IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	}	
	}	
Plaintiff.	}	
	}	
v.	}	**CRIMINAL NO. 1:20-CR-00122-RP**
	}	
PAUL KRUSE,	}	
	}	
Defendant.	}	

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS THE CASE FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE ROBERT PITMAN,
UNITED STATES DISTRICT JUDGE:

The United States properly instituted a felony criminal information against defendant PAUL KRUSE on May 1, 2020, amidst the exigent circumstances of a global pandemic that precluded safely convening a grand jury. The defendant chose not to waive prosecution by indictment, and the information therefore should now be dismissed. Pursuant to statute, the United States may seek the return of a new indictment within six months of the date of dismissal of the information, or six months from the date when the next regular grand jury is convened. 18 U.S.C. § 3288. During that time, any applicable statute of limitations will be tolled. *Id.* While the public health circumstances surrounding this matter are unusual, the law sets a straightforward course to follow.

ARGUMENT

1. A Felony Information May Lawfully Institute a Criminal Proceeding

By statute, "except as otherwise expressly provided by law, 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 years next after such offense shall have been committed." 18 U.S.C. § 3282(a). The filing of an information, even without defendant's waiver of indictment, qualifies as "institut[ing]" the information under 18 U.S.C. § 3282(a). *United States v. Burdix-Dana*, 149 F.3d 741, 742 (7th Cir. 1998). In *Burdix-Dana*, the Court reasoned that although the "absence of a valid waiver of prosecution by indictment bars the acceptance of a guilty plea or trial," it does not "mak[e] the filing of an information a nullity." *Id.*; *see also United States v. Cooper*, 956 F.2d 960, 962-963 (10th Cir. 1992) (applicable rule does not prohibit the filing of an information in the absence of waiver of indictment by defendant; instead, the rule proscribes *prosecution* without waiver). The United States is unaware of any court of appeals opinion that conflicts with the commonsense holding in *Burdix-Dana*.

Section 3282 contains no requirement that the United States must not only file an information but also obtain a defendant's waiver of indictment before the expiration of the statute of limitations. Instead, the statute requires only that the information be "instituted"—that is, "inaugurate[d]," "commence[d]," "start[ed]," or "introduce[d]." *Black's Law Dictionary* 800 (6th Ed. 1990). In a different statutory context, the Supreme Court has construed "instituted" in exactly that fashion. *Gollust v. Mendell*, 501 U.S. 115, 124 (1991). Institution requires only "commencement[.]" *Id.*

This position is consistent with courts' interpretation of Federal Rule of Criminal Procedure 7(b), which states that an information may be used to prosecute a felony case with a

valid waiver of indictment. Rule 7(b) does not "prohibit the *filing* of an information in the absence of a waiver by the defendant. Instead, the rule proscribes *prosecution* without waiver. Therefore, [an] information [can be] filed within the period of limitations, thus providing a valid basis for prosecution." *United States v. Cooper*, 956 F.2d 960, 962–63 (10th Cir. 1992).

The defendant correctly cites to Fifth Circuit cases for the proposition that an information should be dismissed where there is no valid waiver of indictment. However, those cases do not hold that a waiver is required to *institute* an information. *See United States v. Teran*, 98 F.3d 831, 835 (5th Cir. 1996) (indictment or waiver of indictment is necessary to convict defendant of a felony); *United States v. Moore*, 37 F.3d 169, 173 (5th Cir. 1994) (analyzing validity of defendants' written waivers of indictment); *United States v. Montgomery*, 628 F.2d 414, 416 (5th Cir. 1980) (analyzing whether defendant's waiver of indictment was made knowingly).

Two of the cases cited by defendant from outside the Fifth Circuit are in accord with the United States' position that a felony information validly institutes a criminal proceeding. *See United States v. Wessels*, 139 F.R.D. 607, 609 (M.D. Pa. 1991) (an information may be filed before the defendant waives his right to be prosecuted by indictment but he cannot be required to plead or be tried until such waiver has been made); *United States v. Watson*, 941 F. Supp. 601, 602-03 (N.D. W.Va. 1996) (citing to *Montgomery* for the proposition that the lack of a valid waiver of indictment goes to the jurisdiction of the court but stating that an information may be filed without a waiver). In fact, the partial quote from *Watson* cited by defendant, "[i]t is beyond peradventure that the absence of a valid waiver of prosecution by indictment is a jurisdictional defect that bars the acceptance of a guilty plea or the commencement of trial on the relevant charges," goes on to state that "[i]t does not follow from that proposition, however, that a waiverless information cannot therefore be 'instituted' within the meaning of § 3282." *Id.* at 603.

Defendant does not seem to argue in his motion that the information in this case was not properly instituted, but he does cite to one district court case that is in disagreement with the holding in *Burdix-Dana*. However, that case from the District of Massachusetts is not controlling authority, and the court in that case also acknowledged that "the few courts to have considered the question have reached the opposite conclusion." *United States v. Machado*, 2005 WL 2886213, at *8. Along those lines, the United States also brings the court's attention to *United States v. Sharma*, in which a district court in the Southern District of Texas questioned the holding in *Burdix-Dana* that a felony information can properly institute a criminal proceeding. *United States v. Sharma*, 2016 WL 2926365. However, the *Sharma* court noted two crucial distinctions: First, the court found that exigent circumstances could provide a valid basis to proceed by information. *Id.* at *3-4. Second, the court noted that the information in *Sharma* was filed under seal, keeping it hidden from the defendant and public scrutiny and thereby undermining one of the purposes of filing within the statute of limitations. *Id.* at *4.

In the instant case, the ongoing pandemic prevented a safe meeting of the grand jury and constituted a considerable exigent circumstance. Further, the United States filed the information publicly to provide defendant with notice of the charges and allegations against him. Therefore, *Sharma* is not in direct contradiction with the United States' position. As with *Machado*, it also is not controlling authority.

In sum, the statute and case law interpreting it support the United States' assertion that the government lawfully instituted an information charging the defendant here with seven felony counts.

2. The Information was Properly Filed Within the Statute of Limitations Period

An information must be instituted within five years after an offense is committed. 18 U.S.C. § 3282(a). In this case, the information filed on May 1, 2020 sets out seven counts that allege crimes committed between February 19, 2015 and April 7, 2015, as well as certain aspects of a conspiracy that appropriately reach back further than those dates. These counts are all within the statute of limitations. First, the defendant signed a one-month tolling agreement with the United States dated January 21, 2020. (Exhibit #1). The tolling agreement alone means that counts 1 and 6-7 of the information are within the statute of limitations. Further, the Chief Judge for the Western District of Texas subsequently issued an order tolling all deadlines, including all statutes of limitations, beginning on March 16, 2020. *Additional Order Regarding Grand Jury Proceedings Under the Exigent Circumstances Created by the COVID-19 Pandemic* (March 16, 2020) available at https://www.txwd.uscourts.gov/wp-content/uploads/2020/03/ORDER-re-Grand-Jury-Proceedings-031620.pdf. The Chief Judge subsequently extended the tolling of statutes of limitations through supplemental orders which remain in place through June 30, 2020. *Supplemental Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic* (April 15, 2020) available at https://www.txwd.uscourts.gov/wp-content/uploads/2020/03/SupplementalOrderCOVID19-041520.pdf; *Supplemental Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic* (May 8, 2020) available at https://www.txwd.uscourts.gov/wp-content/uploads/2020/03/SupplementalOrderCOVID19%20050820.pdf. The Chief Judge's orders means that counts 2-5 of the information also fall within the statute of limitations.

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