UNITED STATES DISTRICT COURT
STETSON DISTRICT OF FLORIDA
WESTVIEW DIVISION

Case No. 1:21-cr-36

UNITED STATES OF AMERICA,

v.

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

Defendant.

MOVANT'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

/s/ 109
Attorneys for the Defendant

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INTRODUCTION

This Court should grant Ms. Maximoff's Motion to Dismiss the Indictment against her because the Indictment fails to comply with the statute of limitations. The Government filed an indictment against Ms. Maximoff more than one year after the ten-year statute of limitations lapsed due to the Government's failure to investigate in a diligent and timely manner.

The Fifth Amendment to the United States Constitution requires the government to obtain an indictment from a grand jury before commencing a prosecution, unless the defendant waives their right to an indictment under Federal Rule 7 of Criminal Procedure. Accordingly, the Government's Information ("July 2020 Information") was null and void because Ms. Maximoff never waived her right to an indictment. Congress never intended for an invalid information to substitute a defendant's right to an indictment. Accordingly, when the Government moved to dismiss the July 2020 Information, the Court should have dismissed the matter with prejudice.

The Government's argument that the statute of limitations should be tolled against Ms. Maximoff is equally meritless. Criminal statutes of limitations are intended to serve as an absolute bar to prosecution once lapsed, unless a congressionally created exception applies. Even if this Court decides that equitable tolling is available in this matter, the Government is unable to satisfy the requirements of equitable tolling. While investigating Ms. Maximoff, the Government failed to exercise reasonable diligence and is attempting to use the COVID-19 pandemic as an excuse to accommodate for their neglect to conduct a timely investigation.

STATEMENT OF FACTS

An unacceptable investigation. On the evening of May 3, 2018, Special Agent Jimmy Woo ("Agent Woo") received a phone call from Sergeant Stanley Nielson ("Sergeant Nielson") informing Agent Woo that Sergeant Nielson suspected someone unlawfully assisted an alien in obtaining a driver's license. (Special Agent Woo Decl. 2.) The next day, Agent Woo began to investigate the activity. (Special Agent Woo Decl. 3–5.) Subsequently, Agent Woo was appointed to a new case, so he tabled the investigation from August 15, 2018, to February 14, 2019. (Special Agent Woo Decl. 5.) After the six-month tabling period, Agent Woo believed that Wanda Maximoff violated 8 U.S.C. § 1324(a)(1)(A)(iv) and (v). (Special Agent Woo Decl. 8.)

An unconsented information. Nearly two years after the investigation, the Government filed the waiverless July 2020 Information, four days before the applicable limitations lapse and without Ms. Maximoff's consent. (Initial Appearance Tr. 4.) Administrative Order No. 20-19, suspended the grand jury in the District of Stetson on March 23, 2020. (Initial Appearance Tr. 4.) The suspension was lifted on March 24, 2021, under Administrative Order No. 20-19. (Initial Appearance Tr. 4.) Then, the Government moved to dismiss the July 2020 Information under the Federal Rules of Criminal Procedure. *See* (Order Granting Mot. for Voluntary Dismissal of Information 1.)

An untimely indictment. The Government filed an Indictment that was returned by the grand jury on September 21, 2021—six months after the dismissal of the July 2020 Information and over a year after the expiration of the applicable statute of limitations. *See* (Indictment 3.)

An unanticipated arrest. On September 23, 2021, around 10:45 a.m., Agent Woo of the Department of Homeland Security unexpectedly arrived to arrest Ms. Maximoff at her permanent residence, though she never knew an investigation took place. (Supplemental Decl. of Agent Woo 1.) Initial appearances were entered on September 23, 2021, at approximately 2:00 p.m. (*See* Initial Appearance Tr. 4.)

ARGUMENT

I. The Indictment was untimely because the Government filed it more than ten years after the commission of the alleged offense.

