

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO.: 1:20-cr-24

WANDA V. MAXIMOFF,
a/k/a “Scarlet”

Defendant.

DEFENDANT’S BRIEF IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

Front Cover Page	i
Table of Contents	ii
Table of Authorities	iv
Introduction and Prayer for Relief	5
Question Presented	8
Statement of Facts	9
Argument	11
A. The Government failed to file a timely indictment and failed to comply with the purpose and requirements of 18 U.S.C. § 3288, and thus the Government is not entitled to the six-month grace period prescribed by the statute.	13
1. The Government failed to meet the textual requirements of 18 U.S.C. §3288.	15
2. Government's attempted use of §3288 does not align with the statute's intended purpose but instead rises to the level of abuse of the statute and prosecutorial harassment.	19
a. The legislative intent behind 18 U.S.C. §3288 is to allow the Government a grace period to amend a curable breach.....	20
b. The Government's use of §3288 is solely based on strategy and rises to the level of abuse and prosecutorial misconduct.....	22
3. The Government failed to file filed instituted information within the meaning of 18 U.S.C 3298, and the Government failed to comply with the Federal Rules of Criminal Procedure 7.	24
a. The Government's filing of unconsented information was not instituted within the meaning of 18 U.S.C. §3298 when the Government filed it with the Clerk of Court.....	27
b. Even if the court finds that the information was properly instituted, the Government failed to comply with Federal Rule of Criminal Procedure 7(b). Thus, the information is null and void.....	27
B. This Court should grant Ms. Maximoff's motion to dismiss because the criminal statute of limitations bars the Government's charge. Therefore, the Government cannot establish that it is entitled to equitable tolling.	36
1. The Government cannot establish that it has been pursuing its rights diligently and therefore is not entitled to equitable tolling.	38

2. The Government cannot establish extraordinary circumstances stood in their way in pursuing this case, and therefore they are not entitled to equitable tolling.....41

Conclusion.....24
Certificate of Service/Signature Block.....26

TABLE OF AUTHORITIES

Cases

Amma Adu Gyamfi v. Whitaker, 913 F.3d 168 (1st Cir. 2019).....22
Davis v. United States, 2013 U.S. Dist. LEXIS 109335 (D.S.C. 2013).22
Holland v. Florida, 560 U.S. 631 (2010).....19
Jihad v. Hyass, 267 F.3d 803 (8th Cir. 2001).22
Mottahedeh v. United States, 794 F.3d 347 (2d Cir. 2015).6, 18
Rinaldi v. United States, 434 U.S. 29 (1977).....13
Robertson v. Simpson, 624 F.3d 781 (6th Cir. 2020).....18
Smith v. Davis, 953 F.3d 582 (9th Cir. 2020)19
Taylor v. United States, 2021 U.S. Dist. LEXIS 58150 (E.D. Mo. 2021).....22
Thompson v. Hendrickson USA, LLC., 2021 U.S. Dist. Lexis 41697 (M.D. Tenn. 2021).18
Toussie v. United States, 397 U.S. 112 (1970).14, 21
United States v. Atiyeh, 402 F.3d 354 (3d Cir. 2005).....19

United States v. B.G.G., CASE NO. 20-80063-CR-MIDDLEBROOKS (S.D. Fla. January 11, 2021).14, 21

United States v. Burdix-Dana, 149 F.3d 743 (7th Cir. 1998).....15, 16

United States v. Clawson, 104 F.3d 250 (9th Cir. 1996)12, 13

United States v. Livecchi, 711 F.3d 345 (2d Cir. 2013).....18

United States v. Machado, No. CRIM.A.04-10232-RWZ, 2005 WL 2886213 (D. Mass. Nov. 3, 2005).16

United States v. Salinas, 694 F.2d 351 (5th Cir. 1982)14

United States v. Shipsey, 363 F.3d 971 (9th Cir. 2004).....13

United States v. Western Titanium, Inc., 2010 U.S. Dist. LEXIS 65786 (S.D. Cal. 2010)21

INTRODUCTION AND REQUEST FOR RELIEF

In the case before the Court today, the Government seeks to use procedural loopholes and an equitable remedy to circumvent Ms. Maximoff's constitutional rights.

