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## Hiding in Plain Language: A Solution to the Pandemic Riddle of a Suspended Grand Jury, an Expiring Statute of Limitations, and the Fifth Amendment

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# Hiding in Plain Language: A Solution to the Pandemic Riddle of a Suspended Grand Jury, an Expiring Statute of Limitations, and the Fifth Amendment

NICOLE D. MARIANI\*

*Under the statute of limitations applicable to most federal crimes, 18 U.S.C. § 3282(a), “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.” That long-standing, generally uncontroversial procedural statute was thrust into the spotlight in 2020, when courts, prosecutors, and criminal defendants confronted an unprecedented and extraordinary scenario.*

*In response to the COVID-19 pandemic, many federal district courts suspended grand juries to prevent the spread of the highly contagious life-threatening virus through group congregation. Indeed, to combat the rampant and unabating COVID-19 outbreak in Florida, the District Court for the Southern District of Florida suspended grand juries from March 26, 2020, until November 17, 2020, creating a nearly eight-month period during which prosecutors could not obtain indictments. But, under the Fifth Amendment to the United States Constitution, criminal defendants have the right to be prosecuted by indictment. Thus, during the grand*

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*jury suspension, the five-year statute of limitations applicable to most federal crimes was expiring on uncharged criminal conduct that ended in 2015 at a time when prosecutors could not comply with the Fifth Amendment. Despite being alerted of this constitutional issue, Congress did not enact legislation giving either the Chief Judge of the United States Supreme Court or the Chief Judges of the United States District Courts authority to suspend statutes of limitations during national emergencies, such as the COVID-19 pandemic, that affect the functioning of the courts. The combination of that judicial decision to suspend grand juries and that legislative decision not to suspend statutes of limitations posed a pandemic riddle: how can prosecutors comply with both the statutes of limitations and the Fifth Amendment when there are no grand juries?*

*This Article examines the text of 18 U.S.C. § 3282(a), Federal Rule of Criminal Procedure 48(a), and 18 U.S.C. §§ 3288 and 3289; the purposes of statutes of limitations and the Fifth Amendment right to prosecution by indictment; and the related legislative history. Based on that examination, this Article suggests that, for most federal crimes, when defendants assert their Fifth Amendment right to prosecution by indictment during a pandemic (or other national emergency) that suspended grand juries and the statute of limitations on their alleged crimes is expiring, prosecutors can uphold that constitutional right and that statutory privilege as well as the public interest in seeing lawbreakers brought to justice by: (1) filing an information to toll the statute of limitations under 18 U.S.C. § 3282(a); (2) dismissing that information without prejudice under Federal Rule of Criminal Procedure 48(a) if the defendant does not waive his right to prosecution by indictment; and (3) obtaining a timely indictment within six months of the resumption of grand juries under the savings clauses in 18 U.S.C. §§ 3288 and 3289 for re-prosecutions after the dismissal of a timely filed information. This Article concludes that there already is a mechanism in the federal statute of limitations applicable to most federal crimes that allows prosecutors to constitutionally*

*preserve criminal charges when a national emergency prevents grand juries from finding indictments.*

INTRODUCTION .....	940
I. THE SOUTHERN DISTRICT OF FLORIDA IS A HOTSPOT OF COVID-19 AND CRIME.....	944
II. CONGRESS DID NOT AMEND THE STATUTES OF LIMITATIONS IN RESPONSE TO THE COVID-19 PANDEMIC ....	947
III. A SOLUTION TO THE PANDEMIC RIDDLE WAS HIDING IN THE PLAIN LANGUAGE OF THE STATUTE OF LIMITATIONS APPLICABLE TO MOST FEDERAL CRIMES .....	950
A. <i>Prosecutors Can Toll the Statute of Limitations in 18 U.S.C. § 3282(a) by Filing an Information</i> .....	951
B. <i>After that Information Tolls the Statute of Limitations, Prosecutors Can Uphold a Defendant’s Fifth Amendment Right by Dismissing that Information Without Prejudice under Federal Rule of Criminal Procedure 48(a)</i> .....	966
C. <i>Prosecutors Have Six Months from the Date on Which the Next Regular Grand Jury is Convened to Indict the Defendant on Those Dismissed Charges under 18 U.S.C. §§ 3288 or 3289</i> .....	969
IV. THE JUDICIAL REACTION TO THE PROPOSED SOLUTION TO THE PANDEMIC RIDDLE IN FLORIDA .....	972
A. <i>The District Court for the Southern District of Florida Judges Split on Whether Filing an Information Tolls the Statute of Limitations in 18 U.S.C. § 3282(a)</i> .....	972
B. <i>The United States Court of Appeals for the Eleventh Circuit Could Be the First Post-Pandemic Appellate Court to Evaluate the Proposed Solution</i> .....	977
CONCLUSION.....	980

## INTRODUCTION

In 2020, COVID-19 compelled humanity to re-examine the way it did nearly everything, forcing difficult choices between competing values and creative solutions at every turn. The American criminal justice system was no exception. The standard procedures for

enforcing the criminal laws and protecting constitutional rights and statutory privileges were suddenly fraught with lethality. Thus, courts, prosecutors, and criminal defendants had to re-examine long-used statutes and rules for potential flexibility and alternative procedures to balance the individual rights enshrined in the Constitution and the individual privileges created by Congress in its statutes against the communal need for health and safety during an unprecedented and unexpected years-long global pandemic.<sup>1</sup>

For example, the Fifth Amendment of the United States Constitution guarantees criminal defendants the right to be prosecuted by indictment, meaning they can be brought to trial on federal criminal charges only if at least twelve grand jurors agree that the charges alleged by the prosecutor are supported by probable cause.<sup>2</sup> To protect that right, Federal Rule of Criminal Procedure 7(b) mandates that the federal government prosecute felonies by indictment—and cannot prosecute felonies by information—unless the defendant knowingly waives his right to prosecution by indictment.<sup>3</sup> As a result of that constitutional right and its strict implementing procedure, the United States usually prosecutes defendants by indictment and usually files an information only if the defendant first indicates that he will waive his right to prosecution by indictment.<sup>4</sup>

COVID-19, however, made adhering to that standard procedure impossible. In March 2020, to control the spread of that terrifying virus, federal, state, and local governments prohibited public gatherings.<sup>5</sup> In alignment with that necessary response, many federal

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<sup>1</sup> *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. Courts (Feb. 18, 2021), <https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology>.

<sup>2</sup> U.S. CONST. amend V. To find an indictment against a defendant, at least twelve members of a sixteen-to-twenty-three-person grand jury, after hearing evidence presented by the prosecutor and deliberating as a group, must agree that the charges are supported by probable cause. *See* FED. R. CRIM. P. 6.

<sup>3</sup> *See* FED. R. CRIM. P. 7(a)(1) (“An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable by: (A) death; or (B) by imprisonment for more than one year.”); FED. R. CRIM. P. 7(B) (“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.”).

<sup>4</sup> *Id.*

<sup>5</sup> *See, e.g., 15 Days to Slow the Spread*, WhiteHouse.gov (Mar. 16, 2020), <https://trumpwhitehouse.archives.gov/articles/15-days-slow-spread/>.

district courts suspended grand juries to protect jurors and courtroom employees from contracting COVID-19 through sustained group contact.<sup>6</sup> Without grand juries, prosecutors could not obtain indictments and defendants could not exercise their constitutional right to be prosecuted by indictment.<sup>7</sup> The customary initiation process of the federal criminal justice system was on a break, but the federal criminal justice system was not. The statutes of limitations applicable to federal crimes continued to run even though there were no grand juries to find the indictments that would stop those limitations clocks.<sup>8</sup> As a result, prosecutors faced a pandemic riddle: how could they comply with both the statute of limitations and the Fifth Amendment when there were no grand juries?