The Fifth Amendment to the United States Constitution protects defendants from prosecution unless indicted by a grand jury. U.S. CONST. amend. V. Later, Federal Rule of Criminal Procedure 7(a) codified this protection by requiring an indictment to prosecute a felony. Fed. R. Crim. P. 7(a). The only exception to this rule is Federal Rule of Criminal Procedure 7(b), which allows for prosecution by information "if the defendant in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment." Fed. R. Crim. P. 7(b).

A. The July 2020 Information is null and void because Ms. Maximoff did not waive her rights protected by Federal Rule of Criminal Procedure 7(b).

In *United States v. Rosecan*, the government and Dr. Rosecan signed an agreement to toll the applicable statute of limitations—extending the expiration date by three months. No. 20-CR-80052, 2021 WL 1026070, at *1 (S.D. Fla. Mar. 17, 2021) (facing and appeal filed April 1, 2021). Seven months after the extension, the government filed an information without a waiver, and Dr. Rosecan moved to dismiss the charges. *Id.* Following Dr. Rosecan's motion, the government issued an indictment. *Id.* The court agreed that a

waiverless information must not proceed as a prosecution under Federal Rule of Criminal Procedure 7(b) but may instead be instituted to toll the statute of limitations. *Id.* at *3.

1. The Information was not accompanied by a waiver of rights because Ms. Maximoff was unaware she was under investigation at the time of filing.

The July 2020 Information is null and void because Ms. Maximoff did not execute a waiver or consent to prosecution by information before the Government filed the Information, as required by 7(b). Fed. R. Crim. P. 7(b); (Initial Appearance Tr. 5–6.) Specifically, Ms. Maximoff was not informed of the Government's charge against her until officers arrived unexpectedly at her residence. (Initial Appearance Tr. 5–6.); *cf Rosecan*, 2021 WL at 1026070, at *1; *see also United States v. Burdix-Dana*, 149 F.3d 741, 743 n.3 (7th Cir. 1998) ("Burdix–Dana did have notice of the charges pending against her."). Thus, the defective July 2020 Information is insufficient to initiate the prosecution and does not meet the necessary requirements of 18 U.S.C. § 3298. Fed. R. Crim. P. 7(b).

2. The court lacked subject matter jurisdiction over the Government's July 2020 Information.

An information without a waiver is "virtually meaningless." *United States v. Wessels*, 139 F.R.D. 607, 609 (M.D.Pa. 1991). Accordingly, a district court without either an indictment or a waiverless information lacks jurisdiction over the charged offense. *See Id.* at 609. For instance, in *United States v. Machado*, Judge Zobel concluded that the court did not have subject matter jurisdiction because the court was not in possession of a waiver of indictment. No. CRIM.A.04-10232-RWZ, 2005 WL 2886213 at *2 (D. Mass. Nov. 3, 2005). The *Machado* court further noted that "[t]he jurisdictional nature of the waiver is grounded in the Fifth Amendment, which requires the government to prosecute felonies by

indictment." *Id.* It follows that this Court did not have subject matter jurisdiction over the July 2020 Information. *Id.*; *See Wessels*, 139 F.R.D. at 609.

B. The Government instituted the prosecution by filing the July 2020 Information.

Title 18, § 3298 of the United States Code provides the statute of limitations for non-capital federal crimes under the Immigration and Nationality Act. 18 U.S.C. § 3298. This section reads as follows: "No person shall be prosecuted, tried, or punished for any non-capital offense or conspiracy to commit a non-capital offense . . . unless the indictment is found or *the information is instituted* not later than [ten] years after the commission of the offense." *Id.* (emphasis added). Accordingly,

> a new indictment may be returned . . . 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 jury is convened, which new indictment shall not be barred by any statute of limitations.

