Team 118

CASE NO. 1:20-cr-24

UNITED STATES DISTRICT COURT
DISTRICT OF STETSON
WESTVIEW DIVISION

UNITED STATES OF AMERICA

v.

WANDA MAXIMOFF

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT IN VIOLATION OF THE STATUTORILY MANDATED FILING PERIOD

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INTRODUCTORY STATEMENT

NOW INTO COURT, through undersigned counsel, comes your Defendant, **WANDA MAXIMOFF** (hereinafter "Maximoff") who respectfully files this memorandum of law: (1) in support of Maximoff's motion for dismissal of the September 2021 Grandy Jury Indictment (hereinafter the "Indictment") against her as untimely under 18 U.S.C. § 3298; and, (2) pursuant to the order issued by this Court on September 23, 2021.

Maximoff respectfully requests this Court grant her motion to dismiss the Indictment as untimely under § 3298 because: (1) the July 22, 2020, Bill of Information (hereinafter the "Information") was procedurally improper and therefore could not institute the Information for tolling purposes; and, (2) the Indictment was found more than ten years after the date of the last alleged offense.

Further, Maximoff respectfully requests this Court deny the Government's request for equitable tolling of § 3298 because: (1) § 3298 is properly categorized as a statute of repose and thus not subject to equitable tolling when the defendant properly raises the objection of timeliness; and (2) even if this Honorable Court classifies § 3298 as a statute of limitations, rather than one of repose, equitably tolling § 3298 is neither demanded by sound legal principles, nor by the interests of justice.

STATEMENT OF FACTS

Defendant, Wanda Maximoff has been charged under the I.N.A., 8 U.S.C. 1324(a)(1)(A)(iv) and (v) for allegedly inducing aliens to reside in the United States and for allegedly manufacturing and selling false OSUPs to aliens illegally residing in the United States between May 31, 2007, and July 24, 2010. (Indictment ¶ 7-8).

Grand jury indictments were suspended from March 20, 2020, under Administrative Order No. 20-019, through March 29, 2021, under Administrative Order No. 21-008. (Initial Appearance Transcript, hereinafter "I.A.," p. 5:61-64). Notwithstanding the foregoing, Maximoff never waived her constitutional right to a grand jury indictment, and the Government filed its formal charges against Maximoff through the Information on July 22, 2020. (I.A., p. 3:56-58). Upon the Government's own motion, this Court dismissed the Information without prejudice on July 23, 2020. (I.A., p. 3:59-60).

On March 29, 2021, the Court lifted the grand jury suspension. (I.A., p. 5:62-65). Thereafter, the Government filed the Indictment on September 21, 2021. (Indictment, p. 3). The statutorily mandated filing period expired on July 24, 2020; thus, the Indictment was untimely returned as a matter of law. (I.A., p. 2:44-3:52); 18. U.S.C. § 3298. Maximoff was arrested on September 23, 2021, at which point she first became aware of the charges against her. (I.A., 5:71-6:74).

LAW AND ARGUMENT

The Government cannot use the COVID-19 pandemic as a justification for violating criminal defendants' statutory and constitutional rights. Regardless of societal emergencies, criminal defendants' due process rights cannot be subrogated.

Indictments must be returned within the ten-year statute of limitations imposed on Immigration and Nationality Act ("I.N.A.") section 274(a) offenses. 18 U.S.C. § 3298. The September 2021 Indictment ("Indictment") against Maximoff was untimely returned outside of the ten-year statute of limitations under § 3298 and therefore, must be dismissed. The July 2020 Information ("Information") filed during the statute of limitations was not properly "instituted" as required under § 3298 because the prosecution failed to obtain Maximoff's constitutional waiver of her right to an indictment. Thus, the mere filing of the Information also failed to toll the ten-year statute of limitations. Moreover, the government moved to dismiss the Information it filed before the statute of limitations expired, therefore making 18 U.S.C. § 3288 inapplicable.