As the proverb posits, necessity is the mother of invention.<sup>9</sup> Unwilling to sacrifice either protecting the public health from viral variants or protecting the public safety from criminal perpetrators, prosecutors had to find novel solutions to familiar problems. One such solution lies in the combination of 18 U.S.C. § 3282(a), Federal Rule of Criminal Procedure 48(a), and 18 U.S.C. §§ 3288 and 3289.<sup>10</sup> Using those statutes and that procedural rule in concert, prosecutors can preserve the timeliness of most federal criminal charges while grand juries are suspended, even for defendants who invoke their Fifth Amendment right to prosecution by indictment, by filing an information before that statute of limitations expires, dismissing the charges in the information without prejudice if the defendant does not waive his right to prosecution by indictment, and using the savings clauses that Congress added to the federal statutes of limitations to indict the defendant on those charges within six months of whenever grand juries resume. Some defendants, however, have challenged the legality of that solution, arguing that the Fifth Amendment right to prosecution by indictment is so paramount that, if grand juries are suspended when the statute of

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<sup>6</sup> See *Grand Juries Carry on During Pandemic*, U.S. COURTS (Oct. 27, 2020), <https://www.uscourts.gov/news/2020/10/27/grand-juries-carry-during-pandemic>.

<sup>7</sup> See FED. R. CRIM. P. 6; FED. R. CRIM. P. 7.

<sup>8</sup> See 18 U.S.C. § 3282(a).

<sup>9</sup> PLATO, REPUBLIC 47 (Hackett Publishing Company, Inc. 2004 ed. C.D.C. Reeve trans.) (“But its real creator, it seems, will be our need.”).

<sup>10</sup> 18 U.S.C. § 3282(a); FED. R. CRIM. P. 48(a); 18 U.S.C. §§ 3288–3289

limitations expires, a defendant must automatically be absolved of his crimes because he cannot be indicted for them.<sup>11</sup> In other words, those defendants contend that the pandemic riddle is unsolvable and that the cost of protecting the public from COVID-19, or some future national emergency, is that some criminals will go uncharged and unpunished.

As often happens when competing American policy ideals do battle, the winner will likely be declared in Florida. Florida was an epicenter of the COVID-19 pandemic, and, as a result, the District Court for the Southern District of Florida suspended grand juries for longer than any other federal judicial district.<sup>12</sup> Indeed, the District Court for the Southern District of Florida suspended grand juries from March 26, 2020, until November 17, 2020.<sup>13</sup> Accordingly, the litigation over the legality of charging crimes with expiring statutes of limitations via information while grand juries were suspended during the COVID-19 pandemic primarily occurred in the District Court for the Southern District of Florida.<sup>14</sup> That litigation resulted in an intra-district split on the issue, with three district court judges holding that filing an information tolls the statute of limitations and one district court judge holding, instead, that the statute of limitations continues to run until either the defendant waives his right to

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<sup>11</sup> See, e.g., *United States v. Sanfilippo*, No. 21-60006-CR-ALTMAN, 2021 WL 5414945, at \*3 (S.D. Fla. Nov. 19, 2021); *United States v. Rosecan*, 528 F. Supp. 3d 1289, 1292 (S.D. Fla. 2021); *United States v. B.G.G.*, No. 20-cr-80063 (S.D. Fla. Jan. 11, 2021).

<sup>12</sup> Max Greenwood & Julia Manchester, *Florida Becomes Epicenter of COVID-19 Surge*, The Hill (Aug. 3, 2021, 3:47 PM), <https://thehill.com/home-news/campaign/566168-florida-becomes-epicenter-of-covid-19-surge>; Order Concerning Partial Sequestration of Grand Juries, Administrative Order 2020-87 (S.D. Fla. Nov. 16, 2020) [hereinafter *Partial Sequestration of Grand Juries Order*].

<sup>13</sup> Order Concerning Grand Jury Sessions, Administrative Order 2020-22 (S.D. Fla. Mar. 26, 2020) [hereinafter *Grand Jury Sessions Order*]; Seventh Order Concerning Jury Trial and Other Procedures, Administrative Order 2020-76 (S.D. Fla. Oct. 20, 2020) [hereinafter *Seventh Jury Trial Order*].

<sup>14</sup> See, e.g., *Sanfilippo*, 2021 WL 5414945; *Rosecan*, 528 F. Supp. 3d 1289; *B.G.G.*, No. 20-cr-80063.

prosecution by indictment or an indictment is found by the grand jury.<sup>15</sup>

This article explains why the federal courts, including the District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, should approve the above-described solution for complying with the federal statute of limitations and the Fifth Amendment right to prosecution by indictment during times when grand juries are suspended. The suggested approach is permitted by the plain statutory language, and it strikes the proper balance between a defendant's constitutional right to indictment, a defendant's statutory privilege to timely notice and the public's interest in safety and the enforcement of the criminal laws during a national emergency. In addition, because the proposed solution is grounded in the text of well-established and long-standing statutes and procedural rules,<sup>16</sup> it can be utilized during future national emergencies, even if courts cannot predict their scope, duration, or cause.

#### I. THE SOUTHERN DISTRICT OF FLORIDA IS A HOTSPOT OF COVID-19 AND CRIME

On March 11, 2020, with worldwide COVID infections increasing at a dizzying rate, the World Health Organization declared the COVID-19 outbreak a global pandemic.<sup>17</sup> Two days later, the President of the United States declared that the COVID-19 outbreak in the United States constituted a national emergency and recommended that measures be taken to control the virus' spread.<sup>18</sup> By April 1, 2020, Florida had 7,540 reported COVID-19 cases, which was 3.1 percent of the reported COVID-19 cases in the United

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<sup>15</sup> *Sanfilippo*, 2021 WL 5414945 at \*3; *United States v. Webster*, 2021 WL 4952572, at \*2 (S.D. Fla. Sept. 27, 2021), report and recommendation adopted, 2021 WL 4949170 (S.D. Fla. Oct. 25, 2021); *Rosecan*, 528 F. Supp. 3d at 1293. *But see* *United States v. Xavier*, No. 20-cr-80054, slip op. at 5–6 (S.D. Fla. Sept. 8, 2021); *B.G.G.*, No. 20-cr-80063, slip op. at 12.

<sup>16</sup> *See, e.g.*, 18 U.S.C. § 3282(a); *see also* FED. R. CRIM. P. 7.

<sup>17</sup> Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020) (noting WHO's declaration).

<sup>18</sup> *Id.*

States,<sup>19</sup> and, as a result, the State of Florida imposed strict stay-at-home orders, closed schools, and shuttered public gathering places.<sup>20</sup>

The District Court for the Southern District of Florida was at the epicenter of Florida's relentless COVID-19 outbreak.<sup>21</sup> That federal judicial district encompasses 15,197 square miles of Florida in nine counties; it includes the large metropolitan areas of West Palm Beach, Fort Lauderdale, and Miami; it is a major point of entry for international travelers with multiple airports and seaports; and it has a population of over 6.3 million.<sup>22</sup> The coupling of that large and dynamic population with the explosive spread of COVID-19 throughout Florida made public gatherings in the Southern District of Florida particularly dangerous.<sup>23</sup> The District Court for the Southern District of Florida regularly convened such public gatherings, including by holding grand jury sessions.<sup>24</sup> For example, during the year before the COVID-19 outbreak—March 31, 2019 through March 31, 2020—the District Court for the Southern District of Florida held 273 grand jury sessions during which 5,807 grand jurors met in groups of sixteen to twenty-three jurors for a total of 1,091 hours to find indictments.<sup>25</sup> Despite the heavy need that prosecutors had for grand juries in the district, the District Court for the Southern District of Florida realized that it played a critical role in combatting COVID-19 and had a duty to protect the health of civic

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<sup>19</sup> *COVID Data Tracker*, CTR FOR DISEASE CONTROL AND PREVENTION, covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited Apr. 26, 2022). According to the Center for Disease Control and Prevention, on April 1, 2020, Florida had 7,540 reported COVID-19 cases and the United States had 240,876 reported COVID-19 cases. *Id.*

<sup>20</sup> Fla. Exec. Order No. 20-91 (Apr. 1, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-91-compressed.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-91-compressed.pdf).