18 U.S.C. § 3288. No controlling case law explicitly defines the meaning of 18 U.S.C. § 3298's phrase: "information is instituted." Nevertheless, the Supreme Court considered the term "institute" and held that the government must be able to prosecute the alleged defendant in order "to institute" a criminal complaint. *See Burdix-Dana*, 149 F.3d at 742, n.1, (citing *Jaben v. United States*, 381 U.S. 214 (1965)). Instead of following the Supreme Court's holding, the Seventh Circuit proposed and applied a two-part inquiry to analyze this issue in a seemingly identical statute: (1) whether the government may "institute" an information; and if so, (2) whether the dismissal of the information and subsequent filing

of the indictment after the limitations period expired satisfy the statute of limitations. *Id.* at 742. Because there is no controlling case law, Judge Middlebrooks of the United States District Court of the Southern District of Florida conducted a thorough analysis of the nearly identical statute's legislative history. *See United States v. B.G.G.*, Case No. 20-80063-CR-Middlebrooks [ECF No. 35-1].

In *Burdix-Dana*, the government filed an information without a waiver approximately four days prior to the expiration of the statute of limitations. 149 F.3d at 742. The government filed an indictment for the same charge two weeks later. *Id.* In response, the defendant moved to dismiss the untimely indictment, and the court chose to deny the motion. *Id.* The defendant appealed the denial to the Seventh Circuit, which held that a waiverless information is not null and may be filed to toll the statute of limitations in accordance with 18 U.S.C. § 3282. *Id.* Though the Seventh Circuit held that the government could institute the information to toll the statute of limitations, they conceded that there were compelling concerns raised by their holding. *Id.* at 743.

Judge Middlebrooks's analysis in *United States v. B.G.G.* proves that a plain reading of the statute is ambiguous and requires a dive into legislative history. *See* Middlebrooks, *supra*. His analysis indicated that 18 U.S.C. § 3282 presumes that criminal prosecutions can be initiated by informations, consistent with the Fifth Amendment and Federal Rule of Criminal Procedure 7. *Id.* at 11. While tracing the legislative history of informations and the intent of 18 U.S.C. § 3288, Judge Middlebrooks pointed to the Senate report, which stated the following: "[t]he proposed amendments recognize that felony prosecutions may be instituted by informations and that dismissals of such prosecutions because . . . technical

defects in the informations should be accorded treatment similar to that accorded prosecutions instituted by indictments." S. REP. NO. 88-1414, at 2 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3257–58. Additionally, then-Attorney General Robert F. Kennedy's letter discussing the 1964 adaptations to 18 U.S.C. § 3288 indicated that "[t]he amendments would . . . permit reindictment in similar cases where an *information* was filed *after the defendant waived in open court prosecution by indictment*. *Id.* (emphasis added). Therefore, an information cannot be instituted to toll the limitations period because this procedure was not contemplated during the construction of 18 U.S.C. § 3288 or its predecessors. Middlebrooks, *supra* 19. Here, the waiverless July 2020 Information and January 2021 Indictment charged Ms. Maximoff with violating Title 8 of the United States Code, § 1324(a)(1)(A)(iv) and (v). (Indictment ¶ 3.) Accordingly, the applicable statute of limitations is 18 U.S.C. § 3298. (Initial Appearance Tr. 4–5.)

1. **Congress did not intend for defective informations to bypass the statute of limitations.**

The statute of limitations is a safeguard that limits a defendant's exposure to criminal proceedings by creating a time frame during which to initiate prosecutions. *See Toussie v. United States*, 397 U.S. 112, 114 (1970). These protections keep parties, like the government, from filing an information "willy-nilly" to extend the limitations period. *United States v. Sharma*, No. 4:14-CR-61, 2016 WL 2926365, at *2 (S.D. Tex. May 19, 2016). For instance, the statute of limitations operates with at least two honorable purposes. *Id.* at *4. The limitations period (1) encourages promptness in prosecuting criminal actions

and (2) protects people from relying on fading memories to defend themselves. *Mo., Kan. & Tex. R. Co. v. Harriman*, 227 U.S. 657, 672 (1913); *Toussie*, 397 U.S. at 115.

