Team 116

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

UNITED STATE OF AMERICA

v. CASE NO. 1:21-cr-36

WANDA MAXIMOFF
_____/

**DEFENDANT WANDA MAXIMOFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT**

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## INTRODUCTION

On September 21, 2021, a grand jury indicted Wanda for conspiring to encourage and induce illegal entrants to unlawfully reside in the United States by manufacturing and selling false and fraudulent papers to those illegal entrants between May 31, 2007, and July 24, 2010. *See* Dkt. 2; 18 U.S.C. § 1324(a)(1)(A)(iv) and (v). However, the Court should dismiss the indictment as untimely.

First, the indictment was not filed within the ten-year statute of limitations under § 3298 and did not relate back to an invalid information. The government obtained a grand jury indictment over eleven years after the offense. *See* Dkt. 2; Dkt. 1. Also, because the government failed to obtain a valid waiver of indictment under Federal Rule of Criminal Procedure 7, the information filed within the statute of limitations was not "instituted" and was null and void. Thus, the indictment did not relate back and was not timely filed, and even if the information was sufficient, the indictment nevertheless fell outside the six-month grace period of 18 U.S.C. § 3288. Accordingly, this Court should dismiss the indictment as untimely.

Second, the doctrine of equitable tolling does not apply. The government failed to exercise reasonable diligence, and the pandemic did not prevent the government from using the other mechanisms under Rule 7 to timely institute

proceedings. Therefore, the pandemic does not constitute an extraordinary circumstance, and the doctrine of equitable tolling does not apply.

Overall, the government failed to timely file the indictment, and the equitable tolling doctrine does not apply. This Court should dismiss the indictment and, pursuant to Federal Rule of Criminal Procedure 12(g), order that Wanda be released under 18 U.S.C. § 3142.

## STATEMENT OF FACTS

Unknown to Ms. Wanda Maximoff ("Wanda"), the Department of Homeland Security ("DHS") has investigated her for years for conspiring to encourage and induce illegal entrants to unlawfully reside in the United States by manufacturing and selling false and fraudulent papers. *See* Dkt. 2. Without Wanda's knowledge, the government filed an information under seal on July 22, 2020, and on July 23, 2020, the government's motion to dismiss the information without prejudice was granted. Dkt. 1. Subsequently, on September 21, 2021, a grand jury indicted Wanda for a conspiracy allegedly occurring between May 31, 2007, and July 24, 2010. *See* Dkt. 2.

Then, on September 23, 2021, while Wanda was living with Monica Rambeau, who is her foster care mother, Special Agent Jimmy Woo ("Special Agent Woo"), along with other officers with the DHS, knocked on the door and announced his name and status as law enforcement. Dkt. 10 at 1. Wanda answered

the door, and after Special Agent Woo asked her to confirm her identity, she complied and allowed Special Agent Woo in the home. Dkt. 10 at 1. After entering the house, Special Agent Woo explained that they had an arrest warrant for Wanda. Dkt. 10 at 1. Wanda was surprised and asked to view the indictment. Dkt. 10 at 1. Special Agent Woo explained, however, that the indictment was under seal, but he did talk about the charge against her and about crimes Wanda supposedly committed in 2007. Dkt. 10 at 1; Dkt. 12 at 3. Wanda cried and asked the officers what she had done wrong. Dkt. 12 at 3. Subsequently, Special Agent Woo arrested Wanda, transported her to the Marshal's office at the United States Courthouse for booking, and subsequently transported her for her initial appearance. Dkt. 10 at 2.

## ARGUMENT AND AUTHORITIES

### I. THE COURT SHOULD DISMISS THE INDICTMENT BECAUSE IT WAS NOT TIMELY FILED UNDER § 3298 AND § 3288.

The government obtained a grand jury indictment over eleven years after the offense. *See* Dkt. 2; Dkt. 1. The indictment also did not relate back to an insufficient information, and even if the information was sufficient, the indictment fell outside the six-month grace period of 18 U.S.C. § 3288. The indictment was untimely.