<sup>21</sup> *Federal Judicial Districts of Florida*, U.S. Dist. Ct. S. Dist. Fla, <https://www.flsd.uscourts.gov/Federal-Judicial-Districts-Florida> (last visited Feb. 13, 2022).

<sup>22</sup> *Id.* See also *Historical Overview*, THE U.S. ATTY'S OFF. S. DIST. OF FLA, <https://www.justice.gov/usao-sdfl/about> (last visited Feb. 13, 2022).

<sup>23</sup> See *id.*; see also Greenwood & Manchester *supra* note 12.

<sup>24</sup> *Table J-1, U.S. District Courts-Grand and Petit Jurors Federal Judicial Caseload Statistics (March 31, 2020)*, U.S. COURTS (Mar. 31, 2020), <https://www.uscourts.gov/statistics/table/j-1/federal-judicial-caseload-statistics/2020/03/31>.

<sup>25</sup> *Id.*

participants in the judicial system and judicial employees.<sup>26</sup> Thus, the court suspended grand juries from March 26, 2020, until April 27, 2020.<sup>27</sup>

Unfortunately, COVID-19 tightened its grip on South Florida as 2020 continued; infection rates skyrocketed and hospitals overflowed with pandemic patients.<sup>28</sup> As a result of that unabated viral march through the state, the District Court for the Southern District of Florida issued monthly orders further suspending grand juries for additional thirty-day periods in May, June, and July 2020.<sup>29</sup> Finally, on August 11, 2020, the District Court for the Southern District of Florida entered a more permanent order, suspending all grand juries until January 4, 2021.<sup>30</sup> About two months later, however, the District Court for the Southern District of Florida amended that order and directed that, beginning on November 17, 2020, it would permit two grand jury sessions per week, which was a fraction of the pre-pandemic number.<sup>31</sup> In total, no grand jury met in the District Court for the Southern District of Florida for nearly eight months during 2020.<sup>32</sup>

The disappearance of grand juries from the District Court for the Southern District of Florida substantially impacted the court's criminal docket. Between December 2019 and December 2020 only sixty-eight grand jury sessions were held by the District Court for the Southern District of Florida; the year before it held 273 grand

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<sup>26</sup> Grand Jury Sessions Order, *supra* note 13.

<sup>27</sup> *Id.*

<sup>28</sup> By the end of 2020, Florida had over 1,318,222 COVID-19 cases, which was an increase to 6.5 percent of the total reported 20,150,162 COVID-19 cases in the United States. *Florida State Overview*, Johns Hopkins U. Med., <https://coronavirus.jhu.edu/region/us/florida> (last visited March 5, 2022).

<sup>29</sup> Third Order Concerning Jury Trial and Other Proceedings, Administrative Order 2020-24 (S.D. Fla. Apr. 3, 2020) [hereinafter Third Jury Trial Order]; Fourth Order Concerning Jury Trial and Other Proceedings, Administrative Order 2020-33 (S.D. Fla. May 31, 2020) [hereinafter Fourth Jury Trial Order]; Fifth Order Concerning Jury Trial and Other Proceedings, Administrative Order 2020-41 (S.D. Fla. June 29, 2020) [hereinafter Fifth Jury Trial Order].

<sup>30</sup> Sixth Order Concerning Jury Trial and Other Proceedings, Administrative Order 2020-53 (S.D. Fla. Aug. 11, 2020) [hereinafter Sixth Jury Trial Order].

<sup>31</sup> *See* Seventh Jury Trial Order, *supra* note 13.

<sup>32</sup> *Id.* (setting parameters to resume grand juries which had paused since March).

jury sessions.<sup>33</sup> By comparison, during 2020, the Southern District of New York, which encompasses Manhattan, held 177 grand jury sessions; the Central District of California, which encompasses Los Angeles, held 157 grand jury sessions; the District of Massachusetts, which encompasses Boston, held 137 grand jury sessions; and the Middle District of Florida, which encompasses Orlando and Tampa, held 131 grand jury sessions.<sup>34</sup> As a result of that substantial decrease in the number of grand jury sessions, only 519 criminal charging documents were filed in the District Court for the Southern District of Florida in 2020, compared to the 1552 charging documents filed in that court the year before.<sup>35</sup> That 66.8 percent decline in criminal cases filed was the largest decrease in any federal district court in 2020.<sup>36</sup> Indeed, the nationwide decrease in criminal cases filed in federal district courts during 2020 was only 28.3 percent.<sup>37</sup>

## II. CONGRESS DID NOT AMEND THE STATUTES OF LIMITATIONS IN RESPONSE TO THE COVID-19 PANDEMIC

While the pandemic suspended public gatherings and destroyed the ability of prosecutors to obtain indictments, it did not suspend prosecutors' obligation to pursue justice.<sup>38</sup> Courts had no choice but to continue to enforce statutes of limitations, which encourage both timely notice of and expeditious investigation into criminal charges by limiting the time prosecutors have from the end of a defendant's

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<sup>33</sup> *Table J-1—U.S. District Courts—Grand and Petit Jurors Statistical Tables For The Federal Judiciary (December 31, 2020)*, U.S. COURTS (Dec. 31, 2020), <https://www.uscourts.gov/statistics/table/j-1/statistical-tables-federal-judiciary/2020/12/31>; *Table J-1, U.S. District Courts—Grand and Petit Jurors Federal Judicial Caseload Statistics (March 31, 2020)*, U.S. COURTS (Mar. 31, 2020), <https://www.uscourts.gov/statistics/table/j-1/federal-judicial-caseload-statistics/2020/03/31>.

<sup>34</sup> *Id.*

<sup>35</sup> *Table D Cases—U.S. District Courts—Criminal Statistical Tables for The Federal Judiciary (December 31, 2020)*, U.S. COURTS (Dec. 31, 2020), <https://www.uscourts.gov/statistics/table/d-cases/statistical-tables-federal-judiciary/2020/12/31>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> ABA, *Criminal Justice Standards: Prosecution Function*, Standard 3-1.2 (2017) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”).

alleged criminal conduct to initiate criminal charges.<sup>39</sup> Under 18 U.S.C. § 3282(a), most non-capital federal crimes must be charged within five years of the conclusion of the offense conduct.<sup>40</sup> Because prosecutors are not required to indict a case at the moment they determine that probable cause supports the allegations, prosecutors often do not charge more complicated cases until the end of the limitations period to utilize the full amount of available time to marshal and analyze the evidence needed to ensure proof beyond a reasonable doubt.<sup>41</sup>

While 18 U.S.C. § 3282(a) provides that the statute of limitations can be tolled when either an indictment is found or an information is instituted, the standard procedure used by prosecutors is to charge federal crimes via indictment to ensure compliance with the Fifth Amendment.<sup>42</sup> The Fifth Amendment provides all criminal defendants with the right to be prosecuted by indictment; it specifies 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.”<sup>43</sup> Federal Rule of Criminal Procedure 7 gives effect to that constitutional right by requiring that felonies “be prosecuted by an indictment” unless the defendant has committed a non-capital felony and agrees to “be prosecuted by information” and “waives prosecution by indictment” in “open court and after being advised of the nature of the charges and of [his] rights.”<sup>44</sup> Thus, an indictment is a preferable charging document, because, unlike an information, the defendant cannot decline to be adjudicated upon it.<sup>45</sup> But, if there are no grand juries, there are no indictments.<sup>46</sup>

At the outset of the COVID-19 pandemic in March 2020, the United States Department of Justice sent proposed legislation to

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<sup>39</sup> 18 U.S.C. § 3282(a).