A. The Government is not entitled to the six-month grace period proscribed in 18 U.S.C. § 3288.

The Government is seeking to utilize 18 U.S.C. § 3288 as a procedural loophole to grant the Government an additional sixth-month grace period to bring an indictment against Ms. Maximoff outside of the 10-year statute of limitations proscribed by 18 U.S.C. § 3289. However, the Government's procedural argument contains three distinct issues.

First, the Government fails to meet the textual requirements of 18 U.S.C. § 3288 because the court dismissed charges against Ms. Maximoff within the statute of limitations rather than outside of the statute of limitations.

Second, even if the Government returned a timely indictment, the Government's attempted use of § 3288 fails to align with the statute's legislative intent. Instead, the Government's attempted use arises to the level of prosecutorial harassment.

Third, the Government failed to institute the information within the meaning of § 3298, and the Government failed to comply with the Federal Rules of Criminal Procedure 7(b).

B. The Government is not entitled to equitable tolling because (1) it cannot establish that it has pursued its rights diligently and (2) the extraordinary circumstances of COVID-19 did not stand in their way in pursuing this case.

A party seeking to establish equitable tolling bears the burden of satisfying two elements: (1) that it has been pursuing its rights diligently, and (2) that some extraordinary circumstance stood in its way from pursuing its case. *Mottahedeh v. United States*, 794 F.3d 347, 352 (2d Cir. 2015). Here, the Government did not pursue its rights diligently before, during, and after the extraordinary circumstances occurred. The Government left this case until the last minute and did not obtain Special Agent Jimmy Woo's Affidavit until two days before the expiration of the statute of limitations. During the grand jury suspension, the Government did not pursue any other available alternatives, such as a waiver of the indictment from Defendant. Furthermore, once the grand jury suspension was lifted, the Government waited five months and twenty-eight days to file their indictment. Assuming they did not work on the case at any time during the grand jury suspension, an action that provided them with an extra one month and twenty days that they ordinarily would not have had.

Furthermore, the asserted extraordinary circumstances did not prevent the Government from diligently pursuing their case. At most, the only form of equitable tolling the Government might have a remedy in is three months to account for the period between the suspension of the grand jury and the expiration of the statute of

limitations. However, had the grand jury suspension not occurred and had the Government waited five months and twenty-eight days from March 23, 2020, to file, they would not have been able to comply with the statute of limitations July 24, 2020, deadline. The Government is also unable to point to any newly-discovered facts which it could not have previously discovered through the exercise of due diligence due to COVID-19 during the three months between the grand jury suspension and the expiration of the statute of limitations. The Government cannot show that COVID-19 prevented them from taking other actions available to them, such as seeking a waiver of the indictment from Ms. Maximoff. Therefore, because the Government cannot establish (1) that it diligently pursued its rights and (2) extraordinary circumstances prevented them from pursuing their case, they are not entitled to equitable tolling.

C. Prayer for Relief

Thus, for the reasons stated above, we request that the court dismiss the indictment against Ms. Maximoff.

QUESTIONS PRESENTED

- A.** Under 18 U.S.C. §§ 3288 and 3289, does the Government return a timely indictment that can move forward when the Government returns the indictment within six months of the expiration of the statute of limitations?
- B.** Under the current global state of the COVID-19 pandemic, is the Government entitled to any equitable tolling of a criminal statute of limitations when the statute of limitations has expired due to COVID-19's effects on the court system, or does equitable tolling violate the defendant's constitutional right to due process?

STATEMENT OF FACTS

A. The Indictment

This matter arises from an indictment filed by the United States Government in the District of Stetson, Westview Division, on September 21, 2021, against Wanda V. Maximoff (Ms. Maximoff). (Indictment). Ms. Maximoff was arrested and appeared at an initial appearance on September 23, 2021. (Initial Appearance, line 29). The sole charge on the Indictment alleges that between May 31, 2007, and July 24, 2010, Ms. Maximoff conspired to encourage and induced aliens to continue residing in the United States knowing that such residence would violate the law and for the purpose of commercial advantage or financial gain, in violation of 8 U.S.C. §1324 (a) (1) (A) (iv) and (v). (Initial Appearance, line 29).

