No. _____

In the Supreme Court of the United States

LAUREN ROSECAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the denial of a pretrial motion to dismiss a criminal information that charges, in violation of the Grand Jury Clause, felony offenses without petitioner's consent is interlocutorily appealable under the collateral order doctrine?

RELATED PROCEEDINGS

United States v. Rosecan, 528 F. Supp. 3d 1289 (S.D. Fla. 2021)

United States v. Rosecan, No. 21-11062, 2021 WL 4702628 (11th Cir. June 10, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Lauren Rosecan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The decision of the court of appeals (App. 1–2) is not published in the Federal Reporter, but is available at 2021 WL 4702628. The court of appeals' order denying reconsideration (App. 3) is not published in the Federal Reporter. The order of the district court (App. 4–15) is published in the Federal Supplement at 528 F. Supp. 3d 1289 (S.D. Fla. 2021).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 10, 2021. (App. 1). A motion for reconsideration was denied on September 17, 2021. (App. 3). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 3282(a)

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

28 U.S.C. § 1291 (in relevant part)

The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... except where a direct review may be had in the Supreme Court.

Fed. R. Crim. P. 7 (in relevant part)

(a) **When Used**.

(1) Felony. An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

(2) Misdemeanor. An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule

58(b)(1).

> (b) **Waiving Indictment**. 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 of the defendant's rights—waives prosecution by indictment.

STATEMENT OF THE CASE

The petitioner's right under the Fifth Amendment's Grand Jury Clause to be free of any felony prosecution absent indictment or waiver of the right of indictment was violated. This petition presents the question whether petitioner has an immediate appeal under the collateral order doctrine, as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), from the denial of a motion seeking relief from the Grand Jury Clause violation.

The government wrongly claimed statutory authorization to file a criminal information that violated both the Grand Jury Clause and the rule-created provision for waiver of indictment, Fed. R. Crim. P. 7(b). Petitioner refused to waive indictment and refused to agree to toll the running of the statute of limitations. The government conceded that its filing of the information had no purpose other than to improperly hale petitioner into court without any probable cause finding and to assert a tolling of the statute of limitations based on the filing of the waiverless felony information.

The district court denied petitioner's motion to dismiss the invalid information, and the Eleventh Circuit dismissed petitioner's appeal from that denial, finding that the right of interlocutory appeal in criminal cases does not extend beyond issues of bail, double jeopardy, and the Speech and Debate Clause. App. 1–2 (dismissing appeal without discussion of the merits). Because the fundamental constitutional right not to be prosecuted for a felony absent a grand jury indictment finding probable cause for the commission of the offense would be forfeited if interlocutory review were denied, petitioner seeks this Court's review of the circuit conflict on interlocutory appeal of Grand Jury Clause claims and of the Eleventh Circuit's unduly constricted interpretation of this Court's interlocutory appeal precedents.

Factual and Procedural Background

1. In March 2020, petitioner Lauren Rosecan, an ophthalmic surgeon practicing in Palm Beach County, Florida, was approached by the government regarding a federal investigation into whether laser surgery he had performed to address retinal anomalies was medically necessary for purposes of Medicare billing. App. 5–6. Because the statute of limitations was about to expire on the matters under investigation, the government sought and obtained one extension of the limitations statute by voluntary agreement of petitioner. App. 6. When petitioner refused any further extension of the statute of limitations and made clear that he would oppose any effort to prosecute him for his medical decisions, the prosecutor, fearing the running of the limitations statute, prepared a criminal

information without waiver of indictment and submitted it in open court to a United States Magistrate Judge in June 2020. *See* App. 13 (district court notes concern for governmental "misuse of a waiverless information as a placeholder to indefinitely toll the statute of limitations").

The record is undisputed that the government knew petitioner did not consent to waiver of indictment. Yet despite petitioner's refusal to consent to prosecution by information, the government proceeded with the information in violation of the Federal Rules of Criminal Procedure, including improperly obtaining an order from the Magistrate Judge summonsing petitioner to appear in court in July 2020, to answer the information. The summons violated Fed. R. Crim. P. 9, which permits such a summons or arrest warrant only where the government has satisfactorily established probable cause for the commission of an offense, consistent with the Fourth Amendment. There was no such probable cause finding by a court or grand jury, and the government never offered any evidence or affidavit in support of the information's allegations.

Petitioner complied with the compulsory summons and appeared before the Magistrate Judge to answer the information, without waiving his right to indictment or other constitutional rights. The Magistrate Judge conducted an inquiry of the improperly summonsed petitioner and entered an order stating: "The Defense advised the Court that the Defendant will Not Waive Indictment." Order on Initial Appearance. The Magistrate Judge nevertheless ordered that petitioner be held to answer the

information (which included forfeiture allegations) and required petitioner to post a $50,000 bond that significantly restricts petitioner's liberty.

The Magistrate Judge also ordered the setting of a preliminary hearing on the information, but that order violated Fed. R. Crim. P. 5.1, which contemplates such a hearing only for a valid charging instrument, i.e., a complaint establishing probable cause. Petitioner was required to retain permanent counsel to represent him on the information, and following counsel's filing of a notice of appearance, petitioner filed, on January 26, 2021, a motion to dismiss the information, with prejudice, asserting that the prosecution by information violated the Grand Jury Clause of the Fifth Amendment. *See* App. 4 (order discussing petitioner's motion to dismiss).

Before responding to the motion to dismiss the information, the government filed a "Superseding Indictment." App. 6. The government then filed its opposition to the dismissal motion, asserting that the government was permitted to maintain a criminal information without the consent of the accused even if the filing of the information was undertaken for the sole purpose of tolling the running of the statute of limitations rather than to actually commence a prosecution. *See* App. 13 (district court labels this use of the information as a "placeholder" filing). In reply to the government's opposition, petitioner maintained that the information, filed in violation of the Rules of Criminal Procedure and the Grand Jury Clause and for no valid purpose, was a "legal nullity." App. 8.

2. On March 17, 2021, the district court, without conducting a hearing, denied the motion to dismiss. App. 9 (district court characterizes the issue as whether "Rule 7(b) prohibit[s] the *filing* of an information in the absence of a waiver of indictment by the defendant *so as to impact* the statute governing the limitation period") (emphasis added). On April 1, 2021, the district court summarily denied petitioner's motion for reconsideration.

3. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit, asserting the right of interlocutory appeal in light of the Grand Jury Clause violation. Petitioner alternatively sought mandamus review. In his appellate brief, Petitioner argued that the Eleventh Circuit should exercise collateral order jurisdiction under *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), because petitioner had an immediate right to terminate and foreclose prosecution under the information. *See* Petitioner's C.A. Br. 31–32 (2021 WL 2411409, at **31–32) (filed June 9, 2021) (citing Third and Tenth Circuit authority interpreting *Midland Asphalt* to hold that deprivation of a right not to be tried satisfies the third condition of the collateral order doctrine; that the Grand Jury Clause confers a right not to be tried when there is no grand jury indictment; and that interlocutory review is permissible for such a violation, unlike substantive merits issues in mine-run indictment challenges).

Without addressing the merits of petitioner's Grand Jury Clause claim and related arguments, the Eleventh Circuit dismissed petitioner's appeal on June

10, 2021, holding that the failure of the district court to dismiss the information was not subject to interlocutory appeal. The court of appeals ruled:

> Appellant seeks review of the district court's order denying appellant's motion to dismiss the information with prejudice, which we conclude is not immediately appealable. There has been no final judgment entered in the criminal proceedings in this case, and the Supreme Court has strictly interpreted the collateral-order exception in criminal cases, limiting its application thus far to orders that have denied three types of pre-trial motions: motions to reduce bail; motions to dismiss on double jeopardy grounds; and motions to dismiss under the Speech or Debate Clause. *See* 28 U.S.C. § 1291; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (citing *Flanagan v. United States*, 465 U.S. 259, 263 (1984)); *United States v. Shalhoub*, 855 F.3d 1255, 1260 (11th Cir. 2017). Accordingly, this appeal is DISMISSED for lack of jurisdiction.

App. 2–3. The Eleventh Circuit further denied, without explanation, petitioner's alternative request to treat the appeal as a petition for writ of mandamus. App. 3.

REASONS FOR GRANTING THE WRIT

Petitioner seeks certiorari based on the Eleventh Circuit's erroneous conclusion that this Court has limited the right of interlocutory appeal to bail, double jeopardy, and Speech and Debate Clause issues, an interpretation that suggests silent overruling of *Cohen*

v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). If *Cohen* is to be overruled, it should be only after the issues are fully debated and briefed, rather than by the anticipation of a court of appeals.

A. The Court of Appeals' Decision Not to Exercise Collateral Order Jurisdiction under *Cohen* to Review the Interlocutory Order Is Wrong and Misinterprets *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).

The collateral order doctrine allows for the appealability of an otherwise non-final order that (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from the final judgment. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798-99 (1989); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The Eleventh Circuit's decision in this case, despite citing *Midland Asphalt*, ignored this Court's discussion in that decision of the interlocutory appealability of challenges premised on a violation of the Grand Jury Clause. In *Midland Asphalt*, this Court explained that a claim for relief based on the absence of a grand jury indictment falls within the same Fifth Amendment category of need for interlocutory review as double jeopardy claims, because the Grand Jury Clause specifically guarantees that no one will be "held to answer"—precluding arrest, financial or liberty restrictions, and the need to retain counsel and face trial—for a felony offense absent a grand jury

indictment. 489 U.S. at 802.

This Court made clear in *Midland Asphalt* that prosecution by means other than a grand jury indictment is a fundamental violation that cannot be remedied fully by awaiting finality of the criminal case and instead presents concerns equivalent to a double jeopardy violation for interlocutory appeal purposes:

> As for the Grand Jury Clause of the Fifth Amendment, that reads in relevant part as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." *That does indeed confer a right not to be tried* (in the pertinent sense) when there is no grand jury indictment. ... Only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried.

Midland Asphalt, 489 U.S. at 802 (emphasis added); *see also Ex parte Wilson*, 114 U.S. 417, 426 (1885) ("The purpose of the [Grand Jury Clause] was to limit the powers of the legislature, as well as of the prosecuting officers, of the United States ... . [T]he constitution protect[s] everyone from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment.").

Petitioner had the right to terminate the information and to seek relief flowing from that dismissal. *Midland Asphalt* expressly addressed and reaffirmed that right, as a right not to be held to

answer for an offense alleged in a Grand Jury Clause violative document.

In *Midland Asphalt*, this Court recognized that no involuntary felony proceedings may be pursued in federal court in the absence of a grand jury indictment and that the core right to be free of the prosecution is what distinguishes the claim from other dismissal arguments and grand jury issues sought to be asserted on interlocutory appeal. The correct understanding of *Midland Asphalt*, seen in the decisions of the several Circuits that have fully weighed this Court's analysis of fundamental Grand Jury Clause issues, is that a defendant may interlocutorily appeal a district court's denial of a motion to dismiss based on a fundamental violation of the defendant's Fifth Amendment Grand Jury Clause rights, where the defendant has been improperly prosecuted on a felony information without waiver of indictment.

B. The Court of Appeals' Decision Warrants This Court's Review to Resolve the Conflict with Other Circuits Which Recognize the Special Place the Grand Jury Clause Has in the Application of the Collateral Order Doctrine.

Following the Court's decision in *Midland Asphalt*, the Third, Fourth, Seventh, and Tenth Circuits have recognized that a fundamental violation of the Grand Jury Clause presents an issue on which a viable claim for interlocutory review may lie because it implicates the right not to be subject to prosecution at all on the impermissible charging instrument. Because a defendant has the right not to be prosecuted at all on

a serious offense except by indictment returned by a grand jury, interlocutory appellate review is warranted. *See United States v. Asher*, 96 F.3d 270, 273 (7th Cir. 1996) ("The Grand Jury Clause grants defendants a 'right not to be tried' only where the [defect in the indictment process] is 'so fundamental that it causes the grand jury to no longer be a grand jury, or the indictment to no longer be an indictment.' *Midland Asphalt*, 489 U.S. at 802. Consequently, claims under the Grand Jury Clause *may be heard on interlocutory appeal* only in these very limited circumstances. *Id.* at 800–02 ... ."") (emphasis added); *United States v. Alexander*, 985 F.3d 291, 296 (3d Cir. 2021) (concluding that *Midland Asphalt* holds that a "deprivation of a right not to be tried satisfies the third condition of the collateral order doctrine and ... the Grand Jury Clause 'does indeed confer a right not to be tried ... when there is no grand jury indictment'") (quoting *Midland Asphalt*, 489 U.S. at 800–02); *see also United States v. Wright*, 776 F.3d 134, 139 (3d Cir. 2015) (interlocutory review is permissible for "'technical challenge[s] to the existence of an indictment,' such as where the defendant may have been indicted by an insufficient number of grand jurors'") (quoting *United States v. Tucker*, 745 F.3d 1054, 1069 (10th Cir. 2014)).