<sup>40</sup> *Id.* (“[N]o 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.”).

<sup>41</sup> *United States v. Dyal*, 868 F.2d 424, 429 (11th Cir. 1989) (“The government has no constitutional duty to indict as soon as the prosecutor has probable cause to believe that the defendant is guilty.”).

<sup>42</sup> U.S. CONST. amend V.

<sup>43</sup> *Id.*

<sup>44</sup> FED. R. CRIM. P. 7(a), (b).

<sup>45</sup> *See* FED. R. CRIM. P. 7(b) (explaining waiver of indictment).

<sup>46</sup> *See* FED. R. CRIM. P. 7.

Congress in an attempt to provide a simple, nationally-consistent solution to the tension a grand jury suspension creates between the federal statute of limitations and the Fifth Amendment.<sup>47</sup> First, the Department of Justice proposed amending 15 U.S.C. § 18a, which governs antitrust criminal enforcement cases, to “suspend[]” the running of the statute of limitations applicable to offenses arising under that the laws in Title 15 of the United States Code for the later of 180 days or 60 days after the termination of the COVID-19 national emergency.<sup>48</sup> Second, the Department of Justice proposed a new statute, 28 U.S.C. § 1660, which would authorize the chief judge of any United States District Court, “in the event of a natural disaster, civil disobedience, or other emergency situation requiring the full or partial closure of courts” to toll the federal statutes of limitations “for such period and in such judicial district as may be appropriate.”<sup>49</sup> Third, the Department of Justice proposed a new statute, 18 U.S.C. § 3302, which would authorize the Chief Justice of the United States Supreme Court, when the United States is in a state of national emergency, to toll the federal statutes of limitation “during the period of the national emergency and for one year following the end of the national emergency” if he finds “that emergency conditions will materially affect the functioning of the federal courts.”<sup>50</sup>

On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”).<sup>51</sup> The CARES Act was a wide-ranging piece of largely economic legislation, and it included none of the Department of Justice’s proposed statutes of limitations legislation.<sup>52</sup> Indeed, neither the text of the CARES Act

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<sup>47</sup> Charlie Savage, *In Pandemic, Justice Dept. Seeks Video Court Hearings and Home Detention*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/politics/justice-department-coronavirus.html>.

<sup>48</sup> DEPT. OF JUST., *Proposals for Addressing Issues Created by the COVID-19 Pandemic*, Tab A, <https://int.nyt.com/data/documenthelper/6835-combed-doj-coronavirus-legisla/06734bbf99a9e0b65249/optimized/full.pdf#page=1> (last visited Mar. 5, 2022) (this was a document purporting to be draft legislation submitted to Congress by the Department of Justice and obtained by the New York Times).

<sup>49</sup> *Id.* at Tab B.

<sup>50</sup> *Id.*

<sup>51</sup> CARES Act, 134 Stat. 281 (Mar. 27, 2020).

<sup>52</sup> *See generally id.*

nor its official legislative history mention the statutes of limitations at all.<sup>53</sup> Since the passage of the CARES Act, Congress has enacted no legislation amending the federal statutes of limitations. Accordingly, if a federal judicial district chose to suspend grand juries to protect the public health during the COVID-19 pandemic, it accepted the potential consequence that the statute of limitations could expire on uncharged crimes committed in that district before a grand jury could find an indictment. It was a choice between a death sentence for grand jurors and a get-out-of-jail-free card for criminals. This choice loomed large in the District Court for the Southern District of Florida, where, with each monthly order again suspending grand juries, prosecutors anxiously watched as the statute of limitations clock ticked down in uncharged cases, knowing that Congress was not going to intervene to help.<sup>54</sup>

### III. A SOLUTION TO THE PANDEMIC RIDDLE WAS HIDING IN THE PLAIN LANGUAGE OF THE STATUTE OF LIMITATIONS APPLICABLE TO MOST FEDERAL CRIMES

Given the local decision to suspend grand juries and the national decision not to suspend the statutes of limitations, prosecutors faced a dire choice: (1) let any uncharged federal crimes committed in 2015 go unpunished because of the timing of an unfathomable global pandemic or (2) find a way to constitutionally toll the statute of limitations without assistance from either a grand jury or Congress. By putting together 18 U.S.C. § 3282(a), Federal Rule of Criminal Procedure 48(a), and 18 U.S.C. §§ 3288 and 3289, prosecutors can solve the riddle of an expiring statute of limitations, a suspended grand jury, and the Fifth Amendment. As this article explains, that solution, while seemingly novel, is found in the plain language of long-existing legislation, and thus, can also be used during future national emergencies that necessitate the suspension of grand juries.

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<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., Grand Jury Sessions Order, *supra* note 13; Second Jury Trial and Other Proceedings, Administrative Order 2020-21 (S.D. Fla. Mar. 20, 2020); Third Jury Trial Order, *supra* note 29; Fourth Jury Trial Order, *supra* note 29; Fifth Jury Trial Order, *supra* note 29.

A. *Prosecutors Can Toll the Statute of Limitations in 18 U.S.C. § 3282(a) by Filing an Information*

Under 18 U.S.C. § 3282(a), the five-year statute of limitations applicable to most federal crimes is tolled when either “the indictment is found or the information is instituted.”<sup>55</sup> An indictment and an information are both legal pleadings by which the federal government initiates formal criminal charges, but there is a critical difference as to how they are drafted.<sup>56</sup> An indictment must be signed and sworn by the grand jury foreperson after at least twelve grand jurors agree that the charges stated in it are supported by probable cause before it can be filed with the district court.<sup>57</sup> Thus, the grand jury determines which charges are levied.<sup>58</sup> An information, however, must only be signed and sworn by a prosecutor before it can be filed with the district court.<sup>59</sup> Thus, it is prosecutors who determine which charges are levied.<sup>60</sup> Because an information does not require a grand jury, it, unlike an indictment, could still be created during the grand jury suspension.<sup>61</sup> Thus, depending on what the phrase “the information is instituted” means in 18 U.S.C. § 3282(a), prosecutors could use an information to toll an expiring statute of limitations while grand juries are suspended.<sup>62</sup>

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<sup>55</sup> 18 U.S.C. § 3282(a).

<sup>56</sup> CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CRIMINAL § 121 (4th ed. 2021).

<sup>57</sup> FED. R. CRIM. P. 6; *see* United States v. Gonzalez, 686 F.3d 122, 127 (2d Cir. 2012) (“The Fifth Amendment made the right to indictment by grand jury 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.”) (quoting *Smith v. United States*, 360 U.S. 1, 9 (1959) (internal citations omitted)).

<sup>58</sup> *Id.*

<sup>59</sup> WRIGHT & MILLER, *supra* note 56. An information is often used to initiate a case in which the defendant either agrees there was probable cause to support the allegations against him or wishes to expedite his case. Because it does not require the involvement of a grand jury—which requires waiting for an available grand jury session, waiting for the prosecutor to present his case, and waiting for the grand jury to find probable cause and return the indictment in open court—cases prosecuted by information are generally adjudicated more quickly. *See id.*

<sup>60</sup> WRIGHT & MILLER, *supra* note 56.

<sup>61</sup> *Id.*

<sup>62</sup> 18 U.S.C. § 3282(a).

The starting point for defining “instituted” is the statutory text. The primary canon of statutory interpretation directs that the “plain meaning” of the word controls if it is unambiguous.<sup>63</sup> In determining the “plain meaning” of a word, courts look to dictionary definitions while considering the word’s specific context within the sentence and general context within the statutory scheme.<sup>64</sup> In addition, there is a presumption that Congress is deliberate in the words that it includes and the words that it omits from a statute, which informs the meaning of the included words.<sup>65</sup>

Black’s Law Dictionary defines “instituted” as “inaugurate[d],” “commence[d],” “start[ed],” or “introduce[d].”<sup>66</sup> Similarly, Webster’s Dictionary defines “instituted” as “to originate and get established.”<sup>67</sup> And, back in 1785—five years before Congress enacted the original version of the federal statutes of limitations that included the phrase “the indictment, or information for the same, shall be found or instituted”<sup>68</sup>—Dr. Johnson’s dictionary defined “institute” as to “establish” or to “enact.”<sup>69</sup> Thus, at all relevant times since the inception of the federal statutes of limitations, the term “instituted” has meant the beginning or creation of an item.