Furthermore, applying equitable tolling to the lengthy ten-year period the prosecution had to charge Maximoff would produce inequitable results and infringe on her due process rights. Defendant prays this Court will not allow the prosecution to rely on the pandemic to create loopholes in proper criminal procedure. Since the prosecution failed to timely "institute" the Information or return an indictment

during the decade it had to formally charge Maximoff, her Motion to Dismiss should be granted.

I. This Court should dismiss the Indictment as untimely returned pursuant to 18 U.S.C. §§ 3298 and 3288.

A. The Government's Information was filed without Maximoff's waiver and therefore failed to "institute" the Information as required to toll the ten-year statute of limitations under 18 U.S.C. § 3298.

1. *Maximoff never waived her Constitutional right to a Grand Jury Trial nor her right to an Indictment as required by the Fifth Amendment and Federal Rules of Criminal Procedure.*
2. *The Government's mere filing of the Information absent Maximoff's constitutional waiver is insufficient to "institute" the Information as required under § 3298.*

B. The six-month extension created by 18 U.S.C. § 3288 does not apply and will not save this Indictment.

1. *18 U.S.C. § 3288 does not apply in this matter because the Information was not dismissed after the expiration of the statutorily mandated filing period.*
2. *The Government's mere filing of the Information absent Maximoff's constitutional waiver does not qualify for § 3288.*

A. The Prosecution's Information was filed without Maximoff's waiver and therefore failed to "institute" the Information as required to toll the ten-year statute of limitations under 18 U.S.C. § 3298.

Relevant to Maximoff's charges under 8 U.S.C. § 1324(a)(1)(A)(iv),(v), is the statutory filing period described in 18 U.S.C § 3298, which reads, in pertinent part, "No person shall be prosecuted, tried, or punished . . . under . . . section 274(a) of the Immigration and Nationality Act [8 USCS § 1324(a)] unless the indictment is found **or the information is instituted** not later than 10 years after the commission of the offense." (emphasis added).

An information entered without a defendant's waiver should not be considered "instituted" upon filing just to meet that statutory requirement. If this Court qualifies the Information filed without Maximoff's waiver as being "instituted" thereby tolling § 3298, the Government would effectively be enabled to temporarily toll a statutorily mandated filing period by the mere filing of an improper instrument. The prosecution had ten years to bring formal charges against Maximoff and should not allowed to use the pandemic as a shield for its unreasonable delay.

Although grand jury indictments were suspended in the wake of the pandemic from March 20, 2020, through March 29, 2021, under Administrative Order No. 21-008 and No. 20-019, respectively (I.A., p. 5:61-64)—no such suspension has been imposed on statutes of limitations. During the pandemic, federal prosecutors began a new, questionable practice of filing bills of information without defendants' constitutional waivers. After filing, prosecutors would then move to dismiss their improperly filed bills of information under Federal Rule of Criminal Procedure 48(a) in a strategic attempt to trigger the six-month indictment filing extensions enumerated in §§ 3288 and 3289. *See*, Margot Moss, Carolyn Kendall, *Tips for Federal Criminal Defense Counsel on Statute of Limitations Challenges*, Bloomberg Law (Feb. 2021), https://www.postschell.com/fed-crim-defense.pdf; *see also*, *Ongoing Constitutional Challenges to the Criminal Justice System as a Result of the*

COVID-19 Pandemic, American College of Trial Lawyers (Feb. 2021), https://www.actl.com/docs/white-pages.pdf.

Here, the Government has attempted to do the very same using § 3288; however, this strategy is not only tainted by constitutional and ethical violations, but the Government has failed to correctly utilize the strategy. Section 3288 does not apply to bills of information dismissed **before** the statute of limitations expired. Thus, neither the Information nor § 3288 can save this Indictment from dismissal.