B. The Court should dismiss the Indictment because the statute of limitations has expired.

At the initial appearance hearing, the defense moved to dismiss the indictment on its face because the Government returned the Indictment in violation of the statute of limitations. (Initial Appearance, line 44). 18 U.S.C. §3298 requires that for an I.N.A. offense, “the Indictment is found, or the information is instituted not later than ten years after the commission of the offense.” (Initial Appearance, line 47). The defense argued that the statute of limitations for the alleged conspiracy cited in the Indictment against Ms. Maximoff expired on July 24, 2020.

C. The Government contends that it is entitled to an extension of the statute of limitations under 18 U.S.C. §§ 3288 and 3298, or in the alternative an equitable tolling.

The Government contends that the United States filed materially identical information, under seal, against Ms. Maximoff on July 22, 2020. (Initial Appearance, line 58). As a result, the Government claimed it would produce an order that Judge Bradley signed dismissing the Information without prejudice. (Initial Appearance, line 56). The Government further contends that it was forced to file the Information last summer after the Court, in Administrative Order No. 20-19, suspended the grand jury because of COVID 19 as of March 23, 2020. (Initial Appearance, line 62). The Government stated that when the Court lifted the suspension on March 29, 2021, in Administrative Order No. 21-008, it sought an indictment within six months to comply with 18 U.S.C. § 3288. (Initial Appearance, line 65). The Government also argued that if the Court disagrees with the application of 18 U.S.C. § 3288, the Government argues for equitable tolling of the statute of limitations due to the global pandemic of COVID-19. (Initial Appearance, line 67).

D. The Government failed to return a timely indictment under §§ 3288 and 3298, and the Government is not entitled to the use of equitable tolling of the statute of limitations.

The Government is not entitled to the use of 18 U.S.C. § 3288 because Ms. Maximoff did not waive her right to an Indictment under Federal Rule of Criminal Procedure (FRCP) 7, namely because she never knew that she was under

investigation for a federal crime until her arrest. (Initial Appearance, line 73). Therefore, the July information filed by the Government was always null and void. (Initial Appearance, line 75). Additionally, equitable tolling will not rescue a federal indictment filed after the statute of limitations has lapsed. (Initial Appearance, line 76).

ARGUMENT

A. The Government failed to file a timely indictment and failed to comply with the purpose and requirements of 18 U.S.C. § 3288, and thus the Government is not entitled to the six-month grace period prescribed by the statute.

1. The Government failed to meet the textual requirements of 18 U.S.C. §3288.

18 U.S.C. § 3288 provides a situation in which information or an indictment charging a felony conviction is dismissed *after* the prescribed applicable statute of limitations has expired. In this situation, §3288 allows the Government a six-month grace period to bring a new indictment. 18 U.S.C. §3288 (1948). However, §3288 only applies in a situation in which information or an indictment charging a felony conviction is dismissed *after* the prescribed applicable statute of limitations has expired.

Here, the Government filed information relating to Wanda Ms. Maximoff (Ms. Maximoff) on July 22, 2020, and proceeded to have the information dismissed without prejudice on July 23, 2020. However, the statute of limitations on Ms.

Maximoff's crimes did not expire until July 24, 2020. Therefore, the Government dismissed Ms. Maximoff's information within the prescribed statute of limitations, and thus, the Government is not entitled to the six-month grace period prescribed in §3288.

2. The Government's attempted use of §3288 does not align with the statute's intended purpose but instead rises to the level of abuse of the statute and prosecutorial harassment.

18 U.S.C. §3288 is a statute that allows the Government to extend a statute of limitation to continue the prosecution of an accused that would have otherwise been dismissed due to a procedural defect. However, the Government's attempted use of §3288 fails to align with the statute's legislative purpose and instead rises to the level of abuse of §3288.

a. The legislative intent behind 18 U.S.C. §3288 is to allow the Government a grace period to amend a curable breach.