In *Tucker*, the Tenth Circuit reasoned that such a technical challenge was immediately reviewable, unlike the type of substantive merits issues raised in a mine-run indictment challenge. 745 F.3d at 1069; *see also United States v. Ferebe*, 332 F.3d 722, 747 (4th Cir. 2003) ("And a 'right not to be tried' depends upon

'an explicit statutory or constitutional guarantee that trial will not occur.' *Midland Asphalt*, 489 U.S. at 801...; *see*, *e.g.*, *id.* at 802 ... (noting that the Grand Jury Clause satisfies this requirement because it states that '[n]o person shall be held to answer' for a crime without a grand jury indictment)."); *United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749, 754 (10th Cir. 1992) ("In *Midland Asphalt Corp. v. United States*, 489 U.S. 794 ... (1989), the Supreme Court ruled, under the Grand Jury Clause of the Fifth Amendment, that the lack of a grand jury indictment gives rise to a right not to be tried. *Id.* at 802 ... .").[1]

C. This Case Raises an Important Question Concerning a Party's Ability to Challenge Grand Jury Clause Violations and Jurisdictional Defects in the Proceedings.

The Grand Jury Clause guarantee, that no person shall be held to answer felony charges absent indictment, can be fully preserved only with a right of interlocutory appeal. This Court's recognition (in the context of double jeopardy violations) of the right of interlocutory appeal where a defendant challenges "the

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[1] The Second and Ninth Circuits have found the collateral order doctrine applicable to other criminal appeals than merely the bail, double jeopardy, and Speech and Debate Clause categories identified by the Eleventh Circuit in petitioner's case. *See United States v. Myers*, 635 F.2d 932, 935–36 (2d Cir. 1980) (holding appealable the claim that separation-of-powers principles bar bribery prosecution of a congressman); *United States v. Claiborne*, 727 F.2d 842, 844–45 (9th Cir. 1984) (holding appealable the claim that separation-of-powers principles bar prosecution of a sitting federal judge).

very authority of the Government to *hale him into court* to face trial on the charge against him," *Abney v. United States*, 431 U.S. 651, 659 (1977) (emphasis added), shows that the narrow class of appeals for which interlocutory appeal lies includes the violation of which petitioner sought review.

"Unless there is a valid waiver, the lack of an Indictment in a federal felony case is a defect going to the jurisdiction of the Court." Wright & Miller, *1 Fed. Prac. & Proc. Crim.* § 121 at 213 (4th ed.). The Fifth Amendment's Grand Jury Clause provides: "[N]o person *shall be held to answer* for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V (emphasis added). Dismissal of the jurisdictionally-defective information on which the petitioner could not lawfully be held to answer was mandatory, and the district court's error in denying the motion to dismiss should be reversed. It is well established that a court lacks jurisdiction over a felony information where the government has not obtained a valid waiver. Such an information no more institutes a case than does an indictment that was not issued by a grand jury. *See, e.g., United States v. Teran*, 98 F.3d 831, 835 (5th Cir. 1996) ("In the absence of a valid waiver, the lack of an indictment in a felony prosecution is a defect affecting the jurisdiction of the convicting court."); *United States v. Moore*, 37 F.3d 169, 173 (5th Cir. 1994) (concluding that absent a valid waiver, the lack of an indictment in a federal felony case is a defect going to the jurisdiction of the court); *United States v. Clemenic*, 1988 WL 121575, at *3 (N.D. Ill. Oct. 24, 1988) ("[A] court only

has jurisdiction over felony proceedings brought on the basis of an indictment or brought upon an information where there is a valid waiver of indictment").

> [T]he court has no subject matter jurisdiction over a prosecution in which the government has filed an information without obtaining a valid waiver of indictment. The jurisdictional nature of the waiver is grounded in the Fifth Amendment, which requires the government to prosecute felonies by indictment. Under the Federal Rules of Criminal Procedure, the government may prosecute non-capital felonies by information instead, but only when the defendant has waived indictment "in open court and after being advised of the nature of the charge." Fed. R. [Crim.] P. 7(b). Thus, until a defendant has waived indictment pursuant to Rule 7(b), an information filed with the clerk of court cannot perform the same charging function as an indictment. Indeed, a court in possession of an information but not in possession of a waiver of indictment lacks subject matter jurisdiction over the case; such an information is virtually meaningless.

United States v. Machado, 2005 WL 2886213, at *2 (D. Mass. Nov. 3, 2005).

"[T]he Grand Jury Clause of the Fifth Amendment[,] like the Sixth Amendment jury-trial right, reflects the importance that the founding generation attached to juries as safeguards against oppression." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1435

(2020) (Thomas, J., concurring in the judgment).[2]

The improper use of the felony information has required petitioner to post bond, hire counsel for an obviously complex and expensive merits defense of medical efficacy issues, submit to restrictions of liberty, and prepare for hearings and potential trial.[3]

The district court's denial of dismissal is appealable under the collateral order exception of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because it leaves in place, and validates, a constitutionally-defective information that never properly conferred jurisdiction to engage in the prosecution of petitioner, both in the six months

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[2] In petitioner's case, despite conceding that a felony case cannot proceed without indictment or waiver, the government opposed dismissal of the invalid information. In other cases, *see, e.g.*, *United States v. B.G.G.*, No. 20-cr-80063-DMM (S.D. Fla. Sept. 2, 2020), ECF No. 8; *United States v. Sanfilippo*, No. 20-cr-60112-WPD (S.D. Fla. Feb. 26, 2020), ECF No. 5, the government itself has moved for dismissal of an impermissible felony information. The government's opposition to dismissal of petitioner's information reflects its capacity to change course and continue to employ such an information despite its unconstitutionality.