The government cannot prosecute an individual for conspiracy to commit a non-capital offense under the Immigration and Nationality Act "unless the

indictment is found or the information is instituted no[] later than [ten] years after the commission of the offense." 18 U.S.C. § 3298. Generally, the statute of limitations will start to run once the crime is complete. *United States v. Gilbert*, 136 F.3d 1451, 1453 (11th Cir. 1998) (citing *Pendergast v. United States*, 317 U.S. 412, 418–20 (1943)).

Here, the government filed an information two days before the statute of limitations period expired. *See* Dkt. 1; Dkt. 9. However, the government did not obtain a valid waiver of indictment. *See* Dkt. 3. After the government obtained dismissal of the information a day later, the government obtained a grand jury indictment fourteen months later. *See* Dkt. 2. Therefore, because the government failed to obtain a valid waiver, the information was not "instituted." And even if the information was sufficient, the indictment was outside the period under § 3288. The indictment was untimely.

### A. The Indictment Was Filed More Than Ten Years After Ms. Maximoff Allegedly Committed the Offense and Was Not Timely Under § 3298.

The government failed to obtain a grand jury indictment until September 21, 2021, which is over eleven years after the commission of the offense. *See* Dkt. 2; Dkt. 1. Therefore, because the indictment fell outside the ten-year statute of limitations under § 3298, it was untimely.

Under Federal Rule of Criminal Procedure 7, "[a]n offense . . . must be prosecuted by an indictment if it is [a felony]." Fed. R. Crim. P. 7(a)(1)(B). However, a felony "may be prosecuted by information if the defendant . . . waives prosecution by indictment." Fed. R. Crim. P. 7(b). If the information is not "instituted" or the indictment is not "found" within the limitations period, the defendant must raise the statute of limitations as a defense. *See Smith v. United States*, 568 U.S. 106, 112 (2013); *Biddinger v. Comm'r of Police*, 245 U.S. 128, 135 (1917). Once the defendant raises a limitations defense, the government must prove that the crime was committed within the period or that an exception applies. *Musacchio v. United States*, 577 U.S. 237, 718 (2016).

Here, the indictment alleged that Wanda committed a felony offense between May 31, 2007, and July 24, 2010. *See* Dkt. 2. Therefore, the statute of limitations expired on July 24, 2020, which is ten years after the alleged commission of the offense. *See* 18 U.S.C. § 3298. However, the government failed to obtain a grand jury indictment until over eleven years after the commission of the offense. *See* Dkt. 2; Dkt. 1. Therefore, the indictment was not timely because it fell outside the ten-year statute of limitations under § 3298.

### B. The Indictment Was Not Timely Filed Under § 3288 Because Information Did Not Contain a Valid Waiver and the Indictment Was Filed Fourteen Months After the Information's Dismissal.

While the government did not obtain an indictment within the ten-year statute of limitations, the government did file an information on July 22, 2020, two days before the statute of limitations expired. *See* Dkt. 1; Dkt. 9 at 9. Notably, however, the government did not obtain a valid waiver of indictment. *See* Dkt. 3 at 3:71–4:74. The information was, therefore, not "instituted" within the language of § 3298, and the indictment could not relate back under § 3288 to an information that was invalid. And even if the information was sufficient to "institute" the proceedings against Wanda, the indictment fell outside of § 3288 because the indictment was obtained fourteen months after the information was dismissed. This Court should dismiss the indictment as untimely.

#### 1. The indictment does not relate back to the information filed within the statute of limitations because the information was not "instituted."

Here, the government did not obtain a valid waiver of indictment. *See* Dkt. 3 at 3:71–4:74. Thus, because the government did not obtain a valid waiver of indictment, the information was not "instituted" within the plain language of § 3298, and the indictment does not relate back under § 3288.

Generally, "[w]henever 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." 18 U.S.C. § 3288. As the Eleventh Circuit explained, "[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). The same principle equally applies to a timely filed information. *See United States v. Briscoe*, No. RDB-20-0139, 2020 U.S. Dist. LEXIS 155068, at *2 (D. Md. 2020).

Here, the indictment was untimely. The information did not have a valid waiver, and it was not "instituted." Because the information was not "instituted" under § 3298, § 3288 does not apply, and the indictment does not relate back to § 3288.