The object of “instituted” in 18 U.S.C. § 3282(a) is the “information.”<sup>70</sup> Thus, what must be “established” or “commenced” is the information. Because it is a legal pleading, an information comes

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<sup>63</sup> *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration All.*, 304 F.3d 1076, 1087 (11th Cir. 2002); *see also* *United States v. Rojas*, 718 F.3d 1317, 1319 (11th Cir. 2013) (“The starting point for statutory interpretation purposes is the language of the statute itself.” (quoting *United States v. Zuniga-Arteaga*, 681 F.3d 1220, 1223 (11th Cir. 2012)) (internal citations omitted).

<sup>64</sup> *United States v. Zuniga-Arteaga*, 681 F.3d 1220, 1223 (11th Cir. 2012) (explaining the court will “analyze the language of the provision at issue, the specific context in which that language is used, and the broader context of the statute as a whole” to determine the meaning of a statutory term).

<sup>65</sup> *Patel v. U.S. Att’y Gen.*, 917 F.3d 1319, 1327–28 (11th Cir. 2019).

<sup>66</sup> BLACK’S LAW DICTIONARY 951 (11th ed. 2019).

<sup>67</sup> *Institute*, MIRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/institute> (last visited Mar. 5, 2022).

<sup>68</sup> Crimes Act of 1790, ch.9, § 32, 1 Stat. 112, 119.

<sup>69</sup> SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (defining “institute” as “[t]o establish; to appoint; to enact; to form and prescribe,” “[t]o found; to originate and establish,” and “[t]o begin; to commence; to set into operation”).

<sup>70</sup> 18 U.S.C. § 3282(a).

into existence when it is accepted by the courts. That occurs when the information is filed with the district court; it is docketed and takes its place as a legal filing. Indeed, once filed, an information takes on its inherent powers—it institutes the formal charges against the defendant, it confers subject matter jurisdiction on the federal courts,<sup>71</sup> it permits the defendant to file responsive legal pleadings, and it permits case management procedures to begin.<sup>72</sup>

Accordingly, under that plain and unambiguous meaning of the words Congress used in 18 U.S.C. § 3282(a), “the information is instituted” when it is filed with the district court, tolling the statute of limitations.<sup>73</sup> Because there is no suggestion in 18 U.S.C. § 3282(a)

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<sup>71</sup> Federal subject matter jurisdiction is conferred by statute. Under 18 U.S.C. § 3231, “[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.” 18 U.S.C. § 3231. Based on that statute, the United States Supreme Court held in *United States v. Cotton* that, so long as the charging document states an offense “against the laws of the United States,” then federal courts have subject matter jurisdiction regardless of any legal or procedural defects in that charging document. 535 U.S. 625, 629–30 (2002); see *United States v. McIntosh*, 704 F.3d 894, 903 (11th Cir. 2013) (“An indictment’s relationship to jurisdiction is thus based on whether it alleges conduct constituting a federal offense, not on some intrinsic value of an indictment as such. This understanding of jurisdiction explains why a defendant can waive an indictment and consent to proceed by information; i.e., the court maintains jurisdiction so long as the information alleges a federal offense.”). Indeed, in 2004, in *Kontrick v. Ryan*, the Supreme Court explained that only Congress can alter the jurisdiction of the federal courts and that court-proscribed procedural rules—including the Federal Rules of Criminal Procedure—neither create nor withdraw jurisdiction. 540 U.S. 443, 454–55 (2004). Instead, those procedural rules provide how the jurisdiction granted to the courts by Congress should be exercised. *Id.*; see also *United States v. Daughenbaugh*, 549 F.3d 1010, 1012 (5th Cir. 2008) (holding that the “absence of a waiver of indictment” as required by Federal Rule of Criminal Procedure 7(b), “is a non-jurisdictional defect” under *Cotton*).

<sup>72</sup> WRIGHT & MILLER, *supra* note 56.

<sup>73</sup> The Supreme Court, interpreting a different statute of limitations, held that “instituted” required more than filing the charging document with the district court. *Jaben v. United States*, 381 U.S. 214, 220, 230 (1965). That case, however, is inapposite, and it does not require that an information is “instituted” under 18 U.S.C. § 3282(a) only if that information complies with all the requirements of the Federal Rules of Criminal Procedure. *Jaben* analyzed what was required under 26 U.S.C. § 653 to apply a nine-month extension to a statute of limitations available if a complaint was “instituted before a commissioner of the United States.”

of any further requirement, that clear statutory language is the beginning and end of the analysis.<sup>74</sup>

The rest of 18 U.S.C. § 3282(a) lends greater credence to that interpretation of “the information is instituted.”<sup>75</sup> Another central canon of statutory interpretation is that “[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue as well as the language and design of the statute as a whole.”<sup>76</sup> Accordingly, “[w]hen Congress uses ‘different language in similar sections,’” the courts should give those words “different meanings.”<sup>77</sup> In its entirety, 18 U.S.C. § 3282(a) states that “no person shall be *prosecuted*, tried, or punished for any offense, not capital, unless the indictment is found or the information is *instituted*

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*Id.* at 215. The Supreme Court rejected the argument that a prosecutor filing a draft complaint was sufficient to “institute” it under 26 U.S.C. § 6531. *Id.* at 230. Instead, the Supreme Court held that the extension applied only if the complaint complied with Federal Rule of Criminal Procedure 3—which required a commissioner to find that probable cause supported the charges in the complaint—because were that not the case, then the Commissioner’s role would be a nullity and the statutory text referencing the commissioner would be superfluous. *Id.* at 226–27. Critical to *Jaben*’s reasoning was that the statute of limitations specified that the complaint had to be “instituted before a commissioner of the United States.” *See id.* at 217. That additional directive is not present in 18 U.S.C. § 3282(a). In addition, *Jaben*’s reasoning was tied to the fact that it involved a complaint, which, at that time, could not be drafted sufficient for filing until a commissioner found that it is supported by probable cause. *See id.*; *see* FED. R. CRIM. P. 3. In contrast, for an information to be drafted sufficient for filing, a prosecutor must provide a “plain, concise, and definite written statement of the essential facts constituting the offense charge” and sign it. FED. R. CRIM. P. 7(c)(1). Thus, while a prosecutor could not file a complaint without first obtaining a probable cause determination from a commissioner, a prosecutor can file an information as soon as it is written and signed. *Id.* at 230.

<sup>74</sup> *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (“When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”); *see also* *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) (Even where there are “contrary indications in the statute’s legislative history . . . we do not resort to legislative history to cloud a statutory text that is clear”).

<sup>75</sup> 18 U.S.C. § 3282(a).

<sup>76</sup> *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

<sup>77</sup> *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1089 (11th Cir. 2017) (quotation omitted); *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (“It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.”).

within five years next after such offense shall have been committed.”<sup>78</sup> By using the terms “prosecuted” and “instituted” in the same sentence, Congress indicated that the two verbs carry distinct meanings and “instituted” must be something less than “prosecuted.”<sup>79</sup> Put conversely, the statute is clear that, to stop the limitations clock, an information must merely be filed such that it becomes a formal legal pleading. To read the statute in any other way would render Congress’ use of two different verbs unnecessary.