The *Machado* court declined to follow *Burdix-Dana*. *See Machado*, 2005 WL 2886213, at *3. Instead, the court considered whether the term "institute" constitutes a prosecution and found that the limitations period expired and that the information filed was ineffective. *Id.* at *3. Additionally, the defendant did not know of any pending charges when the government filed the information. *Id.* The court reasoned that the term "prosecution" includes "institution" of a criminal action, such that an information must be accompanied by a waiver of indictment. *Id.* at *2–3. The court arrived at this conclusion by noting that Black's Law Dictionary commonly uses the words "institution of charges" and "prosecution" interchangeably. *Id.* at *2; *See* BLACK'S LAW DICTIONARY 801 (7th ed. 1999) (defining "institution" as the "commencement of . . . a civil or criminal action"); *id.* at 1237 (defining "prosecute" as "[t]o commence and carry out a legal action"). It follows that an information is functionally and constitutionally the same as an indictment. *See Machado*, 2005 WL 2886213, at *2–3. The *Machado* finding reiterated the major concerns (also recognized in *Burdix-Dana*), including the misuse of waiverless informations as a loophole to indefinitely extend the statute of limitations. *Id.*

This Court should follow the Supreme Court's holding in *Jaben*, *Machado*'s finding, and Judge Middlebrooks's analytical approach. In doing so, this Court will continue to apply the statute of limitations for the purpose it was created. *See Toussie*, 397 U.S. 112, 114. Here, the grand jury was suspended on March 23, 2020, until March 29, 2021. (Initial Appearance Tr. 5.) The Government waited to file the Information on July

22, 2020—only two days before the limitations lapsed. (Initial Appearance Tr. 4–5.) Then, the Government stalled for the full sixth months after the grand jury was back in session until September 23, 2021, to file its Indictment. 18 U.S.C. § 3288; *See* (Initial Appearance Tr. 4–5.) If this Court allows the Government to apply 18 U.S.C. § 3288 simply because it wanted an extra year and two months to prepare, it will be setting a precedent of equating "instituted" with "filed" that could lead to prosecutors indefinitely tolling limitation periods. *Machado*, 2005 WL 2886213, at *3. Thus, the Government should not be allowed to bypass the statute of limitations because it defies logic and presents potentially harmful consequences for future defendants. *Id.* at *2.

2. The Government's Order Granting Dismissal should have been granted with prejudice.

Under Federal Rule of Criminal Procedure 48(a), "[t]he government may, with leave of court, dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48(a). The "leave of court" component protects defendants from prosecutorial harassment "when the [g]overnment moves to dismiss . . . over the defendant's objection" by empowering a district court to exercise discretion over the motion to dismiss. *See id.*; *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977); *see also United States v. Salinas*, 693 F.2d 348, 351 (5th Cir. 1982). If the government's motion is "prompted by considerations clearly contrary to public interest," the district court may decline to permit dismissal. *Rinaldi*, 434 U.S. at 29 n.15. Accordingly, the district court may consider whether the dismissal is sought in good faith. *Salinas*, 693 F.2d at 351. The government is entitled to the presumption of good faith in invoking Rule 48(a). *United States v. Dyal*, 868 F.2d 424, 428 (11th Cir. 1989).

Nevertheless, the government cannot use Rule 48(a) to gain an advantage or escape a position of less advantage as the result of its own election. *Salinas*, 693 F.2d at 353.

Because Ms. Maximoff was not informed of and did not waive her "rights to indictment by a grand jury [or] consent to proceed by way of [i]nformation," the Government's requested dismissal should have been granted with prejudice, thus, forever preventing further prosecution of this matter. *Id.* at 351. Notably, the investigation of the alleged offense began on May 18, 2018, approximately two years before the grand jury suspension. (Special Agent Woo Declaration 2–3.) Then, the Government tabled the investigation for six months. (Special Agent Woo Decl. 5.)

