120Non-Mov

UNITED STATES DISTRICT COURT
DISTRICT OF STETSON
WESTVIEW DIVISION

UNITED STATES OF AMERICA,

CASE NO. 1:21-cr-36

v.

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

Defendant.

THE GOVERNMENT'S OPPOSITION TO MOTION TO DISMISS INDICTMENT PURSUANT TO 18 U.S.C. § 3298; POINTS AND AUTHORITIES IN SUPPORT THEREOF

/s/120Non-Mov
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INTRODUCTION

In her Motion to Dismiss filed under section 3298 of Title 18, Defendant Wanda Maximoff seeks to dismiss the Indictment returned on September 21, 2021 by asserting the Indictment violated the statute of limitations. 18 U.S.C. § 3298. Pursuant to section 3298, an indictment must be found or an information "instituted" not later than ten years after the commission of the Immigration and Nationality Act (INA) offense. § 3298; *see also* 8 U.S.C. § 1324(a)(1)(A)(iv)-(v). Defendant argues that she did not waive her right to an indictment pursuant to Federal Rule of Criminal Procedure 7(b) and, as such, section 3288 of Title 18 did not apply to the Indictment and the statute of limitations expired on July 24, 2020. 18 U.S.C. § 3288.

The Government respectfully requests this Court deny Defendant's Motion to Dismiss because: (1) the Indictment was timely returned pursuant to sections 3288 and 3298; or (2) the Government, in the alternative, is entitled to equitable tolling of the criminal statute of limitations.

STATEMENT OF FACTS

On May 3, 2018, Jimmy Woo, a Special Agent (SA) with the United States of Homeland Security, received a call from Sergeant Stanley Nielson about an arrest he made that evening of one "S.P." driving under the influence. Aff. Jimmy Woo, ¶ 5. Sergeant Nielson explained that S.P., the arrested individual, was a Guatemalan citizen who, despite not having the authority to reside in the United States, had an expired Stetson Driver's License issued June 2, 2008. *Id.* Sergeant Nielson asked S.P. how she

obtained the license and she informed him that she received it from a woman named "Scarlet," but provided no further information. *Id.* at ¶ 7. On August 10, 2018, Woo spoke with S.P.'s husband, "H.P.," and based on the information that SA Woo received from H.P., he decided to open an investigation into Agatha Harkness, an attorney in Stetson. Decl. Special Agent Woo, ¶ 14.

While investigating Harkness, SA Woo connected a phone number for "Scarlet" to the Law Office of Agatha Harkness, where Wanda Maximoff was employed. *Id.* at ¶ 19-23. Six months into SA Woo's investigation, he officially opened an investigation into "Scarlet," whom SA Woo believed to be Maximoff. *Id.* at ¶ 24. The investigation continued through July 22, 2020 when the Information was filed under seal. Gov't Mot. to Dismiss, ¶ 2. One day later, the Court granted the Government's motion to dismiss the Information filed under seal without prejudice. *Id*. at ¶ 3. At this time, the Grand Jury was suspended from service due to the COVID-19 pandemic. Initial Appearance Tr. 3:60-65. The Grand Jury was dismissed on March 23, 2020 and reinstated on March 29, 2021. *Id.* On September 21, 2021–less than six months after the reinstatement of the Grand Jury–the Government filed an Indictment against Wanda Maximoff, aka "Scarlet," charging under section 1324 (a)(1)(A)(iv) and (v) of Title 8. Indictment Wanda Maximoff, ¶ 7, Sept. 21, 2021.

Only two days later, on September 23, 2021, SA Woo executed the arrest warrant at 10:45 a.m. at 2800 Sherwood Drive in Westview, Stetson where Maximoff permanently resides with Monica Rambeau. Decl. Woo, ¶ 1-2. At the time of the arrest,

SA Woo explained to Maximoff the charges against her and Initial Appearances were conducted that same day. *Id.* at ¶ 5; Initial Appearance Tr. 1.

