

No. 25-5146

IN THE

Supreme Court of the United States

AHMAD ABOUAMMO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth
Circuit**

**BRIEF FOR THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS *AMICUS
CURIAE* SUPPORTING PETITIONER**

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INTERESTS OF *AMICUS CURIAE*¹

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal-defense lawyers, public defenders, military-defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal-defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal-defense lawyers, and the justice system as a whole. NACDL has a particular interest in ensuring that defendants are tried in the location where their alleged conduct occurred and only after being properly charged by indictment, as required by the Constitution.

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record received notice of *amicus*' intent to file this brief. Pursuant to Rule 37.2, counsel of record received notice of *amicus*'s intent to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The prosecution of Ahmad Abouammo violated *two* express constitutional mandates.

First, crimes must be prosecuted where they were committed. The Constitution says so twice. U.S. Const. art III, § 2, cl. 3. (“The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .”).

The founders included this language in reaction to the scorned practice of dragging colonists to England to face trial for crimes like “daring insults offered to his Majesty’s authority.” William Wirt Blume, *The Place of Trial of Criminal Cases*, 43 Mich L Rev 59, 62-66 (1944). So hated was this practice that it featured in the Declaration of Independence, which denounced King George III “for transporting us beyond Seas, to be tried for pretended offences.”

Jefferson’s objection seems quaint in the face of an “effects-based venue” theory. That theory dispenses entirely with the “committed” part of “shall have been committed,” applying where a statute expressly contemplates *the effect* of influencing an action. *United States v. Abouammo*, 122 F.4th 1072, 1093 (9th Cir. 2024). It bases venue on conduct (receiving something) that is not an element of the crime, that comes after the crime, and that is not “committed” by the defendant at all.

The upshot is just what the framers worried about: the dragging of criminal defendants from the place where they allegedly broke the law, often for no reason relating to truth-seeking or justice. It opens the door to gamesmanship and forum shopping, it makes criminal trials less fair, and it violates the Constitution.

Second, this case presents a critical question with far-reaching implications for criminal procedure: whether the government may strategically file a criminal information unaccompanied by a waiver of indictment to trigger the six-month tolling extension of 18 U.S.C. § 3288 and thereby circumvent expiring statutes of limitations.

The Ninth Circuit's approval of this practice misreads the law. The government's strategic filing of a waiverless information to extend a statute of limitations violates the Fifth Amendment's grand jury guarantee and the Rule 7(b) requirement that an information be accompanied by a waiver of indictment. Thus, a waiverless information is not only procedurally defective—it is constitutionally void.

Allowing such defective documents to trigger statutory tolling provisions eviscerates constitutional protections and invites prosecutorial overreach. Under the Ninth Circuit's reasoning, prosecutors could strategically file a defective information whenever facing timing pressures. This transforms a remedial statute into a prosecutorial weapon.

The Court's review is essential to preserve the integrity of criminal procedure and prevent the legitimization of government misconduct.

ARGUMENT

I. Effects-based venue is unconstitutional.

The Constitution seemed clear: crimes are to be charged where they were “committed.” U.S. Const. art III, § 2, cl. 3. (“The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .”). And yet, these venue protections are widely abused.

The Ninth Circuit’s “effects-based” standard is the latest departure from the Constitution’s plain language. Under Section 1519, the crime of falsifying a document is complete and over when the document is falsified. *United States v. Craig*, 3 F. Supp. 3d 756, 758 (E.D. Ark. 2014) (observing, “Black’s definition of ‘falsifying a record’ does not include delivering a document to another person, nor does the case law.”) (citing Black’s Law Dictionary 678 (9th ed. 2009)). If falsifying does not include delivering (or receiving), then Mr. Abouammo committed no criminal conduct in the Northern District of California and he should not have been chargeable in that district.

The effects-based venue theory not only conflicts with the Constitution’s text (i.e., the word “committed”), it also conflicts with the intent behind that text. In the leadup to the Revolution, Parliament passed resolutions requiring trials in England for treasonous acts such as “daring insults offered to his Majesty’s authority.” William Wirt Blume, *The Place*

of *Trial of Criminal Cases*, 43 Mich L Rev 59, 62-66 (1944). In reaction, colonies passed laws that felony trials should be held within their territories. *Id.* at 63-65. The Declaration of Independence then specifically denounced King George III “for transporting us beyond Seas, to be tried for pretended offences.”