By granting the Government's motion for dismissal without prejudice, Judge Bradley enabled an unlawful action. Middlebrooks, *supra* 7 ("Were I to grant the [g]overnment's request, I would enable and invite an action I believe to be unlawful"); (Order Granting Mot. for Voluntary Dismissal of Information 1–2.) Additionally, the Government indirectly admitted to acting with prosecutorial harassment when it stated that it was forced to file the July 2020 Information to toll the statute of limitations, which was more favorable to the prosecution. *See Rinaldi*, 434 U.S. at 29 n.15; *Salinas*, 693 F.2d at 351. Therefore, the July 2020 Information should have been granted with prejudice.

II. This Court should dismiss the Government's Indictment because the statute of limitations for a criminal matter may not be equitably tolled after lapse.

Equitable tolling is a principle that permits a party to seek a claim after a statute of limitations has expired. *See, e.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). When a party requests a claim to be equitably tolled, courts must first ensure that tolling the time

bar is consistent with Congress's intent. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10–11 (2014). Then, a court requires the proponent to establish that they diligently pursued their claim, and an extraordinary circumstance inhibited their ability to exercise that claim. *See, e.g.*, *Smith v. Davis*, 953 F.3d 582, 591 (9th Cir.), cert. denied, 141 S. Ct. 878 (2020).

Once a party has met this burden, a court may, but is not required to, suspend the statute of limitations. *See Barreto-Barreto v. United States*, 551 F.3d 95, 100 (1st Cir. 2008). Even if a proponent meets both elements, a court may refuse to equitably toll the statute of limitations, unless "the principles of equity would make the rigid application of a limitation period unfair." *Petroleos Mexicanos Refinaction v. M/T King A*, 554 F.3d 99, 110 (3d Cir. 2009) (alterations and internal quotations omitted).

This Court should dismiss the Government's Indictment because equitably tolling a criminal statute of limitations after it lapses is fundamentally unfair because: (1) tolling the criminal statute of limitations against Ms. Maximoff is contrary to Congress's intent; (2) the Government did not diligently pursue charges against Ms. Maximoff; and (3) COVID-19 did not create an extraordinary circumstance that justifies equitable tolling.

A. Tolling the statute of limitations against Ms. Maximoff is contrary to Congress's intent.

Generally, courts presume that equitable tolling is consistent with Congress's intent. *Lozano*, 572 U.S. at 11. However, this presumption may be rebutted when the court finds that Congress made the "time bar at issue jurisdictional." *United States v. Kwai Fun Wong*, 575 U.S. 402, 408 (2015). A court must examine the text, context, and historical treatment

of a statute when determining if Congress intended to make the time bar jurisdictional. *Musacchio v. United States*, 577 U.S. 237, 246 (2016).

Congress intended a criminal statute of limitations to act as a jurisdictional bar to prosecution, once tolled. Historically, criminal statutes of limitations restrained the government's power to prosecute after a specified period of time to encourage efficient investigation and to protect defendants from defending a charge long after favorable witnesses's memories have faded. *See* Charles Doyle, CONGRESSIONAL RESEARCH SERVICE, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 4 (2017). The founding fathers experienced an authoritative government with the unfettered ability to prosecute crimes before the revolution; accordingly, the First Congress exercised caution when bestowing prosecutorial power upon the federal government by installing the first criminal statutes of limitations.[1] Since the First Congress, the federal criminal code continued to develop, and subsequent Congresses created many exceptions for tolling statutes of limitations under specific circumstances. *See* Lindsey Powell, *Unraveling Criminal Statutes of Limitations,* AM. CRIM. L. REV. 115, 115–16 (2008).