ARGUMENT

I. THE INDICTMENT WAS TIMELY RETURNED ON SEPTEMBER 21, 2021 PURSUANT TO 18 U.S.C. §§ 3288 AND 3298.

The statute of limitations applicable to a violation of section 1324(a)(1)(A)(iv) and (v) of Title 8 provides that an indictment must be found or an information "instituted not later than 10 years after the commission of the offense." § 1324(a)(1)(A)(iv)-(v); § 3298. The law, however, offers a grace period when "an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired." § 3288. If a new indictment is returned "in the appropriate jurisdiction . . . within six calendar months of the date when the next regular grand jury is convened," the new indictment "*shall not be barred* by any statute of limitations." *Id.* (emphasis added).

Defendant's Motion to Dismiss the Indictment returned on September 21, 2021 should be denied. First, the Information was properly "instituted" under section 3298 for the purpose of tolling the statute of limitations. Second, the superseding Indictment was timely returned within six months of the next regular grand jury reconvening pursuant to section 3288. Third, the Indictment did not violate Defendant's Fifth Amendment right.

A. The Information Was Properly Instituted Under 18 U.S.C. § 3298 because the Statutory Language Indicates that "Filing" an Information is Sufficient to "Institute" it for the Purpose of Tolling the Statute of Limitations.

The statutory language of section 3298 only requires an information be "instituted" no later than ten years after the commission of an offense. The terms "prosecuted," as used in Rule 7(b), and "instituted," as used in section 3298, are not equivalent. Fed. R. Crim. P. 7(b); § 3298.

The Seventh Circuit held that the statutory language of section 3282 of Title 18 does not state that a "prosecution" must be "instituted" before the expiration of the five-year statute of limitations, but that an "information" must be "instituted." *U.S. v. Burdix-Dana*, 149 F.3d 741, 742-43 (7th Cir. 1998). Rule 7(b) reads, "an offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant [. . .] waives prosecution by indictment." Fed. R. Crim. P. 7(b). Even so, the rule does not bar filing an information "in the absence of a waiver of indictment by the defendant"; instead, it "proscribes *prosecution without waiver*." *U.S. v. Cooper*, 956 F.2d 960, 962-63 (10th Cir. 1992) (emphasis added); *see Burdix-Dana*, 149 F.3d at 742 ("Rule 7(b) does not forbid filing an information without a waiver; it simply establishes that prosecution may not proceed without a valid waiver.").

In this case, the Government's objective was never to prosecute Defendant with the Information as the formal charging document, but to seek a superseding indictment once the Court lifted the Grand Jury suspension. Filing an information for the procedural purpose of tolling the statute of limitations is not analogous to attempting to proceed with prosecution on an information without seeking a waiver from the defendant. The Government's intention was to file the Information for the sole procedural purpose of tolling the statute of limitations during the Grand Jury's suspension, which is evidenced

by the Government filing the Information under seal and subsequently seeking an indictment.

Rule 7(b)'s language demonstrates that it "concerns itself with the requirements that the government must satisfy before [proceeding] with a prosecution," but has no effect on the statute of limitations. *Burdix-Dana*, 149 F.3d at 742-43. Thus, obtaining a Rule 7(b) waiver is not necessary when instituting an information for the purpose of tolling the statute of limitations, and an information is properly instituted when it is filed with the court clerk. *U.S. v. Watson*, 941 F. Supp. 601, 603 (N.D.W.V. 1996) ("[W]hile a Rule 7(b) waiver is necessary to commence a formal prosecution by information, the information is nonetheless 'instituted' within the meaning of [section] 3282, and the limitations period therefore tolled, when the information is filed with the clerk of the court.").