In *United States v. Clawson*, the court dismissed the indictment because it failed to allege an overt act within the statute of limitations period. *United States v. Clawson*, 104 F.3d 250 (9th Cir. 1996). The Government promptly obtained a superseding indictment to correct the error, but the statute of limitations had run by then. *Id.* The Ninth Circuit held that the Government was entitled to a six-month grace period because the Government initially complied with the statute of limitations. *Id.* The failure to allege an overt act was a curable breach. *Id.*

Moreover, in *United States v. Shipsey*, the defendant moved to dismiss the indictment due to the Government's failure to comply with the Speedy Trial Act. *United States v. Shipsey*, 363 F.3d 971 (9th Cir. 2004). The court held that this was a defect capable of being cured. In its analysis, the *Shipsey* court dove further into the text of §3288 findings that read in its entirety, the last sentence cuts off the six-month grace period only where the defect is not capable of being cured. *Shipsey*, 363 F.3d 971 (9th Cir. 2004). In essence, the savings clause merely allows the Government to do what it had a right to do in the first place.

Here, unlike in *Clawson* and *Shipsey*, there is no defect in the information that the Government filed. Therefore, there is nothing for the Government to cure through its use of §3288. Instead, the Government seeks to use §3288 in such a way that constitutes prosecutorial misconduct.

b. The Government's use of §3288 is solely based on strategy and rises to the level of abuse and prosecutorial misconduct.

The Government strategically filed the information against Ms. Maximoff. In light of the Grand Jury suspension due to the COVID-19 pandemic, the Government used the Order to Dismiss to protect against the running of the statute of limitations.

The Government's desired course of conduct falls within the definition of prosecutorial harassment, which the Supreme Court defined as the Government seeking to charge, dismiss, and recharge an accused *Rinaldi v. United States*, 434 U.S. 29 (1977). The 5th Circuit described prosecutorial harassment as charging,

dismissing, and recharging the accused at a different time or place deemed more favorable to the prosecution. *United States v. Salinas*, 693 F.2d 351 (5th Cir. 1982). Here, the Government's sole motivation behind filing the information against Ms. Maximoff was to preserve the ability to proceed with criminal charges against Ms. Maximoff in the future. The Government filed Information against Ms. Maximoff on July 22, 2020, and proceeded to dismiss the information, without prejudice, just twenty-four hours later (Initial Appearance, line 58). The Government filed the information and moved to dismiss all within a twenty-four-hour period simply to toll the statute of limitations and recharge Ms. Maximoff at a later time that was more favorable to the prosecution.

Moreover, from a policy standpoint, allowing the Government to seek a dismissal of information solely to safeguard its ability to charge the defendant at a later date would not serve the substantial public interest of upholding statutory and constitutional provisions. *United States v. B.G.G.*, No. 20-80063-CR-MIDDLEBROOKS (S.D. Fla. January 11, 2021) (Order of Dismissal). Allowing the Government to seek a dismissal of information solely to safeguard its ability to charge the defendant later would diminish the essential purpose of a statute of limitations. In *Toussie v. United States*, the Supreme Court said that the purpose of the statute of limitations is to “limit exposure to criminal prosecution to a certain fixed period following the occurrence of those acts.” *Toussie v. United States*, 397

U.S. 112, 115 (1970). A criminal statute of limitations would serve no purpose if the Government could merely extend the stated limitation whenever desired simply by filing a charge not ready for prosecution.

3. The Government failed to file filed instituted information within the meaning of 18 U.S.C 3298, and the Government failed to comply with the Federal Rules of Criminal Procedure 7.

The Fifth Amendment to the United States Constitution awards defendants' crucial criminal procedure rights. Thus, the courts must strive to protect a defendant's constitutional rights from the Government's ulterior motives because the defendant is in a significantly weaker position.

a. The Government's filing of unconsented information was not instituted within the meaning of 18 U.S.C. §3298 when the Government filed it with the Clerk of Court.