While Congress has made some exceptions for tolling criminal statutes of limitations, the context in which these narrow exceptions apply demonstrates that Congress never intended to allow the government to toll a limitation outside of these clearly defined parameters. *See* Powell, *supra*. For example, Congress permits tolling the statute of

[1] *See* Act of Apr. 30, 1790, ch. 9, §32, 1 Stat. 112, 119 (imposing a two-year statute of limitations for most criminal matters, while creating a three-year statute of limitations for capital crimes other than forgery).

limitations for acts of terrorism, fugitives fleeing justice, and for crimes against children.[2] Congress has not, however, legislated a general equitable tolling provision for the government when prosecuting a defendant. *See* 18 U.S.C. § 3298. In fact, when the Department of Justice sought a congressional grant of authority to suspend proceedings during COVID-19, likely including the ability to toll criminal statutes of limitations, Congress refused to grant the request. *See* Woodruff Swan, *DOJ Seeks New Emergency Powers Amid Coronavirus Pandemic*, POLITICO (Mar. 21, 2020), https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023.

Allowing the government to prosecute individuals beyond the period prescribed by Congress would prevent defendants from mounting an effective defense and risk government abuse. *See* Powell, *supra*. If Congress intended for the government to equitably toll criminal statutes of limitations, they would have made an exception allowing the procedure, as they have for many other circumstances. *See id.* Accordingly, this Court should deny the Government's motion because equitably tolling a criminal statute of limitations in the absence of a congressionally created exception would be contrary to Congress's intent and the historical purpose of the limitations period.

[2] 18 U.S.C. § 3290 (suspending limitations period while a defendant is fleeing justice); Act of Oct. 26, 2001, Pub. L. No. 107-56, Title VII, § 809(a), 115 Stat. 379 (codified as amended at 18 U.S.C. § 3286) (eliminating statute of limitations for certain acts of terrorism); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4805 (codified at 18 U.S.C. § 3294 but moved to § 3283 pursuant to the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796) (eliminating statutes of limitations for sexual or physical abuse of a child).

B. The Government failed to diligently pursue charges against Ms. Maximoff.

Courts require a party to demonstrate that they diligently pursued their claim to be eligible for equitable tolling. *China Agritech, Inc. v. Resh*, 138 S.Ct. 1800, 1808 (2018). Thus, a party is only required to act with "*reasonable* diligence," not "*maximum feasible* diligence." *Holland v. Florida*, 560 U.S. 631, 654 (2010) (emphasis added). Therefore, courts will not permit equitable tolling when a party's request is based on "what is at best a garden variety claim of excusable neglect." *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990).

In civil suits, plaintiffs of a class action who have their claims dismissed for failure to maintain a class of sufficient size have not slept on their rights. *China Agritech*, 138 S.Ct. at 1808. Even though their claims were dismissed, the plaintiffs were entitled to equitable tolling because they exercised reasonable diligence by attempting to adjudicate their claim. *See id*. Similarly, a plaintiff has exercised reasonable diligence in pursuing their claim when they seek assistance from the court, clerks, and the state bar to remove their attorney after their lawyer becomes an impediment to their case. *Holland*, 560 U.S. at 654. Though more effective steps could have remedied the issue in *Holland*, the defendant was entitled to equitable tolling because *reasonable* diligence was the applicable standard, not *maximum feasible* diligence. *See id.* Conversely, a garden variety claim of neglect occurs when a plaintiff's attorney is absent from their practice and fails to commence an action within the period of limitations. *Irwin*, 498 U.S. at 96.

The Government failed to demonstrate reasonable diligence while investigating Ms. Maximoff, which resulted in the tolling of the statute of limitations. The Government

alleges that Ms. Maximoff engaged in criminal activity that concluded on July 24, 2010. (Initial Appearance Tr. 4.) The Department of Homeland Security commenced its investigation into this alleged crime in May of 2018. (Special Agent Woo Decl. 2.) However, the Government tabled this investigation from August 15, 2018, to February 14, 2019. (Special Agent Woo Decl. 5.) The Government's delay resulted in an Indictment against Ms. Maximoff on September 21, 2021, fourteen months after the statute of limitations lapsed for the alleged crime. (Indictment 3.)