Similar to section 3282, the statutory language of section 3298 posits that an information, not a prosecution, must be "instituted" not later than ten years after the commission of the offense. § 3298. As such, Rule 7(b) has no bearing on a statute, such as section 3298, that has little to do with proceeding with a prosecution but everything to do with governing the limitation period. Consequently, no waiver is necessary to file an information for the purpose of tolling the section 3298 limitation period, and an information is properly "instituted" when it is filed with the court clerk. *Watson*, 941 F. Supp. at 603; *see also U.S. v. Stewart*, 425 F. Supp. 2d 727, 729 (E.D. Va. 2006) (reasoning that "[f]iling a criminal information for the purposes of instituting it to toll the statute of limitations" is an entirely different procedure than "the defendant's right to

waive indictment in open court before being prosecuted on a criminal information"); *U.S. v. Hsin-Yung*, 97 F. Supp.2d 24, 28 (D.D.C. 2000) (finding that the case was "not being prosecuted by information, but rather by indictment which subsequently was returned.").

Here, the Government was not required to seek a waiver of prosecution by indictment because the statutory language of section 3298 indicates that filing an information is sufficient to "institute" the information for the purpose of tolling the appropriate statute of limitations as opposed to proceeding with a prosecution. § 3298. The Government filed the Information against Defendant with the court clerk on July 22, 2020, two days before the ten-year limitation period in section 3298 lapsed. The Court granted the Government's Motion to Dismiss the Information without prejudice on July 23, 2020, the very next day, pursuant to Federal Rule of Criminal Procedure 48(a). Therefore, the Government never intended to "dismiss the prosecution during trial without the defendant's consent" by not seeking a waiver, and "the absence of waiver . . . [does not make] the filing of [the] information a nullity" because it was filed for the purpose of tolling the statute of limitations. Fed. R. Crim. P. 48(a); *Burdix-Dana*, 149 F.3d at 742; *see also Watson*, 941 F. Supp. at 603 (holding that "the filing of the information, and not the Rule 7(b) waiver of indictment, is the event critical to tolling the applicable limitations period").

Because the Government filed the Information against Defendant with the court clerk on July 22, 2020, two days before the ten-year limitation period in section 3298 expired, the Information was properly instituted, and the statute of limitations was properly tolled pursuant to section 3288.

B. The Superseding Indictment Was Timely Returned Pursuant to 18 U.S.C. § 3288 because it Was Returned by the Grand Jury Within the Prescribed Six Months.

The law permits tolling the statute of limitations for an INA offense for a period of six months in the event that a felony charging document is dismissed, allowing for a new indictment to be returned. Section 3288 states:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by 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, . . . or, *if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened*, which new indictment shall not be barred by the statute of limitations.

§ 3288 (emphasis added).

Although section 3288 is generally applied as between original and superseding indictments, *U.S. v. Italiano*, 894 F.2d 1280 (11th Cir. 1990); *U.S. v. Charnay*, 537 F.2d 341 (9th Cir. 1976), section 3288 explicitly offers a grace period "whenever an indictment or *information* charging a felony is dismissed for any reason." § 3288 (emphasis added). Section 3288 was intended to apply "whenever the *first charging paper* was vacated for any reason whatever." *U.S. v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976) (emphasis added). As such, the law clearly permits a superseding indictment to relate back to a preceding information for statute of limitations purposes. In this case, the Indictment properly relates back to the first charging paper–the Information filed on July 22, 2020.

With respect to the timing of section 3288, "a superseding indictment brought after the statute of limitations has expired" is valid so long as the "first charging paper" was "timely" and the superseding indictment "does not broaden or substantially amend the original charges." *Italiano*, 894 F.2d at 1282; *Macklin*, 535 F.2d at 193. The Government filed the Information against Defendant on July 22, 2020, two days before the statute of limitations expired, and thus, was timely. Additionally, while the Information was filed under seal and has yet to be released to the Government or the public, there exists no claim that the Information was broadened or substantially amended. As such, the Government operates under the assumption that the Information and the Indictment are substantially similar, if not the same, thereby satisfying the rule.