Under § 3298, either a grand jury indictment must be returned, or an information "instituted" within the ten-year statute of limitations. Maximoff prays this Court will find not only was the Indictment untimely, but also that the mere filing of the Information during the statutory time period is insufficient to toll § 3298. As argued above, and reiterated here, filing the Information did not "institute" criminal proceedings against Maximoff because she never waived her constitutional right to an indictment. (I.A., 5:71-72).

1. Maximoff never waived her Constitutional right to a Grand Jury Trial nor her right to an Indictment as required by the Fifth Amendment and Federal Rules of Criminal Procedure.

The Fifth Amendment of the U.S. Constitution guarantees criminal defendants the right to a fair trial and to an indictment by grand jury for certain offenses. *See*, U.S. Const. amend. V, cl. 1. In addition, the Federal Rules of Criminal Procedure recognize this constitutional right by mandating that an information may only be

used in the prosecution of a felony "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. Pro. 7(b). Thus, for felony offenses to be charged by information, the defendant must first waive their right to an indictment.

The Supreme Court of the United States described a valid constitutional waiver as the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Moreover, it is well established that waiver of criminal constitutional protections must be voluntary and knowing. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *see also, e.g., Brady v. United States*, 397 U.S. 742, 748 (1970); *see also, e.g., Maryland v. Shatzer*, 559 U.S. 98, 104 (2010).

Here, the record is undisputed; Maximoff never waived her constitutional right to an indictment. She could not have given a knowing and voluntary waiver because Maximoff only became aware of the allegations against her at the time of her arrest on September 23, 2021. (I.A., p. 5:71-6:74). Without waiver, the Information was not "instituted" as required to toll § 3298. Fed. R. Crim. Pro. 7(b).

Allowing an unconsented information to toll statutory filing period would create "an end-run around the statute of limitations and contravene the Fifth Amendment's guarantee of a defendant's right to be prosecuted by way of grand jury indictment." *United States v. B.G.G.*, No. 9:20-cr-80063, slip op. at 6 (M.D. Fla. Jan.

11, 2021). A bill of information is designed to put defendants on notice that they are being formally charged and begin the prosecution process. Thus, it would be counterintuitive to allow an information to be "instituted" in a way that violates the defendant's right to an indictment.

2. The Government's mere filing of the Information absent Maximoff's constitutional waiver is insufficient to "institute" the Information as required under § 3298.

Instructive to this inquiry into tolling § 3298 is the circuit split regarding whether informations are "instituted" upon filing, even absent a defendant's waiver, for purposes of tolling § 3282. *See, United States v. Machado*, No. CRIM.A.04–10232–RWZ, 2005 WL 2886213, at *5-6 (D. Mass. Nov. 3, 2005); *c.f.*, *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998). The prosecution concedes that no material difference exists between the language of §§ 3282 and 3298, (Email #2, p. 1)—both of which require either an indictment or the "instituting" of an information within the statutory period.

Therefore, Maximoff asks this Court to adopt the reasoning of district courts in the First, Fourth, and Eleventh Circuits that constitutional waiver is required to institute an information. In *United States v. Machado*, the court found it "defie[d] logic and reason" to deem an improperly instituted information sufficient to toll the statutory filing period when the same document cannot be used to establish jurisdiction or prosecution. *See*, 2005 WL 2886213, at *5-6. Otherwise the

safeguards provided by Federal Rule of Criminal Procedure 7(b) would be meaningless. *See, United States v. Stewert*, 425 F. Supp. 2d 727, 731 (E.D. Va. 2006). Similarly, in *United States v. B.G.G.*, the most recent precedent on this issue, the court refused to recognize "an invalid charging document as a mere mechanism for extending a statute of limitations period, though the same legal instrument could not serve to initiate criminal proceedings on the charges contained therein or confer subject matter jurisdiction on the court in which those proceedings are to take place." *B.G.G.*, No. 9:20-cr-80063, slip op. at 12.