[3] Collateral consequences of the dismissal—such as a new, timely prosecution by the government or, if warranted, petitioner's right to seek recovery under the Hyde Amendment, Pub.L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes), for the improper information filing and the costs entailed in responding to it—are matters for determination after petitioner is no longer held to answer as to the unconstitutional information.

following its filing and thereafter when a superseding charge was filed.

The exceptions to the Grand Jury Clause are few and are constitutionally based. *See Ortiz v. United States*, 138 S. Ct. 2165, 2175 (2018) (noting that the Framers "exempt[ed] from the Fifth Amendment's Grand Jury Clause all cases arising in the land or naval forces) (citation omitted). As the Court explained, more than six decades ago, "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." *Smith v. United States*, 360 U.S. 1, 9 (1959). "The Fifth Amendment made the [grand jury indictment] mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings." *Id.* "[T]he opposite conclusion would deprive defendants of the protection of a grand jury indictment as required by the Constitution and Rule 7(a)." *Id.* at 10 ("Under our view of Rule 7(a), the United States Attorney did not have authority to file an information in this case and the waivers made by petitioner were not binding and *did not confer power on the convicting court to hear the case*.") (emphasis added).

In *Smith*, the government attempted to charge a capital offense by information after it obtained a waiver of indictment. But under the then-applicable version of Rule 7(a), a capital offense could only be prosecuted by indictment (even with a waiver from the defendant). The Court held that because "the United States did not have authority to file an information,"

the information "did not confer power on the convicting court to hear the case." *Smith*, 360 U.S. at 10. Here, even more than in the mere rule violation in *Smith*, because the government lacked authority under the now-applicable version of Rule 7 and under the Grand Jury Clause to initiate a formal charge by information, the government lacked authority to confer power on the district court to proceed on the charges as occurred here.

Just as in *Smith*, where Rule 7(a) prescribed the method of initiating capital charges, here Rules 7(a) and 7(b) prescribe the method of instituting non-capital felony charges: an indictment *or* an information accompanied by a waiver of indictment. And just as in *Smith*, where the failure to initiate capital charges as Rule 7(a) prescribed meant that the government lacked authority to file the information and to confer power on the court to proceed, here the failure to initiate non-capital felony charges as Rules 7(a) and 7(b) prescribe means that the government lacked authority to institute the information and to confer power on the district court to proceed on the felony charges that the information purports to lodge.

D. The Government's Filing of the Information Did Not Toll the Statute of Limitations.

The mere filing of an information without the defendant's consent does not satisfy any relevant statutory, constitutional, or jurisdictional function, and the placeholder concept noted by the district court not only warrants the concern asserted by that court, but is anathema to the constitutional system of justice.

The statute of limitations, 18 U.S.C. § 3282(a), provides that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is *instituted* within five years next after such offense shall have been committed." (emphasis added). Construing this provision must commence with its plain text. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). Under the plain text, the mere filing of a felony information without consent does not "institute" it.[4]

The statutory text shows that the charging instrument must be effective, and not merely filed, to be "instituted." To "institute" something means to "to originate and get established" or "to set going." Webster's Collegiate Dictionary (2020) (online version); *see also* Merriam-Webster's Dictionary (2020) (online version) ("to originate and get established;" "to set going"). Similarly, Black's Law Dictionary defines "institute" as "[t]o begin or start; commence." Black's Law Dictionary (2020) (online version).

In the face of a refusal to waive indictment under Rule 7(b), an information purporting to charge a felony does not "originate," "get established," "set going," "begin," "start," or "commence" anything; it is a legal

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[4] *See* A. Scalia & B. Garner, *Reading Law: the Interpretation of Legal Texts* 69 (2012) ("Words are to be understood by their ordinary everyday meanings—unless the context indicates that they bear a technical sense."); *id.* at 320 ("A statute that uses a common-law term, without defining it, adopts its common law meaning.").

nullity. A defendant cannot be arraigned on such an information without waiver, *see* Fed. R. Crim. P. 10 adv. comm. notes to 2002 amendment, and as a result such a document does not commence any criminal proceedings. The contrary action taken as to petitioner, haling him into court, forcing him to bail out of custody, causing his reputational and business interests to suffer immeasurably, imposing great financial burdens on him to retain counsel and prepare for trial, making him a criminal defendant subject to the liberty restrictions and further criminal exposure of bond, was all accomplished unconstitutionally and beyond the jurisdiction of the district court.[5]

An information is "instituted" only when it is legally effective to "get established" or "commence" a federal criminal case; and it is effective to do so only when it

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[5] When the Court ruled in *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), that "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship," it clearly contemplated those costs to be imposed only after a finding of probable cause by indictment or complaint, and not on the basis of a filing in defiance of the Grand Jury Clause. *See Kaley v. United States*, 571 U.S. 320, 328–33 (2014) ("This Court has often recognized the grand jury's singular role in finding the probable cause necessary to initiate a prosecution for a serious crime.") (citing *Costello v. United States*, 350 U.S. 359, 362 (1956)); *see id*. at 329 ("And that inviolable grand jury finding [of probable cause], we have decided, may do more than commence a criminal proceeding (with all the economic, reputational, and personal harm that entails); the determination may also serve the purpose of immediately depriving the accused of her freedom.").

either charges a misdemeanor or charges a felony and is accompanied by a waiver of indictment. Fed. R. Crim. P. 7(a)(2), 7(b), 58(b)(1). Because the meaningless information in petitioner's case was powerless to "institute" anything, it could not satisfy Section 3282.

The purpose of Fed. R. Crim. P. 7(b), the rule allowing for "waiving indictment," was to facilitate the interest of defendants in speedy resolution of their cases, not to provide the government a means of extinguishing the defendant's rights under the statute of limitations and encouraging pre-indictment delay. *See* Wright & Miller, *1 Fed. Prac. & Proc. Crim.* § 122 Waiver of Indictment (4th ed.) ("Rule 7(b) provides that a defendant charged with a non-capital felony may be charged by information if he waives his right to an indictment. When this provision was adopted as part of the original Criminal Rules it represented a change in practice, whose purpose was to expedite the process for those defendants who desired speed.") *see also id.* at n. 1 (quoting Advisory Committee Note to the 1944 Adoption of Rule 7(b)).

The record in this case notably does not reflect any authorization by a court or the Department of Justice for the felony information. In a contemporaneous case, the government conceded that its practice is to first determine "whether a defendant consents to proceed by way of information," and that "if a defendant does not, then the prosecutor will not file an information absent a waiver of indictment." *B.G.G.*, S.D. Fla. No. 20-cr-

80063-DMM, ECF No. 19 at 5.