Once an information has been dismissed, section 3288 allows a superseding indictment to be "returned within the prescribed six-months period where the dismissal of the first [charging paper] is due to a legal defect, as well as in those cases where the dismissal results from defects or irregularities in the grand jury." *Charnay*, 537 F.2d at 355. Pursuant to Administrative Order No. 20-019, passed on March 23, 2020, the Court suspended the Grand Jury due to COVID-19 restrictions. The Government filed the Information and was granted a dismissal without prejudice four months later. Because the Government could not proceed with prosecution by indictment during the Grand Jury's suspension, the Government filed the Information for the purpose of tolling the statute of limitations, thereby triggering section 3288 until the Grand Jury suspension was lifted on March 29, 2021 pursuant to Administrative Order No. 21-008. The Information was therefore filed and dismissed out of necessity due to the concurrent suspension of the

Grand Jury as a result of the national and global shutdown arising out of the global pandemic. Surely, the year-long suspension of the Grand Jury due to COVID-19 qualifies as a defect or irregularity–*at minimum*.

In order to comply with section 3288, the Government returned a superseding indictment "in the appropriate jurisdiction . . . within six calendar months of the date when the next regular grand jury is convened" to prevent the new indictment from being barred by the statute of limitations. § 3288. Here, the Grand Jury was not in session in July of 2020 at the time the Information was filed and dismissed, so the limitation period was tolled under the authority of section 3288 until the next regular grand jury convened on March 29, 2021. § 3288. The Government complied with section 3288 by timely returning the Indictment on September 21, 2021, eight days before the six-month grace period ended.

C. The Indictment did not Violate Defendant's Fifth Amendment Right.

The Grand Jury Clause of the Fifth Amendment provides that "[n]o 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. Rule 7(b) codified the Grand Jury Clause and provides that "an offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant . . . waives prosecution by indictment." Fed. R. Crim. P. 7(b). The Grand Jury Clause and Rule 7(b) explicitly require the prosecution to obtain a waiver from the defendant to proceed with prosecution on an information rather than an indictment. *See also U.S. v. McIntosh*, 704 F.3d 894, 904

(11th Cir. 2013) ("[A]n indictment is a necessary (unless waived) prerequisite to the prosecution of cases and must be filed prior to an arraignment. . . Simply put, the Grand Jury Clause requires that an indictment be in place before a person can be held to reply to a charge.").

Had the Government intended to proceed with prosecution on the Information, the Grand Jury Clause and Rule 7(b) would apply. However, the Government intends to proceed with prosecution on the Indictment, so neither the Grand Jury Clause nor Rule 7(b) are relevant. In fact, the Indictment was timely returned before the Initial Appearance took place on September 23, 2021. Given that the Information was properly instituted under section 3298 and the superseding Indictment was timely returned pursuant to section 3288, Defendant can be held to reply to the singular charge–a violation of section 1324(a)(1)(A)(iv) and (v)–without contravening the Grand Jury Clause or Rule 7(b).

II. THE GOVERNMENT IS ENTITLED TO THE EQUITABLE TOLLING OF THE CRIMINAL STATUTE OF LIMITATIONS.

The Supreme Court has made clear that a "nonjurisidictional federal statute of limitations is normally subject to a 'rebuttable presumption in *favor*' of equitable tolling." *Holland v. Florida*, 560 U.S. 631, 645 (2010). The doctrine of equitable tolling provides that a statute of limitations will be suspended or temporarily stopped based on principles of equity. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990). Further, a petitioner is not only permitted, but entitled to equitable tolling if the petitioner can show a diligent pursuit of their rights and that an "extraordinary circumstance stood in [their] way"

preventing timely filing. *Id.* at 649 (overruling the Court of Appeals, which narrowed the test for equitable tolling to a small list of specific circumstances). According to the Supreme Court, the rebuttable presumption can be overcome when the language of the statute is unusually emphatic or technical, or if tolling the claim would substantively affect the claim of either party. *U.S. v. Brockamp*, 519 U.S. 347, 350-52 (1997), *superseded by statutory amendment*, (reasoning that the highly detailed, descriptive and technical language of the statute specific to the underlying subject matter overcame the rebuttable presumption favoring equitable tolling); *U.S. v. Beggerly*, 524 U.S. 38, 48-49 (1998) (reasoning that the statute of limitations of twelve years was unusually generous thus precluding the application of equitable tolling).