Although some courts have held that the "institute" requirement of § 3282 is satisfied upon the mere filing of an information, that argument only survives if the initiation of the prosecution and the prosecution itself are subject to two different standards. *See*, *Burdix-Dana*, 149 F.3d at 742 (allowing an unconsented information to institute the tolling of § 3282, but concluding it was insufficient to institute a prosecution); *see also*, *United States v. Holmes*, No. 18-cr-00258-EJD, 2020 WL 5500425 (N.D. Ca. Sept. 11, 2020); *see also, United States v. Briscoe*, No. RBD-20-0139, 2020 WL 5076053 (D. Md. Aug. 26, 2020). Under the prosecution's logic, the filing of its Information was filed for the limited purpose of tolling § 3298, but the Government would still have to obtain Maximoff's waiver before prosecuting her for those offenses. However, that logic is flawed because the entering of formal charges is part of the prosecution just as much as the trial, and Maximoff's

constitutional rights are just as relevant at this pretrial stage as they are when her case goes before twelve jurors. "After all, an information is a charging instrument whose primary practical purpose, aside from apprising a defendant of the charges again him, **is to commence a prosecution**." *B.G.G.*, No. 9:20-cr-80063, slip op. at 12 (emphasis added). Because the Information filed without Maximoff's waiver failed to "institute" the criminal proceedings under § 3298, both it and the subsequent Indictment against Maximoff are time barred.

B. The six-month extension created by 18 U.S.C. § 3288 does not apply and will not save this Indictment.

After filing the improper Information, the Government moved for dismissal in hopes that § 3288 would toll § 3298 and create a six-month period wherein the Government could secure an indictment. However, the Government does not meet the threshold requirement for § 3288 to apply because the Government dismissed the Information before the statute of limitations expired. Furthermore, the Government is not allowed to use § 3288's six-month extension to obtain an indictment on a claim with a ten-year statutory filing period that expired over a year ago. The Government's dismissal of the Information solely to protect its ability to charge Maximoff at a later date is in direct contravention of the purpose of § 3298 and does not serve the strong public interest of upholding statutory and constitutional protections. *See, Toussie v. United States*, 397 U.S. 112, 115 (1970), (finding Congress intended "to limit exposure to criminal prosecution to a certain fixed

period of time following the occurrence"); *see also, B.G.G.*, No. 9:20-cr-80063, slip op. at 6, 12.

1. 18 U.S.C. § 3288 does not apply here because the Information was not dismissed after the expiration of the statute of limitations.

The plain language of § 3288 does not apply to the case at hand. For questions of statutory interpretation, the court must begin with the text. *See, United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). When the language of the statute is unambiguous, the inquiry is complete. *United States v. St. Amour*, 886 F.3d 1009, 1013 (11th Cir. 2018).

First and foremost, § 3288 does not apply because it is specific to informations dismissed **after** the expiration of the statutory filing period. Section 3288 reads, in pertinent part, "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, . . . within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations."

Maximoff does not dispute there was no grand jury in session; however, both the plain language and title of § 3288 evidence that the provisions of the statute are available **if and only if** the information is dismissed **after** the expiration of the

statute of limitations. *See, United States v. Durkee Famous Foods*, 306 U.S. 68, 71 n.2 (1939)*; see also, B.G.G.*, No. 9:20-cr-80063, slip op. p. 4 (finding § 3288 applied because the Government dismissed the information after the limitations expired).

Here, the Government successfully moved to dismiss its information on July 23, 2020 (I.A., p. 3:59-60), and the statutory filing period expired on July 24, 2020. (I.A. p. 5:51-52). Thus, the information was dismissed **before** the expiration of the statutory filing period—rendering § 3288 inapplicable.