This Court's precedent construing the very same word—"instituted"—in a different statute of limitations compels the conclusion that the dismissal of the information would afford petitioner meaningful relief. In *Jaben v. United States*, 381 U.S. 214 (1965), the Court interpreted the word "instituted" in the statute of limitations governing felony tax evasion, which provided that "[w]here a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States." *Id.* at 215–16 (quoting 26 U.S.C. § 6531). The day before the statute of limitations was to expire, the government filed a complaint against the defendant; a grand jury then returned an indictment after the statute of limitations had expired; and the government invoked the nine-month grace period to argue that the indictment was timely. *Id.* at 216. As relevant here, the government argued that the mere filing of a complaint operated to invoke the nine-month grace period under the relevant statute. *Id.* at 217. Accordingly, the government contended, it was irrelevant whether the complaint was sufficient to trigger further proceedings under Rules 4 and 5—i.e., whether it showed probable cause, a necessary condition to issuance of an arrest warrant and a preliminary hearing. *Id.*; *see also* Fed. R. Crim. P. 4–5.

This Court emphatically rejected the government's

placeholder argument. As the Court explained, "[t]he Government would . . . totally ignore the further steps in the complaint procedure required by [the] Rules." 381 U.S. at 217. By ignoring "the requirements of the Rules that follow," the government's position "would deprive the institution of the complaint before the Commissioner of any independent meaning which might rationally have led Congress to fasten upon it as the method for initiating the nine-month extension." *Id.* Moreover, this Court observed, the government's interpretation "provides no safeguard whatever to prevent the Government from filing a complaint at a time when it does not have its case made, and then using the nine-month period to make it." *Id.* at 220. This Court highlighted the dangerous implications of the government's position:

> [I]t follows from its position that once having filed a complaint, the Government need not further pursue the complaint procedure at all and, in the event that the defendant pressed for a preliminary hearing and obtained a dismissal of the complaint, that the Government could nonetheless rely upon the complaint ... as having extended the limitation period.

Id. at 218.

Rejecting the government's position, the Court interpreted the word "instituted" to require that the complaint be "adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules." *Id.* at 220 (emphasis added). Thus, only a

complaint that was "sufficient to justify the next steps in the process—those of notifying the defendant and bringing him before the Commissioner for a preliminary hearing"—could invoke the nine-month grace period. *Id*; *see also id.* at 227 (Goldberg, J., concurring in part and dissenting in part) ("[T]he view that I would accept as correct is that the only complaint that tolls the statute is one that begins effectively the criminal process prescribed by the Federal Rules."). The Court thus proceeded to determine whether the complaint showed probable cause and, concluding that it did, it held that the government had properly invoked the nine-month grace period. *Id.* at 225 (majority op.).

This Court's *Jaben* decision requires rejecting the government's argument that the filing of an information without the defendant's consent satisfies, and thus tolls, the statute of limitations under Section 3282. *Jaben* rejected the position, urged by the government in this case, that the mere filing of a complaint "institutes" it. To the contrary, the Court required that the filed complaint be "adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules." *Id.* at 220. A felony information to which a defendant does not consent is not "adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules." *Id.* Rule 7(b) permits prosecution by felony information only if a defendant waived prosecution by indictment in open court. *See* Fed. R. Crim. P. 7(b). Because petitioner did not waive prosecution by indictment—a fact the

government knew when it filed the information—the information was not "instituted" for purposes of Section 3282.

The government's position here would produce the very same concerns that motivated the Court in *Jaben* to reject that position. The Court explained that the nine-month grace period was not intended "to grant the Government greater time in which to make its case (a result which could have been accomplished simply by making the normal period of limitation six years and nine months)." 381 U.S. at 219. By construing "instituted" to mean the filing of the complaint supported by probable cause, thus satisfying Rules 4 and 5, the Court read the statute to require a "safeguard" "to prevent the Government from filing a complaint at a time when it does not have its case made." *Id.* at 220. Construing "instituted" in Section 3282 to mean the mere filing of an information—absent the defendant's consent—would provide no "safeguard" whatsoever. It would give the government free rein to extend the statute of limitations, on its own, any time it has not yet proven its case to a grand jury within the five-year limitations period.

As the Court observed in *Jaben*, if Congress had intended to accomplish that radical result, it would have said so expressly, rather than through the use of the word "instituted." *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary

provisions—it does not, one might say, hide elephants in mouseholes."). Importantly, the Department of Justice sought congressional intervention to extend the statute of limitations due to the pandemic in 2020, but Congress did not comply with that request.

Finally, if any doubt remained, the well-established principle that "criminal limitations statutes are to be liberally interpreted in favor of repose" would require adopting petitioner's reading of the statute. *Toussie v. United States*, 397 U.S. 112, 115 (1970) (internal quotation marks omitted) (citing *United States v. Habig*, 390 U.S. 222, 227 (1968)); *see also United States v. Gonsalves*, 675 F.2d 1050, 1055 (9th Cir. 1982). This principle is grounded in the basic purpose of criminal statutes of limitations—"to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie*, 397 U.S. at 114–15. Construing Section 3282 to permit the government to toll the statute of limitations by filing an information as a placeholder without the defendant's consent would undermine the very purpose of statutes of limitations.

This principle should apply with special force here in light of the constitutional implications of the government's position. The requirement of a grand jury indictment for felonies is protected by the Constitution and may be excused in only one situation: where the defendant consents. Petitioner's reading of Section

3282 protects that right by ensuring that, within five years of the accrual of a criminal offense, the government must either persuade a grand jury to return an indictment or persuade the defendant to waive her right to indictment. The government's reading, by contrast, would permit the government to extend the statute of limitations unilaterally, even when it has not made its case, by the expedient of filing an information without the defendant's consent, initiating a criminal proceeding, with all of its attendant burdens, without any finding of probable cause to charge the defendant. That is not, and cannot be, the law.