***a. The plain language of the statute confirms that the information was not "instituted" because it did not contain a valid waiver of indictment.***

The plain language of the statute suggests that the mere filing of an information does not "institute" proceedings against the defendant. Therefore, because the government filed an insufficient information two days before the statute of limitations expired, the information was not "instituted." *See* Dkt. 1; Dkt. 9 at 9; Dkt. 3 at 3:71–4:74.

When interpreting a statute, the first step is looking to the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* Further, where the language of the statute is unambiguous, the inquiry ends. *United States v. St. Amour*, 886 F.3d 1009, 1013 (11th Cir. 2018).

Here, the plain language of § 3298 states that "[n]o person shall be prosecuted, tried, or punished for any non-capital offense or conspiracy to commit a non-capital offense . . . unless . . . the information is *instituted* not later than [ten] years after the commission of the offense." 18 U.S.C. § 3298 (emphasis added). Because the language of the statute mentions nothing about the mere filing of an information, the text suggests "filing" does not equal "instituting." Specifically, under Rule 7(b), the prosecution may not proceed without a valid waiver of indictment. *See United States v. Cooper*, 956 F.2d 960, 962 (10th Cir. 1992). Further, the word "institute" means "[t]o begin or start; commence." *Institute*, *Black's Law Dictionary* (11th ed. 2019). According to these definitions, an information is "instituted" when it begins or commences the prosecution. However, it can only commence a prosecution if it contains a valid waiver of indictment. *See Cooper*, 956 F.2d at 962. Therefore, the plain language of the statute suggests that filing an information does not "institute" proceedings because

an invalid information, though filed, does not permit the government to prosecute the defendant. *See* Fed. R. Crim. P. 7(b).

***b. The broader statutory scheme confirms that an information must contain a valid waiver to be "instituted."***

The broader statutory scheme also confirms that an information is "instituted" when it has a valid waiver of indictment. Other sections under Title 18 use the word "filed" instead of "instituted," so Congress's purposeful exclusion of the word "file" from § 3298 demonstrates that "filed" does not mean "instituted."

According to the Supreme Court, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

Here, Congress based the statute of limitations found in other sections on the "filing" of an information, not on an information being "instituted." *See* 18 U.S.C. § 3293 (stating that the information must be "filed" within the statute of limitations); § 3294 (same); § 3300 (same). Therefore, if the Court interpreted the word "institute" to mean filing an information, it would go against this

fundamental canon of construction. Specifically, Congress's inclusion of the word "instituted" and exclusion of the word "filed" in § 3298 prevents this Court from equating "filing" with "instituting." Otherwise, it would undermine the presumption that Congress is intentionally inclusive and exclusive with words. The broader statutory scheme, therefore, confirms that filing an information is not sufficient to "institute" proceedings.

***c. The policy concerns of the government filing an invalid information and waiting indefinitely to extend a statute of limitations support the interpretation that an information must contain a valid waiver.***

Here, the government simply filed the information to extend the statute of limitations and continue building its case against Wanda, and Wanda had no means to know that she was the subject of an investigation. Several policy concerns require that an information is "instituted" when it contains a valid waiver.

The statute of limitations defense protects defendants from defending against charges when the passage of time has obscured the basic facts, and it limits exposure to criminal prosecution to a fixed period. *Toussie v. United States*, 397 U.S. 112, 114 (1970). This defense also encourages law enforcement to be prompt in investigations. *Id.* at 115. When dealing with limitations, "[n]otice to the defendant is the central policy." *Italiano*, 894 F.2d at 1283. For example, in *Jaben v. United States*, the Supreme Court addressed a six-year statute of limitations on a felony charge, and the Supreme Court would not adopt the government's

interpretation of the statute because no provision would exist for notifying the defendant of the charges, one of the Commissioner's basic functions. *Jaben v. United States*, 381 U.S. 214, 215, 218 (1965). Moreover, the statute of limitations was not designed to provide the government with more time to prepare its case. *Id.* at 219. Instead, it was meant for situations where the government could not obtain an indictment because of the grand jury schedule. *Id.* at 219–20. According to the Supreme Court in *Jaben*, the government's position that the mere filing of a complaint is sufficient would "provide[] no safeguard whatever to prevent the [g]overnment from filing a complaint at a time when it does not have its case made[] and then using the nine-month period to make it." *Id.* at 220.