2. The prosecution's mere filing of the Information absent Maximoff's constitutional waiver does not qualify for § 3288.

Section 3288 is clear in indicating that its safeguard will not extend to any new indictment when the reason for dismissal was failure to timely file the original indictment. Here, the Government failed to return this Indictment within § 3298's ten-year statutory filing period and the Information is a legal nullity because it was entered without Maximoff's waiver. *See, B.G.G.*, No. 9:20-cr-80063, slip op. at 6, 12. The legislative history of § 3288 also demonstrates that Congress intended it to toll limitations periods only upon the dismissal of informations instituted with a defendants waiver. *See, B.G.G.*, No. 9:20-cr-80063, slip op. at 18 (*citing* S. Rep. No. 88-1414, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3257, 3258). Since Maximoff never waived her right to indictment, § 3288 does not apply, and the Indictment should dismissed with prejudice as null pursuant to the statutorily mandated filing period enumerated in § 3298.

II. This Court should grant Defendant's motion to dismiss because the statute of limitations has run, and the Government is not entitled to any equitable tolling in this matter.

A. 18 U.S.C. § 3298 is properly classified as a statute of repose, the likes of which are not subject to equitable tolling when the statutory defense is properly raised.

B. Tolling of 18 U.S.C. § 3298 in this matter is neither demanded by sound legal principles, nor by the interests of justice.

1. The Government failed to exercise reasonable care and diligence in pursuing its claim against Maximoff.

2. Absent more, a national emergency is insufficient to establish the requisite extraordinary circumstance necessitating equitable tolling.

A. 18 U.S.C. § 3298 is properly classified as a statute of repose, the likes of which are not subject to equitable tolling when the statutory defense is properly raised.

Equitable tolling is legal remedy which may be applied to temporarily suspend the expiration of a statutory filing period under certain limited instances; however, the equitable tolling of a criminal statute is an extraordinary remedy that should be limited to "rare and exceptional circumstances." *Thomas v. Attorney Gen.,* 992 F.3d 1162, 1179. (11th Cir. 2021), (*quoting Hunter v. Ferrell,* 587 F.3d 1304, 1308 (11th Cir. 2009)). Generally, the primary question of whether a statutory period may be properly tolled rests upon the court's interpretation of Congress's intent for application of the statute itself. *See, Lozano v. Montoya Alvarez,* 134 S. Ct. 1224, 1232 (2014). Although there is rebuttable presumption that all statutes prescribing limitations to a cause of action are subject to equitable tolling, "where the pertinent rule or rules invoked show a clear intent to preclude tolling, courts are without

authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving." *Nutraceutical Corp. v. Lambert*, 139 S.Ct. 710, 714 (2019); *see also*, *Holland v. Florida*, 130 S.Ct. 2549, 2560 (2010).

Moreover, filing deadlines, such as the one at issue in this matter, constitute either: (1) jurisdictional deadlines, which may neither be tolled nor waived; (2) mandatory claims-processing deadlines, which may be tolled only if the deadline is not waived; or, (3) nonmandatory claims processing deadlines, which may be tolled irrespective of a defendant's waiver. *See, Young v. Sec. & Exch. Comm'n*, 956 F.3d 650, 654-656 (D.C. Cir. 2020).

The Supreme Court has consistently held, and neither party disputes, that statutory limitation periods are not jurisdictional unless expressly provided for by Congress. *See generally*, *Musacchio v. United States*, 136 S.Ct. 709, 716-717 (2016). Section 3298 contains no such express designation of jurisdiction; thus, § 3298 is non-jurisdictional, and the key determination is whether the limitation set forth in § 3298 constitutes a mandatory claims-processing deadline or a nonmandatory claims-processing deadline. *See, Sec'y, U.S. Dep't of Labor v. Preston*, 873 F.3d 877, 883 (11th Cir. 2017).

The principal difference between a statute of limitations and one of repose is that a statute of limitations is a bar based upon when the claim accrued, whereas a statute of repose precludes the bringing of any claim after a specified amount of time

has passed, irrespective of later accrual. *See*, *Id*. In *Preston*, the Eleventh Circuit held that 29 U.S.C. § 1113 constituted a statute of repose—rather than one of limitation—based upon express language of the statute, which provides, in pertinent part, "no action may be commenced . . . with respect to a violation of this part . . . six years after the date of the last [violation]." *See*, *Id*.; *see also*, 29 U.S.C. § 1113. Similarly, the Supreme Court in *China Agritech, Inc. v. Resh* recently held that a statute barring claims six years after the date of the last action was in fact a state of repose, and thus not subject to tolling when raised as a defense. *See generally*, 138 S.Ct. 1800, 1804 (2018).