The Supreme Court has yet to hand down any controlling law, and the Circuits have sparsely litigated the issue of construing the meaning of § 3289's "information is instituted." However, the 7th Circuit has found that the filling of information, even absent a waiver of indictment, is sufficient to institute information within the meaning of 18 U.S.C. § 3282. *United States v. Burdix-Dana*, 149 F.3d 743 (7th Cir. 1998). § 3282 is nearly identical to section § 3298 in language, with the only difference being §3282 provides the rule for non-capital related offenses and provides for a five-year statute of limitations. In contrast, § 3298 provides the rule for trafficking-related offenses and provides for a ten-year statute of limitations.

Thus, in *Burdix-Dana*, the court reasoned that filed information, even absent a waiver, could not be used to prosecute, but it could be used to toll the statute of limitations. *Id.* at 742.

Despite the 7th Circuit's ruling, we ask the court to adopt an alternative view on the use of "instituted information" circulating in the district courts. In *United States v. Machado*, Judge Zobel took an opposite stance in comparison to the 7th Circuit. Judge Zobel reasoned that a court in possession of information but not in control of a waiver of indictment lacks subject matter jurisdiction over the case, thus rendering the information meaningless. *United States v. Machado*, No. CRIM.A.04-10232-RWZ, 2005 WL 2886213 (D. Mass. Nov. 3, 2005). Moreover, Judge Zobel continued by stating that it defies logic and reason that the court may accept information without a waiver for the purpose of applying the statute of limitations when the same document is meaningless for subject matter jurisdiction and prosecution. *Id.*

Here, should this Court follow the 7th Circuit's holding, the court would allow the Government's requested dismissal without prejudice to toll the already-expired, ten-year statute of limitations period even though the same information is invalid for prosecution. Thus, the logical answer is for the court to hold that the Government did not correctly "institute information" on July 22, 2020, because the Government

failed to file information accompanied by a waiver before the limitations period expiration.

b. Even if the court finds that the information was properly instituted, the Government failed to comply with Federal Rule of Criminal Procedure 7(b). Thus the information is null and void.

Federal Rule of Criminal Procedure 7(a) gives effect to the Fifth Amendment by requiring that felonies, defined as offenses punishable by death or imprisonment of more than one year, "be prosecuted by an indictment." Fed. R. Crim. P. 7(a). However, the exception to this Rule is subdivision 7(b), which allows for a non-capital felony offense "to be prosecuted by information if the defendant – in open court and after being advised of the nature of the charge and the defendant's rights – waives prosecution by indictment." Fed. R. Crim. P. 7(b).

Here, the Government moved for the indictment based solely on the information filed against Ms. Maximoff on July 22, 2020. However, information may only be used when the Government has obtained a waiver of the indictment from the defendant. Ms. Maximoff did not waive her right to an indictment under Federal Rule of Criminal Procedure 7 because she never knew she was under investigation for a federal crime until the morning of her arrest. (Initial Appearance, line 71). Thus, the information filed on July 22, 2020, was null and void because the Government failed to afford Ms. Maximoff her procedural right to waive the indictment.

B. This Court should grant Ms. Maximoff's motion to dismiss because the criminal statute of limitations bars the Government's charge. Therefore, the Government cannot establish that it is entitled to equitable tolling.

A statute of limitations period refers to the length of time in which an action can be commenced. *Thompson v. Hendrickson USA, LLC*, 2021 U.S. Dist. LEXIS 41697 (M.D. Tenn. 2021). "Limitations refers to the legal doctrine whereby a plaintiff is barred from bringing a claim based upon the lapse of the applicable limitations period." *Id.* In asserting a statute of limitations argument, the defendant bears the burden of proof because it is an affirmative defense. *United States v. Livecchi*, 711F.3d 345, 352 (2d Cir. 2013). However, "[t]he party seeking equitable tolling bears the burden of proving he is entitled to it." *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). A party seeking equitable tolling "bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Mottahedeh v. United States*, 794 F.3d 347, 352 (2d Cir. 2015). The Government cannot establish that (1) it has been pursuing its rights diligently or (2) that some extraordinary circumstances stood in its way. Because the Government cannot establish those two elements, it does not carry its burden of proof, and therefore the Government is not entitled to equitable tolling.