Some defendants, however, have opposed that textual interpretation of 18 U.S.C. § 3282(a)’s “the information is instituted,” contending that more must be required to “institute” an information because it is not a charging document equivalent to an indictment.<sup>80</sup> They contend that 18 U.S.C. § 3282(a) must be read in concert with the Fifth Amendment right to prosecution by indictment and Federal Rule of Criminal Procedure 7(b), because those two provisions curtail the circumstances in which an information can be used to prosecute a defendant.<sup>81</sup> Those defendants posit that an information is not “instituted” when it is filed, and, instead, an information is instituted only after both a prosecutor files it with the district court and the defendant waives his right to prosecution by indictment, which Federal Rule of Criminal Procedure 7(b) requires before a defendant can be prosecuted by information.<sup>82</sup> Put differently, under this theory “instituted” in 18 U.S.C. § 3282(a) is synonymous with “prosecuted” in Federal Rule of Criminal Procedure 7(b),<sup>83</sup> and only an information that satisfies all the procedural requirements for a district court to adjudicate its charges tolls the statute of limitations. This argument is unpersuasive and reaches far beyond the plain and

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<sup>78</sup> 18 U.S.C. § 3282(a) (emphasis added).

<sup>79</sup> *Id.*

<sup>80</sup> *See* United States v. Webster, 2021 WL 4952572, at \*2 (S.D. Fla. Sept. 27, 2021) (“But, Defendant argues that the filing of a waiver-less information for felony charges is inconsistent with the purpose and statutory text of 18 U.S.C. § 3282(a).”); United States v. Rosecan, 528 F. Supp. 3d 1289, 1292 (S.D. Fla. 2021) (“Dr. Rosecan . . . 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.”).

<sup>81</sup> *See supra* note 80.

<sup>82</sup> *See* FED. R. CIV. P. 7(b).

<sup>83</sup> *See* 18 U.S.C. § 3282(a); FED. R. CIV. P. 7(b).

unambiguous language of both 18 U.S.C. § 3282(a) and Federal Rule of Criminal Procedure 7(b).

Federal Rule of Criminal Procedure 7(b) does not impact the interpretation of the federal statutes of limitations. It is a claim-processing rule that only concerns what procedures must be followed to ensure that a defendant is fully aware of his Fifth Amendment right to prosecution by indictment before he is adjudicated—via either a trial or guilty plea—on charges that are brought in an information.<sup>84</sup> Federal Rule of Criminal Procedure 7(b) requires that, for a defendant “to be prosecuted by information,” he must first knowingly waive “prosecution by indictment” in “open court.”<sup>85</sup> Federal Rule of Criminal Procedure 7 does not use the verb “instituted” and it does not state in any of its sections that an information does not exist until a defendant waives prosecution by indictment.<sup>86</sup> Further, under Rule 7(b), “[i]t is inconsequential whether the information is filed before or after the defendant has waived indictment.”<sup>87</sup>

Not only are the objects—the defendant and the information—of the two actions different, but also institution is a different moment in a criminal case’s life than prosecution. Instituted and prosecuted have different meanings. The verb “to institute” means to begin, start, or commence—it connotes the creation of a legal pleading—while the verb “to prosecute” means to “institute *and* pursue a criminal action against (a person)”—it connotes the legal document’s ultimate denouement in an adjudication.<sup>88</sup> Thus, prosecuting is more than instituting. In writing 18 U.S.C. § 3282(a), Congress did not include that more. Instead, Congress stated that institution alone was sufficient to toll the statute of limitations and there is nothing in 18 U.S.C. § 3282(a) that suggests that the information must be able to support a prosecution before the expiration of the limitations period. If Congress had intended to make the ability of an information to prosecute a defendant an element of the statute of limitations, it would have so said. It did not.

The same analysis applies to 18 U.S.C. § 3282(a) and Federal Rule of Criminal Procedure 6(f), confirming that Congress saw the

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<sup>84</sup> See *United States v. Hartwell*, 448 F.3d 707, 717 (4th Cir. 2006).

<sup>85</sup> FED. R. CRIM. P. 7(b).

<sup>86</sup> See *id.*

<sup>87</sup> WRIGHT & MILLER, *supra* note 56.

<sup>88</sup> BLACK’S LAW DICTIONARY 951, 1476 (11th ed. 2019) (emphasis added).

ultimate prosecutorial viability of a charging document as a separate inquiry from the tolling of the statute of limitations. As explained above, the statute of limitations in 18 U.S.C. § 3282(a) is tolled when “the indictment is found.”<sup>89</sup> Under Federal Rule of Criminal Procedure 6(f), a grand jury is required to both find and “return” an indictment before the defendant can be adjudicated.<sup>90</sup> The title of Federal Rule of Criminal Procedure 6(f) is “Indictment and Return,” connoting that the establishment of an indictment and its return are two separate procedural moments.<sup>91</sup> An indictment is “found” when twelve grand jurors agree the allegations are supported by probable cause and the foreperson subscribes to a true bill—that is when a legal pleading capable of being filed is created.<sup>92</sup> Federal Rule of Criminal Procedure 6(f) does not suggest that an indictment is “found” only after it is also returned, meaning it is publicly docketed.<sup>93</sup> Instead, as with the information, the pivotal moment for the statute of limitations is when a prosecutor’s allegations evolve into a legal pleading that can be filed with the court.<sup>94</sup> The additional requirement that the indictment be returned was omitted from 18 U.S.C. § 3282(a), just as the additional requirement that an information be accompanied by a waiver of prosecution by indictment was omitted from 18 U.S.C. § 3282(a).<sup>95</sup> Thus, Federal Rule of Criminal Procedure 6(f) requires “found plus” just as Federal Rule of Criminal Procedure 7(b) requires “instituted plus,” and neither of

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<sup>89</sup> 18 U.S.C. § 3282(a).

<sup>90</sup> FED. R. CRIM. P. 6(f) (“The grand jury—or its foreperson or deputy foreperson—must *return* the indictment to a magistrate judge in open court.” (emphasis added)).

<sup>91</sup> *Id.*; see *Carter v. United States*, 530 U.S. 255, 256 (2000) (“[T]he title of a statute is of use only when it sheds light on some ambiguous word or phrase in the statute itself.”); *United States v. Thompson*, 287 F.3d 1244, 1250–51 (10th Cir. 2002) (“Although the title to a statutory provision is not part of the law itself, it can be used to interpret a statute.”).

<sup>92</sup> FED. R. CRIM. P. 6(f).

<sup>93</sup> This is because indictments must be “found” by grand juries and cannot merely be written or issued by prosecutors or courts. See *Ex parte Bain*, 121 U.S. 1, 9 (1887), *overruled in part by* *United States v. Cotton*, 535 U.S. 625 (2002) (holding a defective indictment no longer deprives a court of federal subject matter jurisdiction).

<sup>94</sup> See FED. R. CIV. P. 6(f).

<sup>95</sup> See 18 U.S.C. § 3282(a).

those “plus” elements are required by 18 U.S.C. § 3282(a) to toll the statute of limitations.<sup>96</sup>

Reading “instituted” as requiring only that the information be filed with the district court is supported by the entirety of the federal statutes of limitations.<sup>97</sup> In 18 U.S.C. §§ 3288 and 3289, Congress created two savings clauses for charges brought in indictments and informations that were filed within the limitations period but then were dismissed either after the limitations period ran (18 U.S.C. § 3288)<sup>98</sup> or with less than six months remaining on the applicable statute of limitations clock (18 U.S.C. § 3289).<sup>99</sup> In both instances,

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<sup>96</sup> See *Thompson*, 287 F.3d at 1251 (“This court holds that an indictment is ‘found’ under 18 U.S.C. § 3282 when the grand jury votes to indict the defendant and the foreperson subscribes the indictment as a true bill,” not when the indictment is returned).

<sup>97</sup> See 18 U.S.C. §§ 3288, 3289.

<sup>98</sup> 18 U.S.C. § 3288 (“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, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.* This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.” (emphasis added)).