Several federal circuit courts have determined that unless there is inducement or trickery by a defendant, the statute of limitations should only be tolled in the "rare situation where equitable tolling is demanded by sound legal principles as well as the interest of justice." *U.S. v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998) (quoting *Alvarez-Machain v. U.S.*, 96 F.3d 1246, 1251 (9th Cir. 1996)); *see also U.S. v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005) (declaring that the "unqualified limitation period of [section] 3282 reflects a balance that has already been struck" by Congress). However, the Supreme Court held that while equitable tolling should not be available in "garden variety claim[s]" of neglect or carelessness on the part of the attorneys, the doctrine is too important not to maintain flexibility in what may be considered extraordinary circumstances. *Holland*, 560 U.S. at 652 (finding extraordinary circumstances because of an attorney's egregious failure to act within professional standards of care); *see also Glus*

v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 235 (1959) (finding extraordinary circumstances when an adversary misrepresented crucial information for plaintiff's filing); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 435 (1965) (finding extraordinary circumstances when a plaintiff filed timely, but in the wrong court).

While the Supreme Court has emphasized that equitable tolling should be used sparingly and that considering each case ad hoc may contribute to unpredictability in equitable tolling, that does not negate the necessity for flexibility. *Irwin*, 498 U.S. at 98 (expanding the "same rebuttable presumption of equitable tolling applicable to suits against private defendants . . . to suits against the United States"). Nowhere is that necessity more apparent than in circumstances as those presented in this case where the Government was unable to file a timely complaint, not through any mishandling or fault of its own, but rather because of the global COVID-19 pandemic. To consider that this is not a case where equity should prevail to impose a standard on a party to control even uncontrollable circumstances in order to have their grievance heard in court.

Recently, the Department of Justice proposed legislation to Congress that would allow equitable tolling in cases of natural disasters, pandemics and other emergency situations. *See* Riley Beggin, *DOJ asks Congress for broad new powers amid Covid-19. Schumer says, "Hell no."*, Vox.com, Mar. 22, 2020; *see also* Rebecca Falconer, *DOJ emergency powers report raises ire among conservatives and liberals*, Axios.com, Mar. 22, 2020. The proposal made by the DOJ included broad changes to procedure that would allow federal judges to suspend or adjust timelines and deadlines at every level of the judicial process. *Id.* Thus, it came as no surprise that a bipartisan majority of Congress

opposed the DOJ's proposal. *Id.* The Government is not asking for such broad discretion to be granted to District Courts, but rather that this Court should follow the Supreme Court's pattern of considering each case on an ad hoc basis.

Recognizing that this case presents circumstances that–through no fault of the Government–call for the tolling of the statute of limitations in order to uphold the principles of equity, and will not give blanket permission to every future claimant to take advantage of equitable tolling–a system designed to protect the right of a plaintiff to seek relief. On the contrary, such a holding would do the opposite; by recognizing that while hard line rules and absolutes are necessary for the judicial process, courts must be able to accommodate for *extraordinary* circumstances that affect not only the judicial system, but every person, business, and branch of government.

Taken plainly, "extraordinary circumstance" clearly applies to an unprecedented global pandemic that effectively shut down the majority of the world for months at a time. In *Holland*, the "extraordinary circumstance" which permitted equitable tolling was an "attorney's failure to satisfy professional standards of care," as long as it was not of the garden variety. *Holland*, 560 U.S. at 645 (reasoning that the actions, or lack of action, taken by the attorney amounted to egregious violations of standards of care). If the Supreme Court allows equitable tolling in cases of an attorney's failure to abide by professional standards of care–even *egregious* failure–it logically follows that circumstances, which led to the dismissal of the Grand Jury for nearly a year without adequate warning, should qualify as an "extraordinary circumstance."

CONCLUSION

The Government respectfully requests that this Court deny Defendant's Motion to Dismiss the Indictment as the Indictment was timely returned pursuant to sections 3288 and 3298, or, in the alternative, that the Government is entitled to equitable tolling of the criminal statute of limitations.

Respectfully submitted,

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