1. The Government cannot establish that it has been pursuing its rights diligently and therefore is not entitled to equitable tolling.

For the Government to demonstrate it has been pursuing its rights diligently and satisfy the first element required for equitable tolling, "...[it] must show that [they] have been reasonably diligent in pursuing [its] rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim in federal court." *Smith v. Davis*, 953 F.3d 582, 598-99 (9th Cir. 2020) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). The party seeking equitable tolling must also actively pursue his rights when free from extraordinary circumstances. *Id.*

On March 23, 2020, this Court suspended the grand jury because of the COVID-19 pandemic, just four months before the statute of limitations expired. (Initial Appearance, line 62). Almost fourteen months passed from the expiration of the statute of limitations on July 24, 2020, until the Government filed for indictment on September 21, 2021. Section 3298 Title 18 of the United States Code requires that for an INA offense, "the Indictment is found or the information is instituted not later than ten years after the commission of the offense." 18 U.S.C. § 3298. September 21, 2021, the filing date was well past the expiration of the statute of limitations. *See United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005) (stating that the Third Circuit "has never applied equitable tolling to rescue a Government indictment filed after the statute of limitations has lapsed..." and would not do so in

the future). These extra fourteen months allowed the Government to gather further evidence to build their case. The Government did not even acquire testimony from Special Agent Jimmy Woo until July 22, 2020. (Aff. 9). This was just two days before the statute of limitations expired. Had the Government had a case for indictment within the statute of limitations, they would not have waited five months and twenty-eight days after the lift of the grand jury suspension on March 29, 2021, to file for indictment on September 21, 2021. The Government's delay in the filing shows that not only did they not reasonably pursue their rights during the grand jury suspension, but they also did not reasonably pursue their rights after the suspension.

Assuming that the Government did not use any time during the grand jury shutdown to work on the case and obtain evidence against Ms. Maximoff, they still used an extra one month and twenty days that they would not have ordinarily had. This is because the difference between the time the grand jury suspension and the Statute of limitations date was just four months and one day, while the difference in time between the suspension lift of the grand jury and the filing of the indictment was five months and twenty-eight days. If the Government's request for equitable tolling is granted, it will erode the fundamental purpose of the statute of limitations, "the purpose of a statute of limitations is to limit exposure to criminal prosecution and to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time." *United States v.*

Western Titanium, Inc., 2010 U.S. Dist. LEXIS 65786 *9 (S.D. Cal. 2010) (citing *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)). The purpose of a criminal statute of limitations could not be served if the Government could just extend the limitations whenever so doing would serve the Government's interest. *United States v. B.G.G.*, CASE NO. 20-80063-CR-MIDDLEBROOKS *1, *6 (S.D. Fla. January 11, 2021). This means that even if the criminal charge against Ms. Maximoff had merit, that would not be a factor the court would consider in favor of equitable tolling. Here, after ten years, the Government has extended Ms. Maximoff's exposure to criminal prosecution by thirteen months and twenty-eight days. This extended exposure shows that the Government did not act reasonably diligently in pursuing this case. Had they had legitimate evidence to indict Ms. Maximoff, they would have done it as soon as the Court lifted the suspension on the grand jury. Therefore, because the Government cannot establish that it had been reasonably diligent in pursuing its potential ability to prosecute Ms. Maximoff, they are not entitled to equitable tolling.

2. The Government cannot establish extraordinary circumstances stood in their way in pursuing this case, and therefore they are not entitled to equitable tolling

While the COVID-19 pandemic has been a novel situation that not only the courts but the whole world has had to deal with, District Courts throughout the United States have stated, "[t]he COVID-19 pandemic does not automatically

warrant equitable tolling..." *Taylor v. United States*, 2021 U.S. Dist. LEXIS 58150, *7 (E.D. Mo. 2021). "Application of equitable tolling 'must be guarded and infrequent.'" *Taylor*, 2021 U.S. Dist. Lexis 58150 at *4 (quoting *Jihad v. Hvass*, 267 F.3d 803, 804 (8th Cir. 2001)). Statutory deadlines are extended by equitable tolling in extraordinary circumstances for parties who were prevented from complying with statutory limitations through no fault or lack of diligence of their own. *Amma Adu Gyamfi v. Whitaker*, 913 F.3d 168, 174 (1st Cir. 2019).