These experiences and grievances were fresh in delegates’ minds at the Constitutional Convention. Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 808 (1976). They understood that “limitation of venue was . . . necessary to insure a fair trial for persons accused of a crime.” *Id.* This was in part because of the inconvenience and expense of defending a case in a distant land. *Id.* at 809. Especially “[f]or an accused of limited means, trial at a distant location could, in effect, mean a complete inability to present a defense to the charge.” *Id.*

This Court likewise recognized, more than a century ago, that “[t]o require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction.” *Hyde v. Shine*, 199 U.S. 62, 78 (1905).

If effects-based venue is now the law, then the Constitution has done a full 180. Under that theory, uttering “daring insults” against a monarch would have been properly chargeable in England, where the monarch was presumably expected to receive the insults. It is not plausible that the Constitution enshrined the very conduct it sought to ban.

II. A waiverless information cannot extend the statute of limitations under § 3288.

This case presents a stark question of statutory and constitutional boundaries: may the government knowingly file a legally defective charging instrument—in this case, a felony information without the defendant’s waiver of indictment—solely to extend the statute of limitations under 18 U.S.C. § 3288? The Ninth Circuit answered “yes.” That answer is wrong, it undermines the protections of the Fifth Amendment’s grand jury guarantee, it distorts the purpose of the information as a charging document, it contravenes the history and purpose of § 3288, and it invites prosecutorial gamesmanship.

A. The Ninth Circuit’s holding undermines the Fifth Amendment’s grand jury guarantee and distorts the purpose of an information as a charging document.

The Fifth Amendment provides that “[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. Ratified in 1791, “[t]he grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders.” *Costello v. United States*, 350 U.S. 359, 362 (1956). This protection constitutes a foundational safeguard of criminal due process, essential to maintaining the integrity and fairness of our justice system.

In *United States v. Cotton*, 535 U.S. 625, 634 (2002), this Court unanimously recognized that “the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power.” This citizen check operates as what the Court has termed “a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor.” *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

The constitutional importance of this protection is reflected in the strict procedural requirements governing departures from indictment. Under Federal Rule of Criminal Procedure 7(b), prosecution by information requires explicit defendant waiver. Indeed, a defendant cannot be arraigned on an information without such a waiver. *See* Fed. R. Crim. P. 10 advisory committee note (2002) (... [W]hen the defendant is charged with a felony information ... the defendant is required by Rule 7(b) to be present in court to waive the indictment.).

Thus, a waiverless information is a legal nullity—it has no power to prosecute. *United States v. Montgomery*, 628 F.2d 414, 416 (5th Cir. 1980) (“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.”) (citing 1 Wright, *Federal Practice and Procedure: Criminal* § 121 at 213).

This approach also subverts the intended purpose of the criminal information. Congress’s focus in developing the federal criminal information was on protecting defendants, not expanding prosecutorial

power. The 1941 Judicial Conference of Senior Circuit Judges recommended allowing waiver of indictment specifically as “a substantial aid to defendants” who might otherwise face “lengthy delays” while detained pre-indictment. Fed. R. Crim. P. 7, note to subdivision (b). The following year, the Judicial Conference reinforced this defendant-protective purpose, recommending waiver provisions “so that persons accused of crime may not be held in jail needlessly pending trial.”

Thus, the criminal information was created to be a tool for defendant relief, not prosecutorial advantage. In practice, they also facilitate pre-indictment plea negotiations, allowing defendants and the government to resolve cases without the time and expense of grand jury presentations.

The government’s approach here inverts the constitutional framework. Rather than respecting the grand jury as a check on prosecutorial power and the criminal information as an enhancement to due process, prosecutors here are strategically exploiting a defective information to extend their power to prosecute.

Finally, the Ninth Circuit’s ruling directly contradicts this Court’s precedent in *Jaben v. United States*, 381 U.S. 214 (1965). *Jaben* held that, for a complaint under Federal Rule of Criminal Procedure 3 to be filed within the limitations period, it “must be adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules. It must be sufficient to justify the next steps in the process” *Id.* at 220. A waiverless information thus cannot be

used to advance a criminal prosecution for any reason—let alone to buy the government more time to bring a proper indictment.