In *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998), the principal case accepting the government's placeholder position, the Seventh Circuit deemed the filing of a waiverless felony information to "institute" it under Section 3282 and further held that the government was entitled to invoke Section 3288's automatic six-month grace period upon dismissal of an information filed without consent. *Burdix-Dana*'s reasoning, premised on a cursory analysis with virtually no discussion of the text of Section 3288, is unpersuasive for a host of reasons, including where the Seventh Circuit (1) ignored the plain meaning of the term "instituted," failing to address its ordinary meaning or dictionary definitions, and instead merely equated the term with "filed;" (2) overlooked Congress's use of the term "filed" in other statutes of limitations, confirming Congress would have chosen "filed" had that been its intent here; (3) ignored this Court's

analysis in *Jaben*, relegating it to a footnote and failing to acknowledge that *Jaben* construed the same word, "instituted," in an analogous statute of limitations; (4) violated the settled principle that criminal statutes of limitations must be liberally construed in favor of repose; and (5) dismissed—despite *conceding*—the same policy concern underlying this Court's construction of the word "instituted" in *Jaben,* namely, that "by equating 'instituted' with 'filed' and then applying 18 U.S.C. § 3288, "we have allowed prosecutors to file an information, wait indefinitely, then present the matter to a grand jury well beyond the statute of limitations but within six months of the dismissal of the information," *Burdix-Dana* at 743. Relying on the cursory analysis in *Burdix-Dana*, numerous district court decisions over the past two years have approved the use of the invalid informations to skew the rules regulating the waiver of rights under the Grand Jury Clause. *See United States v. Sanfilippo*, No. 21-60006-CR, 2021 WL 5414945, at *3 (S.D. Fla. Nov. 19, 2021) (string citing numerous recent decisions permitting use of invalid informations to toll statute of limitations); *but see United States v. Machado*, 2005 WL 2886213 (D. Mass. Nov. 3, 2005) (rejecting *Burdix-Dana* in view of its "lack of logic and reason," *id.* at *3, and concluding, in reliance on standard tools of statutory construction, that filing a waiverless information did not "institute" it under Section 3282; dismissing charges as time-barred and ruling that subject matter jurisdiction over the case was lacking given the absence of a waiver of

indictment).

E. The Question Presented Warrants This Court's Review.

The Fifth Amendment's Grand Jury Clause bars felony prosecution (including restricting the defendant's liberty on bond) in the absence of a grand jury indictment. Under *Midland Asphalt*, denial of the fundamental right to indictment by grand jury supports interlocutory appeal jurisdiction, consistent with the view of the other Circuits to discuss the issue, and petitioner's case presents an ideal case to clarify the law applicable to interlocutory appeal of Grand Jury Clause violations.

The decision below deepens an entrenched circuit conflict on a recurring issue of substantial importance. The occurrence of the government's intentional violation of the Grand Jury Clause for tactical advantage has gone from a trickle to a flood in the past two years, and the recent prevalence of unreviewed district court decisions suggests the practice will continue without correction in the absence of this Court's intervention.[6]

Certiorari is warranted in this case to address the circuit split and to assure that the appellate

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[6] *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110 n.2 (2009) (suggesting the need for interlocutory review is greater where district courts are "systematically underenforcing" the asserted right).

gatekeeping function of *Cohen* is applied in a manner to sufficiently guarantee that meritorious claims for immediate appellate relief are heard.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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December 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11062-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAUREN ROSECAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Jun. 10, 2021)

Before: ROSENBAUM, LUCK, and BRASHER, Circuit Judges.

BY THE COURT:

Appellant seeks review of the district court's order denying appellant's motion to dismiss the information with prejudice, which we conclude is not immediately appealable. There has been no final judgment entered in the criminal proceedings in this case, and the Supreme Court has strictly interpreted the collateral-order exception in criminal cases, limiting its application thus far to orders that have denied three types of

pre-trial motions: motions to reduce bail; motions to dismiss on double jeopardy grounds; and motions to dismiss under the Speech or Debate Clause. *See* 28 U.S.C. § 1291; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (citing *Flanagan v. United States*, 465 U.S. 259, 263 (1984)); *United States v. Shalhoub*, 855 F.3d 1255, 1260 (11th Cir. 2017). Accordingly, this appeal is DISMISSED for lack of jurisdiction.

Finally, Appellant's alternative request to treat this matter as a petition for a writ of mandamus is DENIED. Any outstanding motions are DENIED as moot.

App. 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11062-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAUREN ROSECAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Sep. 17, 2021)

Before: ROSENBAUM, LUCK, and BRASHER, Circuit Judges.

BY THE COURT:

Lauren Rosecan's July 29, 2021 motion for reconsideration of our June 10, 2021 order dismissing this appeal for lack of jurisdiction is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CR-80052-RUIZ(s)

UNITED STATES OF AMERICA,

v.

LAUREN ROSECAN,

Defendant. /

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

(Filed Mar. 17, 2021)

This matter involves the interplay between Federal Rule of Criminal Procedure 7(b) and the applicable statute of limitations under 18 U.S.C. section 3282. Defendant, Lauren Rosecan, M.D., maintains that because he never consented to prosecution by information or waived his right to an indictment as contemplated by Rule 7(b), the Government's timely filing of an information in this case is a legal nullity. But, as explained herein, Dr. Rosecan's position misstates the prohibitions contained within Rule 7(b) and is rebutted by the plain language of section 3282. Thus, the Court having carefully reviewed Defendant's Motion to Dismiss the Information with Prejudice [ECF No. 35], the Government's Response in Opposition [ECF No. 42], and Defendant's Reply [ECF No. 44], and being otherwise fully advised, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss the Information with Prejudice [ECF No. 35] is **DENIED** as set forth below.

BACKGROUND

On June 26, 2020, the Government filed an information charging Dr. Rosecan with fourteen counts of health care fraud, in violation of 18 U.S.C. section 1347 (Counts 1–14), and eight counts of making false statements relating to a health care matter, in violation of 18 U.S.C. section 1035 (Counts 15–22). *See* Information [ECF No. 1]. All charges in the information relate to allegations that Dr. Rosecan improperly diagnosed and treated his patients for choroidal melanoma, a malignant cancer or tumor of the eye. *Id.* Counts 1 through 22 provide specific dates for Dr. Rosecan's treatments and corresponding claim submissions to Medicare. *Id.* ¶¶ 29; 31. The earliest offense date alleged is April 13, 2015 and the latest offense date alleged is August 24, 2015. *Id.* Accordingly, based upon the specific dates set forth in the information, the five-year statute of limitations for the latest offense would have expired on August 24, 2020. *See* 18 U.S.C. § 3282(a) ("[N]o person shall be prosecuted . . . unless the indictment is found or the information is instituted within five years [] after such offense shall have been committed.").

