was filed before the ten (10) year statute of limitations set forth in 18 U.S.C. § 3298. Accordingly, the second indictment must fall within the six-month grace period permitted by § 3288. If the statute of limitations has not passed, then read plainly, the facts are not too obscure to warrant prosecution.

The COVID-19 pandemic halted all grand jury proceedings on March 23, 2020, and the suspension was lifted on March 29, 2021. It was impossible to convene a grand jury before March 29, 2021. Technically, the statute of limitations for 8 U.S.C. § 1324 (a)(1)(A)(iv), (v) ended on July 24, 2020. R-51. However, the goal of § 3288 is to decrease the likelihood of wrongdoers using technicalities to escape culpability. Here, if applied without the intent of § 3288 in mind would allow the Defendant to do just that.

Finally, the Information and Indictment did not substantially change or broaden the original charge. The Indictment filed on March 26, 2021, was the exact same as the Information that was dismissed.

Therefore, the Indictment of Defendant is valid because it falls within the six (6) month grace period of § 3288. The Government fell within the meaning of §

3288 by rightfully indicting Defendant because the superseding Indictment did not substantially change or broaden the charges from the original Information.

The Government properly Indicted the Defendant by filing an information before the statute of limitations ran. In doing so, once grand juries were empaneled post COVID-19, the Government indicted Defendant with charges that did not substantially broaden or substantially amend the charge.

### **III. The Government is entitled to Equitable Tolling.**

The Third Circuit has held there is no distinction between the rights protected by criminal and civil statutes of limitations, and the statute of limitations should be tolled where equitable tolling is “demanded by sound legal principles as well as in the interest of justice.” *U.S. v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998). “A ‘petitioner’ is ‘entitled to equitable tolling’ if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 633 (2010) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

In *Kilck v. Cenikor Found*, the district court held that the COVID-19 pandemic constituted an “extraordinary circumstance.” 509 F. Supp. 3d 951 (S.D. Tex. 2020). Equitable tolling is appropriate when (1) the plaintiff has been pursuing their rights diligently, and (2) that some extraordinary circumstance blocked plaintiff from bringing his action before the expiration of the statute of

limitations. *Id.* The court found there to be extraordinary circumstances where there had been various extensions for time, a complex procedural history, slowdowns in the court system due to COVID-19, and inability for counsel to conduct discovery due to COVID-19. *Id.* Further, the court noted that plaintiff was exercising their due diligence when their case was delayed due to COVID-19, and through no fault of their own. *Id.*

In *Brown v. Davis*, the Court held the COVID-19 pandemic to be an ongoing extraordinary circumstance fitting for equitable tolling. 482 F. Supp. 3d 1049 (E.D. Cal. 2020). The Court noted that the Ninth District has held that the length of an equitable tolling “cannot be mechanically determined” absent a showing of due diligence. *Id.* at 1057. Petitioner argued that he could not timely file his habeas corpus petition due to the pandemic preventing evidence gathering, and other elements needed. *Id.* at 1052. Further, the court in *Cowan v. Davis*, held that the COVID-19 pandemic undoubtedly presents an extraordinary circumstance for equitable tolling. No. 119-CV-00745-DAD, 2020WL 4698968, at \*2 (E.P. Cal. Aug. 13, 2020).

Here, the Government brought indictment charges, prior to the expiration of the statute of limitations, on July 22, 2020. However, under Administrative Order No. 21-008, grand jury proceedings were suspended from March 23, 2020, until March 29, 2021, in response to the COVID-19 pandemic. Subsequently, unable to

bring a grand jury indictment because of the administrative order, the Government brought a Motion for Order of Dismissal without prejudice on July 23, 2020, which this Court granted. The statute of limitations expired on July 24, 2020.

The COVID-19 pandemic, which paused all grand jury proceedings, is most certainly an “extraordinary circumstance”. Similar to *Kilck*, the court system has been backed up and “paused” during the government shutdown. It is of no fault of the Government that the proceedings were delayed during the course of the pandemic. The Government has exercised due diligence in bringing the Indictment as soon as the grand jury proceedings resumed. There would have been no way for the Government to bring a grand jury indictment prior to May 29, 2021.

Through no fault of the Government, while exercising due diligence, extraordinary circumstances arose which would not permit Indictment changes to have been brought prior to Administrative Order No. 21-008. Therefore, the statute of limitations should be equitably tolled.

### **CONCLUSION**

**WHEREFORE**, the Government requests that the Motion to Dismiss be DENIED. The dismissed Information was properly instituted under Federal Rules of Criminal Procedure 7(b) and the superseding Indictment fell within the six (6) month grace period of § 3288. Additionally, the hardships brought on by the COVID-19 require the application of equitable tolling.

Respectfully Submitted,

*s/* \_\_\_\_\_

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September 23, 2021