B. The 1988 amendment to § 3288 did not authorize the waiverless information.

Statutes of limitations serve as fundamental checks against prosecutorial overreach and ensure the integrity of criminal proceedings. As this Court has recognized, limitations periods constitute the “primary guarantee against bringing overly stale criminal charges.” *United States v. Ewell*, 383 U.S. 116, 122 (1966). These protections are “designed 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 v. United States*, 397 U.S. 112, 114-115 (1970).

Beyond protecting defendants, limitations periods also encourage prompt law enforcement action and “provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.” *United States v. Marion*, 404 U.S. 307, 322 (1971). Given these essential functions, “criminal limitations statutes are to be liberally interpreted in favor of repose.” *Toussie*, 397 U.S. at 115.

Against this backdrop, Congress enacted what is now 18 U.S.C. § 3288 as a narrow remedy to preserve charges when prosecutors discover defective indictments after limitations periods expire. *United*

States v. Durkee Famous Foods, 306 U.S. 68, 71 n.2 (1939) (citing a 1934 Attorney General letter to the Senate Judiciary Committee as having specifically contemplated “legislation providing that in any case in which an indictment is found defective or insufficient for any cause, after the period prescribed by the statute of limitations has run . . . a new indictment may be returned”).

The operative phrase, “found defective,” contemplates discovery of an existing flaw, not the intentional creation of one. The government here did not “find” a defective information; it deliberately filed one knowing it lacked the required waiver, intending to exploit § 3288’s tolling provision.

The Ninth Circuit’s reliance on Congress’s 1988 removal of waiver language from § 3288 misreads legislative intent. When Congress removed the phrase “filed after the defendant waives in open court prosecution by indictment,” it did not authorize the filing of a criminal information without a waiver. Nothing in the legislative history suggests Congress intended to broaden the power of a criminal information or override constitutional requirements. Rather, the amendment simply streamlined the statutory language while preserving the underlying constitutional and procedural requirements that exist independently in the Fifth Amendment and Federal Rule 7(b).

The waiver requirement exists independently in Federal Rule of Criminal Procedure 7(b) and flows directly from the Fifth Amendment. Congress cannot override constitutional requirements through mere statutory amendment. To read Congress’s amendment as authorizing a fundamental

transformation of criminal charging procedures would violate the principle that Congress “does not . . . hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001).

C. The Ninth Circuit’s ruling invites prosecutorial gamesmanship and undermines legislative.

The decision below creates dangerous precedent extending far beyond pandemic circumstances. Under the Ninth Circuit’s reasoning, prosecutors could strategically file a defective charging document whenever they face timing pressures, whether due to natural disasters affecting grand jury proceedings, witness availability issues, resource constraints, and simple prosecutorial delay or poor case management.

For instance, in *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998), the Seventh Circuit authorized such tolling despite the absence of any emergency conditions. The *Burdix-Dana* court disregarded the principle that limitations statutes should be interpreted in favor of repose, ignored the statute’s plain meaning, and relegated this Court’s precedent in *Jaben* to a footnote dismissal. As amici have noted, *Burdix-Dana* was “poorly reasoned and unpersuasive.” Brief for Amici Curiae Nat’l Ass’n of Crim. Def. Lawyers & Cato Inst. at 11-13, *United States v. Webster*, No. 21-10165 (11th Cir. Apr. 21, 2021).

This flawed reasoning subsequently influenced pandemic-era decisions where courts similarly permitted a waiverless information to toll limitations periods. See *United States v. Briscoe*, 101 F.4th 282,

292 (4th Cir. 2024), cert. denied, 145 S. Ct. 382 (2024); *United States v. Webster* 127 F.4th 318, 321 (11th Cir.), cert. denied, 145 S. Ct. 1461 (2025). While not yet widespread, the combination of *Burdix-Dana* and these recent pandemic cases threatens to normalize this destructive use of § 3288.

CONCLUSION

The Court should grant the petition and reverse the judgment below.

Respectfully submitted,

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August 18, 2025