<sup>99</sup> 18 U.S.C. § 3289 (“Whenever an indictment or information charging a felony is *dismissed for any reason* before the period prescribed by the applicable statute of limitations has expired, and such period will expire within six calendar months of the date of the dismissal of the indictment or information, *a new indictment may be returned in the appropriate jurisdiction within six calendar months of the expiration of the applicable statute of limitations, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final, or, if no regular grand jury is in session in the appropriate jurisdiction at the expiration of the applicable statute of limitations, 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.* This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.” (emphasis added)).

Congress decided that an additional six-month statute of limitations would apply to the dismissed charges.<sup>100</sup> That six-month limitations period runs from the later of the end of the original statute of limitations period, the date that the charges are dismissed, or the date on which the next regular grand jury is convened; a 60-day limitations period applies if the entry of dismissal results from an appeal.<sup>101</sup> And, importantly for instant purposes, both 18 U.S.C. §§ 3288 and 3289 explain that the savings clauses only have the following two exceptions: (1) the reason for the dismissal “was the *failure to file* the indictment or information within the period prescribed by the applicable statute of limitations” or (2) the reason for the dismissal was “some other reason that would bar a new prosecution.”<sup>102</sup> As the emphasized portions of the above quotation show, the savings clauses apply to an information dismissed for “any” reason so long as it was “file[d]” within the limitations period.<sup>103</sup> That verb choice in 18 U.S.C. §§ 3288 and 3289—to file—to describe the act that rendered the indictment or information timely indicates that Congress intended for the terms “instituted” and “filed” to be synonymous with respect to an information.

That Congress used the term “instituted” in 18 U.S.C. § 3282(a), which was written in 1790, and the term “filed” in 18 U.S.C. § 3288, which was written in 1948,<sup>104</sup> to describe the same moment—when the statute of limitations is tolled by an information—is logical.<sup>105</sup> In 18 U.S.C. § 3282(a), Congress, at the time when American criminal procedure was being developed, specified that an indictment tolls the statute of limitations when it is “found” and an information

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<sup>100</sup> See 18 U.S.C. §§ 3288–3289.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (emphasis added).

<sup>104</sup> 18 U.S.C. § 3288 (Supp. II 1949). Congress first added a savings clause for dismissed charges to the statutes of limitations in 1934, but it used significantly different language. In its original iteration, Congress stated, “[w]henever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session.” Act effective May 10, 1934, ch. 278, 48 Stat. 772 (codified as amended at 18 U.S.C. § 3288). See generally *United States v. Durkee Famous Foods*, 306 U.S. 68, 70–71 (1939) (discussing the creation of the statute of limitations savings clause).

<sup>105</sup> 18 U.S.C. §§ 3282(a), 3288.

tolls the statute of limitations when it is “instituted.”<sup>106</sup> Those different verbs denote the different paths that an indictment and an information take in drafting. As aforementioned, a list of allegations does not become an indictment that can be filed as a legal pleading until twelve grand jurors agree that the allegations written by a prosecutor are supported by probable cause.<sup>107</sup> But a list of allegations written by a prosecutor becomes an information that can be filed as a legal pleading once it is written and signed by a prosecutor.<sup>108</sup> The use of those two different verbs in 18 U.S.C. § 3282(a)—“found” and “instituted”—made it clear that an indictment and an information still had to adhere to their individual, differing drafting requirements to toll the statute of limitations.<sup>109</sup> In writing 18 U.S.C. § 3288 in 1948, Congress was no longer so concerned with that pre-filing documentary evolution. After 1946, those drafting requirements were enshrined in the Federal Rules of Criminal Procedure.<sup>110</sup> Further, the applicability of the savings clause hinges only upon whether the now-dismissed charging document tolled the statute of limitations.<sup>111</sup> In that context, the verb “filed” could be used to cover both an indictment and an information in a single, more concise clause, because it is the final step of filing that tolls the statute of limitations for all charging documents regardless of what had to occur to ready the document to be accepted for that “filing.”<sup>112</sup>

In addition to comports with the plain meaning of the statutory language in 18 U.S.C. §§ 3282(a), 3288, and 3289, defining “instituted” as “filed with the district court”—and not also compliant with Federal Rule of Criminal Procedure 7(b)—comports with the purposes of the federal statutes of limitations and Federal Rule of Criminal Procedure 7(b).<sup>113</sup> The statutes of limitations, 18 U.S.C. §§ 3281-91, “represent legislative assessments of relative interests of the State and the defendant in administering and receiving

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<sup>106</sup> See 18 U.S.C. § 3282(a).

<sup>107</sup> FED. R. CRIM. P. 6(f).

<sup>108</sup> See *id.*; FED. R. CRIM. P. 7(a); see also WRIGHT & MILLER, *supra* note 56.

<sup>109</sup> See 18 U.S.C. § 3282(a).

<sup>110</sup> See FED. R. CRIM. P. 6 (1946); see FED. R. CRIM. P. 7.

<sup>111</sup> 18 U.S.C. §§ 3288–3289.

<sup>112</sup> See *id.*

<sup>113</sup> See 18 U.S.C. §§ 3282(a), 3288, 3289; see FED. R. CRIM. P. 7(b).

justice.”<sup>114</sup> Their purpose is primarily to provide notice to the defendant within a reasonable amount of time so that the defendant can locate witnesses and evidence to support any potential defenses and secondarily to encourage the expeditious investigation of crimes by law enforcement.<sup>115</sup> Both purposes are satisfied by the plain meaning reading of 18 U.S.C. § 3282’s text. Regardless of whether a defendant has waived his right to prosecution by indictment, a filed information gives the defendant notice of the allegations charged against him in a formal legal pleading, guarantees against “overly stale criminal charges” and the potential loss of access to exculpatory witnesses or evidence, and ensures that law enforcement completes its investigation promptly.<sup>116</sup>

The purpose of Federal Rule of Criminal Procedure 7(b) is to protect a defendant’s Fifth Amendment right to prosecution by indictment,<sup>117</sup> and the purpose of the Fifth Amendment right to prosecution by indictment is to protect individuals from having to defend themselves from unfounded criminal charges.<sup>118</sup> Specifically, the Fifth Amendment was enacted to ensure that an individual “shall not be put upon his trial” without the benefit of an indictment, which are accusations by his fellow citizens upon a finding of probable

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<sup>114</sup> *United States v. Marion*, 404 U.S. 307, 322 (1971); *Smith v. United States*, 568 U.S. 106, 112 (2013) (“A statute-of-limitations defense does not call the criminality of the defendant’s conduct into question, but rather reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution.”).

<sup>115</sup> *United States v. Lovasco*, 431 U.S. 785, 789 (1977); *Toussie v. United States*, 397 U.S. 112, 114–15 (1970) (noting that statutes of limitations “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time” and “may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity”); *see also* *United States v. Ratcliff*, 245 F.3d 1246, 1253 (11th Cir. 2001) (“Notice to the defendant is the central policy underlying the statute of limitations.”).

<sup>116</sup> *United States v. Trainor*, 376 F.3d 1325, 1332 (11th Cir. 2004) (“Statutes of limitations play an important role in ensuring the reliability of evidence presented at trial: by preventing stale claims—and the accompanying lost evidence and witnesses with faded memories—adjudication becomes both more efficient and more reliable.”).

<sup>117</sup> FED. R. CRIM. P. 7(b).

<sup>118</sup> *See* U.S. CONST. amend V; *see also* *Ex parte Wilson*, 114 U.S. 417, 426 (1885); *see also* *United States v. McIntosh*, 704 F.3d 894, 904 (11th Cir. 2013).

cause.<sup>119</sup> It ensures the charges are independently evaluated and considered by more than just a prosecutor or judge.<sup>120</sup> Tolling the statute of limitations before a defendant invokes or waives his Fifth Amendment right to prosecution by indictment does not impact this Constitutional protection. Instead, as Federal Rule of Criminal Procedure 7(b) makes clear, a defendant cannot be adjudicated on the charges in an information—meaning he can neither plead guilty to them nor be tried upon them—until he knowingly waives his right to prosecution by indictment.<sup>121</sup> He can make that waiver—or decline to make that waiver—at any time, including after the statute of limitations has expired, because it is concerned with the conclusion of the criminal proceedings, not their beginning.