Unlike the plaintiffs in *China Agritech*, the Government slept on their ability to prosecute Ms. Maximoff because it did not commence any legal action until the statute of limitations had already lapsed. *See* 138 S.Ct. at 1808. Unlike the petitioner in *Holland*, the Government cannot claim that it exercised reasonable diligence but was impaired by a third party because the Government created the delay by tabling the investigation for six months. *See* 560 U.S. at 654. This delay is analogous to the delay experienced in *Irwin*, where the attorney went out of town and failed to commence the action before the limitations lapsed. *See* 498 U.S. at 96. Accordingly, this Court should find that the Government's self-created delay amounts to no more than a garden variety claim of excusable neglect.

C. COVID-19 did not create an extraordinary circumstance that justifies equitable tolling.

The last element courts require before equitably tolling the statute of limitations is an extraordinary circumstance outside the party's control that impairs their ability to timely commence their action. *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016). Judicial interference, such as intentionally misleading a party on the applicable

tolling period, constitutes an extraordinary circumstance beyond a party's control. *See Pliler v. Ford*, 542 U.S. 225, 232 (2004) (O'Connor, J., concurring). Conversely, an attorney miscalculating a filing deadline does not amount to an extraordinary circumstance where courts will permit tolling. *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007).

Some courts have already evaluated equitably tolling statutes of limitations within the context of the COVID-19 pandemic. One court held that "[t]he COVID-19 pandemic does not automatically warrant equitable tolling for any movant who seeks it on that basis." *Taylor v. United States*, No. 4:20CV1489 HEA, 2021 WL 1164813, at *3 (E.D. Mo. Mar. 26, 2021), reconsideration denied, No. 4:20CV1489 HEA, 2021 WL 2142461 (E.D. Mo. May 26, 2021). In *Taylor*, the court noted that COVID-19 had only existed for a portion of the plaintiff's limitations period, and that the plaintiff failed to allege how the pandemic specifically impaired their ability to commence their action within the permitted period. *See id.* Courts have also found that prison lockdowns due to COVID-19 that resulted in a prisoner losing access to legal materials was not an extraordinary circumstance because the prisoner-plaintiff failed to explain how these materials prevented a timely filing. *Phillips v. United States*, No. 8:18-CR-91-T-27AAS, 2021 WL 679259, at *3 (M.D. Fla. Feb. 22, 2021).

While the COVID-19 pandemic is undoubtedly a circumstance beyond the Government's control, it is not an "extraordinary" occurrence that warrants this Court to automatically equitably toll the statute of limitations against Ms. Maximoff. Like the plaintiff in *Taylor*, the pandemic only had the *potential* to impact a portion of the applicable limitations period. WL 1164813, at *3. Moreover, the Government has not provided any

support of how COVID-19 impaired their ability to commence a timely action against Ms. Maximoff. *See* (Initial Appearance Tr.)

The Court suspended the grand jury due to COVID-19 on March 23, 2020 and reinstated the grand jury on March 29, 2021. (Initial Appearance Tr. 5.) Although this likely served as an impediment to the Government, this inconvenience is analogous to the impact of prison lockdowns on the plaintiff in *Phillips*. *See* 2021 WL 679259, at *3. Although the Government was deprived of the use of a grand jury for over a year, the Government still had access to the grand jury for nine years before the pandemic. *See* (Initial Appearance Tr. 5.) Accordingly, the Government's claim that COVID-19 prevented the timely filing of its action within the period of limitations, without further support, is not an extraordinary circumstance that permits equitable tolling.

CONCLUSION

This Court should grant Ms. Maximoff's Motion to Dismiss the Government's Indictment. The Government filed an Indictment over a year after the statute of limitations lapsed, and the July 2020 Information was invalid because Ms. Maximoff never waived her right to an indictment. Moreover, the Government cannot equitably toll a criminal statute of limitations when it caused the delay by failing to exercise reasonable diligence during the investigation.

Respectfully submitted,

/s/ 109
Attorneys for the Defendant