On April 9, 2020, however, Dr. Rosecan—aware of the investigation prior to the filing of the information—signed a Statute of Limitations Tolling Agreement with the Government. *See* Statute of Limitations

Tolling Agreement [ECF No. 42-1] ("Tolling Agreement"). Given that the date of the last specifically alleged offense was August 24, 2015, the original statute of limitations set to expire on August 24, 2020 was extended to a new expiration date of November 24, 2020 under the Tolling Agreement. *Id.* On or about May 18, 2020, prior counsel for Dr. Rosecan advised the Government that he would not consent to any further tolling agreements. *See* Resp. at 2.

After the filing of the information on June 26, 2020, Dr. Rosecan appeared on July 17, 2020 and was released on bond. *Id.* He did not waive indictment and was not arraigned at that time. *Id.* The parties attempted to reach an agreement throughout the summer and fall of 2020, but to no avail. *Id.* On January 6, 2021, Dr. Rosecan filed the instant Motion to Dismiss.[1] Further, on February 4, 2021, a federal grand jury returned a superseding indictment in this case, which is identical to the information in all material respects. *See* Superseding Indictment [ECF No. 41].

LEGAL STANDARD

The Fifth Amendment to the United States Constitution states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless

[1] Given that Dr. Rosecan seeks a ruling from this Court on his Motion to Dismiss before being arraigned, his arraignment has been reset for March 31, 2021, without objection from the Government. *See* Unopposed Motion to Continue the Arraignment [ECF No. 46]; Paperless Order [ECF No. 48].

on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. A felony offense "must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year." FED. R. CRIM. P. 7(a); *see also United States v. McIntosh*, 704 F.3d 894, 904 (11th Cir. 2013) (explaining that "an indictment is a necessary (unless waived) prerequisite to the prosecution of cases and must be filed prior to an arraignment"). However, a defendant may waive an indictment and be prosecuted by information for an offense punishable by imprisonment for more than one year "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) (emphasis added); *McIntosh*, 704 F.3d at 901 (noting a criminal defendant may waive his or her right to an indictment under Rule 7(b)).

Federal Rules of Criminal Procedure require a defendant to make a motion alleging "a defect in instituting the prosecution" by the deadline set by the court for pretrial motions. FED. R. CRIM. P. 12(b)(3)(A), (c); *United States v. Isaac Marquez*, 594 F.3d 855, 858 (11th Cir. 2010). "If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely." FED. R. CRIM. 12(c)(3); *United States v. Suescun*, 237 F.3d 1284, 1286 (11th Cir. 2001).

ANALYSIS

Dr. Rosecan maintains that because he never consented to prosecution by information or waived his

right to an indictment as contemplated by Rule 7(b), the Government cannot maintain a valid prosecution. *See* Mot. at 4. As an initial matter, the applicable statute of limitations in this case is set forth under 18 U.S.C. section 3282:

> **(a) In general.**—Except as otherwise expressly provided by law, ***no person shall be prosecuted***, tried, or punished for any offense, not capital, unless the indictment is found ***or the information is instituted within five years*** next after such offense shall have been committed.

18 U.S.C. § 3282(a) (emphasis added). Thus, based on the Tolling Agreement, the limitations period expired for the earliest charged offense date (April 13, 2015 in Count 5) on July 14, 2020, and expired for the latest offense date (August 24, 2020 in Count 14) on November 24, 2020. *See* Information ¶¶ 29-3 1; Resp. at 3.[2] Given that the information was filed on June 26, 2020—well within the limitations period for all counts charged—the Government maintains the instant prosecution is timely even without a waiver of indictment. *Id.*

However, Dr. Rosecan argues that the information filed by the Government "is a legal nullity which fails

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[2] The Government's Response indicates that the earliest charged offense date is April 14, 2015; therefore, the limitations period for that offense expired on July 15, 2020. However, because the information indicates that the earliest charged offense date is April 13, 2015—not April 14, 2015—the Court has adjusted the date in this Order accordingly.

to legally charge Dr. Rosecan under both the U.S. Constitution and the Federal Rules of Criminal Procedure." Mot. at 5. Specifically, he asserts that the information is defective because it was not accompanied by a waiver of indictment and was therefore insufficient to begin the prosecution within the limitations period. *Id.* at 6. This argument focuses "on the meaning of the word 'institute,' and whether the use of the term 'information' in 18 U.S.C. § 3282(a) refers to an information that attempts to charge a defendant with felonies absent a waiver of indictment." Reply at 4. In other words, does Rule 7(b) prohibit the *filing* of an information in the absence of a waiver of indictment by the defendant so as to impact the statute governing the limitation period?

While the Eleventh Circuit does not appear to have answered this question, the Seventh Circuit, in *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998), squarely addressed the issue in a two-part inquiry:

> 1) whether filing an information with the district court is sufficient to "institute" the information as that language is used in the statute of limitations, 18 U.S.C. § 3282; and if so, 2) whether the subsequent filing of the indictment and dismissal of the information after the period of limitations had run satisfy the statute of limitations.

Id. at 742. Similar to the instant case, the Government in *Burdix-Dana* filed a waiverless information approximately four days before the statute of limitations

expired. *Id.* About two weeks later, outside of the five-year limitations period, the government sought an indictment, which the grand jury returned for the same offense charged in the previously filed information. *Id.* The defendant moved to dismiss the indictment for having been found after the expiration of the statute of limitations, a request that the district court denied. *Id.* The defendant appealed.

Like Dr. Rosecan, the defendant in *Burdix-Dana* urged the Seventh Circuit to "equate 'institute' with the ability to proceed with a prosecution" and hold that "in a felony proceeding, an information is not 'instituted' until the defendant has waived her right to an indictment and the prosecution may proceed on the information." *Id.* The Seventh Circuit declined to adopt this position, stating as follows:

> While we recognize that the absence of a valid waiver of prosecution by indictment bars the acceptance of a guilty plea or a trial on the relevant charges, *see* Fed. R. Crim. P. 7(b), we do not believe that the absence of this waiver makes the filing of an information a nullity. Rule 7(b) does not forbid filing an information without a waiver; it simply establishes that prosecution may not proceed without a valid waiver. Rule 7(b) concerns itself with the requirements that the government must satisfy before it proceeds with a prosecution. We do not see how this rule affects the statute governing the limitation period. There is nothing in the statutory language of 18 U.S.C. § 3282 that suggests a ***prosecution*** must be

> instituted before the expiration of a five year period; instead the statute states that the ***information*** must be instituted. We hold that the filing of the information is sufficient to institute it within the meaning of 18 U.S.C. § 3282.