Here, the same policy concerns are involved. The government filed an information only two days before the statute of limitations expired. *See* Dkt. 1; Dkt. 9 at 9. Then, the government waited and did not obtain a grand jury indictment until September 21, 2021, which is fourteen months after the information's dismissal. *See* Dkt. 2; Dkt. 1. Also, no notice was given to Wanda, and Wanda did not know that the government was even investigating her. *See* Dkt. 10 at 1; Dkt. 12 at 3. Thus, if the government could bypass the limitations by filing an invalid information, the statute of limitations provides no protection for defendants.

However, some courts have held an information to be "instituted" when filed, even though no valid waiver of indictment exists. *See, e.g.*, *United States v. Cooper*, 956 F.2d 960 (10th Cir. 1992); *United States v. Watson*, 941 F. Supp. 601, 603 (N.D.W. Va. 1996); *United States v. Burdix-Dana*, 149 F.3d 741, 743 (7th Cir. 1998); *United States v. Hsin-Yung*, 97 F. Supp. 2d 24, 28 (D.D.C. 2000); *United States v. Thompson*, 287 F.3d 1244, 1249–51 (10th Cir. 2002); *United States v. Stewert*, 425 F. Supp. 2d 727, 731–35 (E.D. Va. 2006); *United States v. Marifat*, WBS-17-0189, 2018 WL 1806690, at *2–3 (E.D. Cal. Apr. 17, 2018); *Briscoe*, 2020 U.S. Dist. LEXIS 155068, at *2. But the policy concerns implicated here did not apply.

For example, in *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998), the Seventh Circuit recognized that, "by equating 'instituted' with 'filed' and then applying 18 U.S.C. § 3288, [it] ha[s] 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." *Burdix-Dana*, 149 F.3d at 743. However, the Seventh Circuit explained that "[t]his issue is not relevant here because in this case [the defendant] did have notice of the charges pending against her." *Id.* at 743 n.3.

Here, Wanda never had notice of the charges until officers arrested her. *See* Dkt. 10 at 1; Dkt. 12 at 3. Therefore, the government could simply file an invalid

information within the limitations period, wait indefinitely, and then rely on § 3288 to broaden the limitations greatly beyond the intended period. *See United States v. Sharma*, No. 4:14-CR-61, 2016 U.S. Dist. LEXIS 66227, at *6–10 (S.D. Tex. 2016) (determining that "that the government can[not] 'willy-nilly' file an [i]nformation at the end of the limitations period as a means of extending it").

In addition, accepting an information without a valid waiver would violate logic and common sense because such an information is meaningless for purposes of jurisdiction and prosecution. *Id.* Generally, when a defendant does not waive indictment, filing an information is "a defect going to the jurisdiction of the court." *United States v. Montgomery*, 628 F.2d 414, 416 (5th Cir. 1980).[1] When the government does not have the authority to file an information and when the defendant's waiver is not binding, filing the information does "not confer power on the convicting court to hear the case." *See Smith v. United States*, 360 U.S. 1, 10 (1959). The waiver's jurisdictional nature is grounded in the Fifth Amendment because the Fifth Amendment requires the government to prosecute felonies by indictment. *United States v. Machado*, No. 04-10232-RWZ, 2005 U.S. Dist. LEXIS 26255, at *5 (D. Mass. 2005); *see also* U.S. Const. amend. V ("No person

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit construed all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981, as binding precedent.

shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.").

If the mere filing of an information tolls the statute of limitations and provides time for the government to make its case, then an invalid information would essentially allow the court to "hear the case" and sidestep the Fifth Amendment. Therefore, filing an information without a valid waiver is not sufficient to "institute" proceedings because such an approach would undermine the applicable jurisdictional rules and relevant provisions of the Fifth Amendment. Policy concerns require that an information is "instituted" when it contains a valid waiver.