Comparing the language of the aforementioned statutes to that of the case at hand, it is readily apparent that § 3298 is a state of repose and is therefore not subject to tolling when properly asserted as a defense. Section 3298 reads, in pertinent part, "no person shall be prosecuted, tried, or punished . . . unless the indictment is found or the information instituted not later than 10 years **after the commission of the offense.** (emphasis added); *see also*, *STATUTE OF REPOSE*, Black's Law Dictionary (11th ed. 2019) ("a statute barring any suit that is brought after a specified time since the defendant acted"). Additionally, it well established that criminal limitation statutes are liberally interpreted in favor of repose. *See, e.g., Toussie*, 397 U.S. 112; 90 S.Ct. 858, 860 (1970); *United States v. Habig*, 88 S.Ct. 926, 929 (1968); *United States v. Scharton*, 52 S.Ct. 416, 417 (1932).

Section 3298 is properly categorized as a statute of repose, thereby deeming the ten-year period a mandatory claims-processing deadline. In accordance with the principles governing the categories of filing deadlines enumerated in *Young*, *supra*, the ten-year bar may only be tolled if the defendant waived her right to assert the deadline. *See*, 956 F.3d 650, 654-656 (D.C. Cir. 2020). Maximoff properly asserted her affirmative defense of a time limitation bar on the Government's action against her by raising the objection upon Maximoff's first opportunity to respond to the allegations against her. (I.A., p. 4-5). Consequently, this Court should refuse to toll the time limitations set forth in § 3298.

B. Tolling of 18 U.S.C. § 3298 in this matter is neither demanded by sound legal principles, nor by the interests of justice.

If this Honorable Court is inclined to disagree with the contention that § 3298 is a statute of repose and is therefore not subject to tolling because Maximoff has timely asserted her defense, this Court must still find that tolling the statute's time limitation is, "demanded by sound legal principles and the interests of justice," in order to apply the doctrine. *See, U.S. v. Atiyeh*, 402 F.3d 354, 367 (3rd. Cir. 2005). The normal measure of whether the case "demands" tolling turns upon a two-element inquiry—both of which must be answered in the affirmative—of whether the plaintiff pursued his rights diligently and whether some "extraordinary" circumstance preventing timely filing. *See, Menominee Indian Tribe of Wisconsin v. United States*, 136 S.Ct. 750, 752 (2016); *Holland*, 130 S.Ct. 2549, 2560 (2010). For

reasons set forth, *infra*, the Government has failed to satisfy their burden of proving either of the two-factors, let alone both.

1. The Government failed to exercise reasonable care and diligence in pursuing its claim against Maximoff.

Classification of actions as "diligent pursuit of rights" typically contemplates a scenario wherein the plaintiff has filed their claim within the prescribed time period, but has, as a reasonable mistake, filed in a court which lacks jurisdiction. *See*, *e.g*., *Nutracentral*, 139 S.Ct. 710, 714 (2019); *see also*, *Young*, 956 F.3d 650, 656 (D.C. Cir. 2020) ("where a litigant 'reasonably believe[s]' that the state court possesses concurrent jurisdiction over a federal claim, courts will toll the limitations period from the filing of the state action"). Certainly, there exist additional factual scenarios that may move a court to find that the plaintiff acted diligently; however, a finding of diligence is ordinarily predicated upon a plaintiff's consistent, quantifiable effort to comply with the statutory requirements. *See*, *e.g*., *Thomas v. Attorney General*, 992 F.3d 1162, 1179-1180 (11th Cir. 2021).