Id. (emphasis in original) (internal citation omitted); *see also United States v. Cooper*, 956 F.2d 960, 962-63 (10th Cir. 1992) ("Rule 7(b) does not prohibit the *filing* of an information in the absence of waiver of indictment by the defendant. Instead, the rule proscribes *prosecution* without a waiver. Therefore, the information could have been filed within the period of limitations, thus providing a valid basis for the prosecution.") (emphasis in original).

This Court fully adopts the logic of the Seventh Circuit in *Burdix-Dana*—because it is grounded in the plain language of section 3282. The main issue in this case is one of statutory interpretation, which mandates that the Court begin with the text at issue. *See United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999) ("The starting point for all statutory interpretation is the language of the statute itself."). And where the language of the statute is unambiguous, the inquiry ends. *United States v. St. Amour*, 886 F.3d 1009, 1013 (11th Cir. 2018) (having concluded that the "language at issue has a plain and unambiguous meaning," "we need go no further."). Here, the plain language of section 3282 only requires that the "information" be "instituted" to satisfy the statute of limitations. The terms "prosecuted" and "instituted" are not equivalent, and

an information is "instituted" when it is properly filed, regardless of the defendant's waiver. *See United States v. Briscoe*, No. CR RDB-20-0139, 2020 WL 5076053, at *2 (D. Md. Aug. 26, 2020) (noting that "[f]urther prosecutorial actions—such as a trial or a plea agreement—would require waiver, as Rule 7(b) sets forth.").

Indeed, the majority of federal district courts to confront this question have reached a similar conclusion: an information is "instituted" when it is "filed with the clerk of the court" and does not require the defendant to have waived prosecution by indictment. *See, e.g.*, *United States v. Holmes*, No. 18-cr-00258, 2020 WL 6047232, at *8 (N.D. Cal. Oct. 13, 2020); *Briscoe*, 2020 WL 5076053 at *2; *United States v. Marifat*, No. 2:17-0189 WBS, 2018 WL 1806690, at *1-2 (E.D. Cal. Apr. 17, 2018); *United States v. Stewart*, 425 F. Supp. 2d 727, 729 (E.D. Va. 2006); *United States v. Hsin-Yung*, 97 F. Supp. 2d 24, 28 (D.D.C. 2000); *United States v. Watson*, 941 F. Supp. 601, 603 (N.D. W. Va. 1996).

Dr. Rosecan relies almost exclusively on a recent Order of Dismissal issued in *United States v. B.G.G.*, Case No. 20-80063-CR-Middlebrooks [ECF No. 35-1] ("B.G.G. Order"), in support of his theory that the information in this case is invalid. However, the analysis set forth in *B.G.G.* appears to depart from a plain reading of section 3282 and instead divines the meaning of the statute through a survey of legislative history. *See B.G.G. Order* at 12-19 (reviewing the legislative and legal history of section 3282 and ultimately concluding that "after studying the legislative history of relevant statutes, I decline to conclude that the unconsented

Information in this case was 'instituted' within the meaning of 3282 when the Government filed it with the Clerk of Court."). Given the plain and unambiguous text of section 3282, such a legislative exposition is unnecessary. *United States v. Noel*, 893 F.3d 1294, 1297 (11th Cir. 2018) ("[I]f the statute's language is clear, there is no need to go beyond the statute's plain language into legislative history.") (internal quotation marks omitted).

Similarly, Dr. Rosecan's reliance on *United States v. Machado*, No. CRIM.A.04-10232- RWZ, 2005 WL 2886213, at *1 (D. Mass. Nov. 3, 2005) is misplaced. In *Machado*, the court effectively rewrote section 3282, defining "prosecution" to include "institution" of a criminal action—thereby concluding that to satisfy the statutory requirement that an information be "instituted," it must be accompanied by a waiver of indictment. *Id.* at *2. Again, this Court finds a clear distinction between "prosecution" and "institution," as "institution" is properly equated with "filing." There is nothing in the statutory language of section 3282 that suggests a "prosecution," rather than the information, must be instituted before the expiration of the 5-year period set forth by section 3282. *See Marifat*, 2018 WL 1806690 at *2.

The Court certainly shares the concern articulated in *Machado* regarding the Government's potential misuse of a waiverless information as a placeholder to indefinitely toll the statute of limitations. However, as explained above, the plain text of section 3282 does not compel the result Defendant seeks—and addressing

such policy implications is a task for Congress, not the courts.

Lastly, given that the information was timely filed under section 3282, the superseding indictment is also timely filed in this case. As explained by the Eleventh Circuit, "[a] superseding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending and was timely and the superseding indictment does not broaden or substantially amend the original charges." *United States v. Italiano*, 894 F.2d 1280, 1282 (11th Cir. 1990); *see also United States v. Farias*, 836 F.3d 1315, 1324 (11th Cir. 2016). This logic applies equally to a timely filed information just as it would to an original indictment. *See Briscoe*, 2020 WL 5076053 at *2 ("Although the rule is ordinarily applied as between superseding and original indictments, there is no reason why a subsequent indictment cannot relate back to a preceding, valid information because the two forms of charging documents are treated the same for statute of limitation purposes.") (citing 18 U.S.C. § 3282(a)). And because the charges in the superseding indictment are identical to the information, it relates back. *See id.*

CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss

the Information with Prejudice [ECF No. 35] is **DENIED**.[3]

DONE AND ORDERED in Fort Lauderdale, Florida, this 17th day of March, 2021.

/s/ Rodolfo A. Ruiz II
RODOLFO A. RUIZ II
UNITED STATES
DISTRICT JUDGE

[3] Having resolved Defendant's Motion to Dismiss through a plain reading of the statutory text under section 3282, as well as analysis of Rule 7(b), the Court need not reach the parties' arguments regarding equitable tolling in light of the ongoing pandemic. *See* Resp. at 12; Reply at 6.