**2. Even an information does not need a valid waiver, the indictment is still untimely because it was filed fourteen months after the information's dismissal.**

On July 23, 2020, the government moved to dismiss the information under Federal Rule of Criminal Procedure 48, and the government's motion was granted. *See* Dkt. 1. Six months after this date of dismissal would have been January 23, 2021. However, the government did not obtain an indictment until September 21, 2021. *See* Dkt. 2, Dkt. 1. Therefore, even if the information "instituted" proceedings, the indictment fell outside of § 3288.

Generally, "[w]henever an indictment or information charging a felony is dismissed . . . 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." 18 U.S.C. § 3288. In addition, "the superseding indictment [must] not broaden or substantially amend the original charges." *Italiano*, 894 F.2d at 1282. The same principle applies equally to a timely filed information. *See Briscoe*, 2020 U.S. Dist. LEXIS 155068, at *2.

Here, even if the information was valid and tolled the statute of limitations, the indictment was still untimely. The government's motion to dismiss the information was granted on July 23, 2020. *See* Dkt. 1. However, the government failed to obtain a grand jury indictment until September 21, 2021, which is fourteen months after the information's dismissal. *See* Dkt. 2; Dkt. 1. Therefore, even if the original information was timely and valid, the indictment is not timely and does not fall within the exception contained in § 3288.

## II. THE COURT SHOULD DISMISS THE INDICTMENT BECAUSE THE DOCTRINE OF EQUITABLE TOLLING DOES NOT APPLY.

While the COVID-19 pandemic may have been uncontrollable, the pandemic did not prevent the government from using the other mechanisms in Federal Rule of Criminal Procedure 7 to institute proceedings against Wanda within the limitations period. However, the government was not diligent, and the pandemic did not specifically prevent it from using those mechanisms. Therefore, the doctrine of equitable tolling is inapplicable.

Generally, "equitable tolling is an extraordinary remedy 'limited to rare and exceptional circumstances and typically applied sparingly.'" *Cadet v. Fla. Dep't of*

*Corr.*, 853 F.3d 1216, 1221 (11th Cir. 2017). A litigant must establish two elements for equitable tolling: "(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, 649 (2010).

Here, the government could have simply obtained a valid waiver of indictment and filed an information, or it could have obtained an indictment sooner. However, because the government failed to pursue its rights diligently and because no extraordinary circumstances prevented it from filing an indictment timely, the doctrine of equitable tolling does not apply.

### A. The Government Has Not Pursued Its Rights Diligently Because It Could Have Obtained a Valid Indictment or a Valid Waiver of Indictment Within the Statute of Limitations.

The government has had eleven years to investigate Wanda, and the government had other means to satisfy the statute of limitations. The government could have simply obtained an indictment before the pandemic, or it could have obtained a valid waiver of indictment. Therefore, the government failed to exercise reasonable diligence.

Equitable tolling first requires that the litigant pursued their rights diligently. *Holland*, 560 U.S. at 649. The court determines whether the litigant exercised "reasonable diligence, not maximum feasible diligence." *Cadet*, 853 F.3d at 1221. For example, "due diligence . . . does not require a [litigant] . . . to exhaust every

imaginable option, but rather to make reasonable efforts." *Smith v. Comm'r, Ala. Dep't of Corr.*, 703 F.3d 1266, 1271 (11th Cir. 2012).

Here, the government failed to pursue its rights in a reasonably diligent manner. The government has been investigating this case since 2018, and the government even tabled the investigation for six months. *See* Dkt. 9 at 2, 5. Further, while the COVID-19 pandemic provided difficulties for the government, the government offered no reason why it did not seek a grand jury indictment before the pandemic even arose. *See* Dkt. 3 at 3:60–3:70. In fact, the government filed an information during the pandemic. *See* Dkt. 1; Dkt. 3 at 3:60–3:70. And if the government filed an information during the pandemic, the government could have obtained a valid waiver of indictment and filed a valid information within the limitations period. Therefore, the government failed to exercise reasonable diligence.

### B. The Pandemic Did Not Constitute an Extraordinary Circumstance and Prevent the Government from Satisfying the Statute of Limitations Because the Government Had Other Mechanisms Available.

The COVID-19 pandemic does not immediately warrant equitable tolling, and the pandemic did not specifically prevent the government from being more diligent in obtaining a valid information or indictment. Therefore, the pandemic does not constitute an extraordinary circumstance.