Further, equitable tolling is not permitted when the facts indicate that the movant only acted diligently during the time of the extraordinary circumstance. In *Donald v. Pruitt*, the Tenth Circuit rejected an equitable tolling argument upon the court's finding that the movant had not acted diligently prior to COVID restrictions being set into place. *See*, 853 Fed. Appx. 230, 234 (10th Cir. 2021). Similarly, in *Howard v. U.S,*, the district court denied equitably tolling the one-year statute of

limitations for applications of a writ of habeus corpus, noting that the movant presented no evidence that he actively pursued his claims prior to March 2020. *See*, 2021 WL 409841, p.3 (E.D. Mo. Feb. 5, 2021).

Under a method of reasoning substantially similar to that utilized by the court's referenced above, it cannot be logically argued that the Government diligently pursued its rights. The Government has presented no evidence that it acted with reasonable prudence prior to the return of the September 21, 2021, Indictment. In fact, the only evidence that the Government submitted indicating any action at all in pursuit of its claim is the July 22, 2020, Bill of Information which was dismissed upon the Government's voluntary motion filed the very next day. (Order Dismissing 2020 Indictment). The Government's action regarding the Information constitutes, at best, a poor attempt to thwart the statutory limitations of § 3298 by filing a procedurally incorrect document just two days before the statutory period ended, and "equitable tolling is not intended as a device to rescue those who inexcusably sleep on their rights." *Ramos-Martinez v. United States*, 638 F.3d 315, 323 (1st Cir. 2011).

2. Absent more, a national emergency is insufficient to establish the requisite extraordinary circumstance necessitating equitable tolling.

As part of its oral argument for equitable tolling, the Government averred that that the COVID-19 pandemic created an extraordinary circumstance justifying the equitable tolling of § 3298. (I.A., p. 5). Recently, the Tenth Circuit affirmed the longstanding principle that the extraordinary circumstance must specifically thwart

a plaintiff's diligent efforts, noting, "The COVID-19 pandemic does not automatically warrant equitable tolling for any petitioner who seeks it on that basis. The petitioner must establish that he was pursuing his rights diligently and that the COVID-19 pandemic specifically prevented him from filing his motion." *Donald*, 853 Fed. Appx. 230, 234.

For reasons enumerated, *supra*, the Government has not demonstrated diligence in pursuing its right; however, even if this Court finds that the Government did diligently pursue its right, the Government is still not entitled to equitable tolling because the Government has not demonstrated why it did not take any action in the nine and one-half years preceding the issuance of Administrative Order No. 20-019. *See generally*, *Id*. (denying equitable tolling because movant failed to demonstrate diligence in the time period prior to the implementation of COVID restrictions).

Surely, the COVID pandemic has altered the policies and practices of most of the modern world; however, the principles of equity and impartiality demand that courts hold fast to fundamental principles of the legal regime:

> [W]e must not forget that criminal limitation statutes are to be liberally interpreted in favor of repose . . . However tempting it may be to create equitable exceptions to bright line rules ... the very existence of a statute of limitations entails the prospect that wrongdoers will benefit.... Ultimately, the clear and unambiguous rule afforded by the criminal statute of limitations is preferable to a shifting standard based on the perceived equity of the [the particular case].

United States v. Midgley, 142 F.3d 174, 180 (3d Cir.1998); *see also*, *Attiyeh* at 367 ("this court has never applied equitable tolling to rescue a government indictment filed after the statute of limitations has lapsed").

CONCLUSION

IN LIGHT OF THE RECENT AND FOREGOING, Defendant, **WANDA MAXIMOFF**, respectfully asks this Court to dismiss the Indictment as untimely under 18 U.S.C §§ 3298 and 3288;

FURTHER, Defendant, **WANDA MAXIMOFF**, respectfully asks this Court to deny the Government's request for equitable tolling of 18 U.S.C § 3298.

Respectfully submitted,

Team

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Counsel for Defendant