Although the grand jury was suspended on March 23, 2020, due to COVID-19, when the suspension was lifted, the Government did not file their indictment charges until five months and twenty-eight days later on September 21, 2021. At most, the only form of equitable tolling the Government might have a remedy in is three months to account for the period between the suspension of the grand jury and the expiration of the statute of limitations. However, had the grand jury suspension not occurred and had the Government waited five months and twenty-eight days from March 23, 2020, to file, they would not have been able to comply with the statute of limitations July 24, 2020, deadline. The Government does not point to any newly-discovered facts which it could not have previously discovered through the exercise of due diligence due to COVID-19 during the three months between the grand jury suspension and the expiration of the statute of limitations. *See Davis v. United States*, 2013 U.S. Dist. LEXIS 109335, *19 (D.S.C. 2013) (finding it

pertinent that the petitioner did not offer any evidence to show any extraordinary circumstances that prevent him from filing a timely motion). The Government fails to point to any newly-discovered facts which it could not have previously discovered through the exercise of due diligence due to COVID-19. Therefore, there is no reason that it should not have been able to file the indictment charge as soon as the Grand Jury suspension was lifted.

The Government has not shown that the COVID-19 pandemic prevented them from taking other actions available to them, such as seeking a waiver of the indictment from Ms. Maximoff. Federal Rule of Criminal Procedure 7(b) provides that, "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 the defendant's rights—waives prosecution by indictment." Fed. R. Crim. P. 7(b). Although the Government is not required to request a waiver from the defendant, a waiver request was a course of action that would not have been affected by COVID-19 and would have complied with the statute of limitations. Even if the Government thought that Ms. Maximoff would have rejected the waiver, a waiver request would have shown that they were acting reasonably diligently. Furthermore, it would also be a factor in showing that the Government was ready to prosecute and could have complied with the statute of limitations. Instead, the Government's inaction seems to imply that they needed more

time because they did not have a case ready and that COVID-19 was available as a device to justify an extension of time.

Although the Government filed the Information on July 22, 2020, this filing was insufficient because, under Rule 7(b) of the Federal Rules of Criminal Procedure, for Information to be sufficiently filed, Ms. Maximoff was required to be presented the information and advised of the nature of the charge and her rights and then waive her right to an indictment. However, Ms. Maximoff never knew she was under investigation for a federal crime until her arrest on September 23, 2021, more than a year after the statute of limitations expired. Therefore, she could never have been advised of the nature of the charge or her rights and, as a result, could not have waived her Fifth Amendment right to an indictment. Therefore, because the Government cannot establish that extraordinary circumstances stood in their way in diligently pursuing this case, they are not entitled to equitable relief.

CONCLUSION WITH PRAYER FOR RELIEF

Government is not entitled to the six-month grace period proscribed in 18 U.S.C. § 3288 nor is it entitled to equitable tolling. The Government is not entitled to the six-month grace period because (1) it fails to meet the textual requirements of 18 U.S.C. § 3288, (2) even if it returned a timely indictment, its attempted use of § 3288 fails to align with the statute's legislative intent, and (3) it failed to institute the information within the meaning of § 3298 or comply with Federal Rules of

Criminal Procedure 7(b). The Government is not entitled to equitable tooling because (1) it cannot establish that it has pursued its rights diligently and (2) the extraordinary circumstances of COVID-19 did not stand in their way in pursuing this case. Therefore, because the Government is not entitled to equitable tolling or the proscribed six-month grace period in 18 U.S.C. § 3288, the Court should dismiss the charge against Ms. Maximoff.

Respectfully Submitted,

/s/ 107

107

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served via hand-delivery on all attorneys of record on this the 30th day of August, 2021:

/s 107
107