Equitable tolling requires the litigant to establish that some extraordinary circumstance prevent them from filing timely. *Holland*, 560 U.S. at 649. Equitable tolling is only available when "extraordinary circumstances . . . are both beyond . . . control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). Also, "the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect." *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990). From a general standpoint, equitable tolling is reserved for cases involving some affirmative misconduct or deception by the adverse party. *Zamudio v. Haskins*, 775 F. App'x 614, 616 (11th Cir. 2019) (citing *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005)).

Several courts have considered whether the COVID-19 pandemic is an extraordinary circumstance, and each has held that an individual must show they were diligently pursuing their rights and that the pandemic specifically prevented them from timely filing. *See., e.g., Klick v. Cenikor Found.*, 509 F. Supp. 3d 951, 960 (S.D. Tex. 2020) (determining that plaintiff's diligence combined with the pandemic and other issues justified equitable tolling); *Willard v. Indus. Air*, No. 1:20-cv-823, 2021 WL 309116, at *4–5 (M.D.N.C. Jan. 29, 2021) (holding that plaintiff failed to show his diligence in pursuing his rights and could not rely on the "chaos created by the pandemic alone to justify equitable tolling"); *Cummins v. Ascellon Corp.*, No. DKC 19-2953, 2020 WL 6544822, at *10 (D. Md. Nov. 6,

2020) (finding that where a filing took place at "a time when the COVID crisis was both new and reaching a fever pitch," equitable tolling was allowed); *Hood v. Cath. Health Sys.*, No. 1:20-cv-673, 2020 WL 8371205, at *6 (W.D.N.Y. Sept. 28, 2020) (stating that, while parties did not dispute that the COVID-19 pandemic was "extraordinary and unpredictable," plaintiff failed to show that the pandemic actually affected her ability to timely file); *Cowan v. Davis*, No. 1:19-cv-00745-DAD, 2020 WL 4698968, at *5 (E.D. Cal. Aug. 13, 2020) ("COVID-19 pandemic undoubtedly presents an extraordinary circumstance impacting petitioner's right to the assistance of appointed habeas counsel in preparing his federal petition."); *Dunn v. Baca*, No. 3:19-cv-702-MMD-WGC, 2020 WL 2525772 (D. Nev. May 18, 2020) (determining that equitable tolling ais llowed where petitioner was diligently pursuing a claim in the face of "the extraordinary circumstance of the COVID-19 pandemic"). Ultimately, the movant must establish that they were pursuing their rights diligently and that the COVID-19 pandemic specifically prevented them from filing their motion. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Here, the government claims that the national pandemic qualifies as an extraordinary circumstance, but the government has failed to establish how the pandemic prevented it from satisfying the statute of limitations. *See* Dkt. 3 at 3:66–3:70. Specifically, the government claims they could not obtain an indictment

because of Administrative Order No. 20-019, which suspended the grand jury on March 23, 2020. *See* Dkt. 3 at 3:60–3:62. However, the government has offered no evidence as to why it could not obtain a valid waiver of indictment. The government filed motions during the pandemic. *See* Dkt. 1. Further, this case involved no affirmative misconduct or deception on Wanda's part in preventing the government from timely filing. The government simply failed to obtain a valid waiver, and the government's failure constitutes excusable neglect. Therefore, the pandemic does not constitute an extraordinary circumstance, and the doctrine of equitable tolling does not apply.

## CONCLUSION

This Court should dismiss the indictment because the government failed the indictment was filed over eleven years after the commission of the offense and did not relate back to an invalid information. And even if the information was sufficient to "institute" the proceedings against Wanda, the indictment nevertheless falls outside the six-month grace period of 18 U.S.C. § 3288. The government also failed to exercise reasonable diligence. Moreover, the pandemic did not prevent the government from using other available mechanisms to satisfy the limitations period, and therefore, the pandemic does not constitute an extraordinary circumstance. Accordingly, this Court should dismiss the indictment as untimely,

and pursuant to Federal Rule of Criminal Procedure 12(g), this Court should order Wanda to be released under 18 U.S.C. § 3142.

Respectfully submitted,

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TEAM 116
ATTORNEYS FOR DEFENDANT