In addition, conditioning the tolling of the statute of limitations by an information on when the defendant waives his right to prosecution by indictment gives the defendant complete control over whether he is immunized from his alleged criminal conduct. Defendants have a vested interest in immunizing themselves from criminal allegations. Thus, there is a strong incentive for a defendant who is charged by an information to delay his decision to waive his right to prosecution until after the statute of limitations has run. At that point—if an information is not “instituted” until the defendant files a waiver of prosecution by indictment—the defendant can then assert his right to prosecution by indictment, rendering the charges in the information untimely and immunizing himself from prosecution on them. That cannot be correct. Because the statute of limitations is an affirmative procedural defense, it cannot hinge solely on the conduct of the defendant but, instead, should hinge on the conduct of the prosecutor.

Finally, the legislative history of 18 U.S.C. §§ 3282, 3288, and 3289 supports the interpretation of “instituted” as tolling the statute of limitations when an information is filed with the court.

The first federal statute of limitations was enacted in 1790.<sup>122</sup> It stated, “nor shall any person be prosecuted, tried or punished for any

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<sup>119</sup> *Ex parte Wilson*, 114 U.S. at 426; *McIntosh*, 704 F.3d at 904 (“Simply put, the Grand Jury Clause requires that an indictment be in place before a person can be held to reply to a charge.”).

<sup>120</sup> *Stirone v. United States*, 361 U.S. 212, 218 (1960).

<sup>121</sup> *See* FED. R. CRIM. P. 7(b).

<sup>122</sup> Crimes Act of 1790, ch. 9, § 32, 1 Stat. 112, 119.

offense, not capital, nor any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense.”<sup>123</sup> Thus, from the start, the federal statute of limitations was tolled when an information was “instituted.”<sup>124</sup> A year later, in 1791, the United States ratified the Fifth Amendment, which enshrined the individual right to be prosecuted by indictment on felony charges.<sup>125</sup> Thus, when Congress voted on that first statute of limitations, the right to prosecution by indictment did not exist.<sup>126</sup> That underscores what the text shows: an information could be instituted for felonies simply by filing it with the court and the tolling of the statute of limitations did not turn on the defendant’s conduct.

The forward-moving legislative history of 18 U.S.C. § 3282(a) further supports that interpretation. Federal Rule of Criminal Procedure 7(b), along with the other Federal Rules of Criminal Procedure, was adopted in 1946.<sup>127</sup> Although several federal courts had held that a defendant could waive his right to prosecution by indictment in a felony case, that was the first time it was codified as a nationally-applicable procedural policy.<sup>128</sup> Since 1946, Congress has amended 18 U.S.C. § 3282(a) four times.<sup>129</sup> At every amendment, Congress was certainly aware that, under Federal Rule of Criminal Procedure 7(b), defendants charged with felony offenses had to

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<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> *See* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. L. REV. 1, 11 n.81 (1996) (citing Sara Sun Beale & William C. Bryson, *Grand Jury Law and Practice* § 1.4 (1986)).

<sup>126</sup> *See id.*

<sup>127</sup> FED. R. CRIM. P. (“the original rules . . . became effective on March 21, 1946”).

<sup>128</sup> *Id.* *See* George H. Dession, *The New Federal Rules of Criminal Procedure II*, 56 YALE L. J. 197, 205 (1947) (“The provision in Rule 7(b) providing for waiver of indictment has long been recommended.”).

<sup>129</sup> *See* Act of June 25, 1948, ch. 645, 62 Stat. 828 (codified as amended at 18 U.S.C. § 3282(a)) (changing the limitations period from five to three years and adding exceptions for certain crimes); Act of Sept. 1, 1954, ch. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145 (codified as amended at 18 U.S.C. § 3282(a)) (changing the limitations period back to five years); Act of Sept. 26, 1961, § 12(a), 75 Stat. 648 (codified as amended at 18 U.S.C. § 3282(a) (changing the effective date of the amendment); Act of Apr. 30, 2003, § 610, 117 Stat. 692 (codified as amended at 18 U.S.C. § 3282(a)) (adding an exception for certain offenses).

waive their right to prosecution by indictment before they could be adjudicated on an information.<sup>130</sup> Yet, Congress never altered, amended, or deleted the phrase “information is instituted” in 18 U.S.C. § 3282(a) to give it a deeper or different meaning, including to require that the defendant waive prosecution by indictment within the five-year limitations period.<sup>131</sup>

Indeed, when Congress last amended 18 U.S.C. § 3282(a) in 2003,<sup>132</sup> the United States Court of Appeals for the Seventh Circuit and two district courts had held that filing an information tolls the statute of limitations in 18 U.S.C. § 3282(a) and that the defendant’s waiver of prosecution by indictment has no bearing on the statute of limitations.<sup>133</sup> No court had reached a contrary conclusion, and the United States Court of Appeals for the Tenth Circuit had applied that holding and reasoning to guide its determination in a related context.<sup>134</sup> In the face of that consistent body of common law interpreting what “instituted” meant in 18 U.S.C. § 3282(a), Congress yet again elected not to alter that statutory text.<sup>135</sup> As the Supreme Court explained, “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”<sup>136</sup> As written,

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<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See Act of Apr. 30, 2003, § 610, 117 Stat. 692 (adding an exception to the statute of limitations for certain offenses).

<sup>133</sup> In 1998, in *United States v. Burdix-Dana*, the United States Court of Appeals for the Seventh Circuit held that filing an information tolls the statute of limitations in 18 U.S.C. § 3282(a). 149 F.3d 741, 743 (7th Cir. 1998). *Burdix-Dana* rejected the argument that Federal Rule of Criminal Procedure 7(b) requires that a defendant also waive prosecution by indictment within five years to toll the statute of limitations. *Id.* Before 2003, two district courts in other circuits followed *Burdix-Dana*. *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).

<sup>134</sup> Before 2003, the United States Court of Appeals for the Tenth Circuit cited *Burdix-Dana* with approval and two district courts in other circuits followed it. See *Thompson*, 287 F.3d at 1250.

<sup>135</sup> See 18 U.S.C. 3282(a).

<sup>136</sup> *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Keene Corp v. United States*, 508 U.S. 200, 212 (1993) (“[W]e apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them.”); *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997) (“Congress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation.”).

18 U.S.C. § 3282(a) clearly tolls the statute of limitations when an information is filed with the court regardless of whether the defendant ultimately consents to be prosecuted by it.<sup>137</sup>

The legislative history of 18 U.S.C. § 3288 also supports this interpretation. In 1964, Congress amended 18 U.S.C. § 3288 to state that the savings clause only applied to an information that was filed within the limitations period “after the defendant waives in open court prosecution by indictment.”<sup>138</sup> In 1988, Congress removed that language.<sup>139</sup> A defendant is no longer required to waive prosecution by indictment in open court, and, instead, the savings clause applies if an information was dismissed “for any reason” other than its failure to be “filed” within the limitations period or another reason that would bar re-prosecution entirely.<sup>140</sup> The purpose of that amendment was to expand 18 U.S.C. § 3288, because “[t]he reason a charge is dismissed (unless the reason for the dismissal would independently bar further prosecution such as a dismissal on grounds of double jeopardy or a dismissal ‘with prejudice’ under a statute) should not determine whether the government is given additional time to bring a new prosecution.”<sup>141</sup> Thus, the legislative history of 18 U.S.C. § 3288 indicates that Congress, at least after 1988, did not intend a defendant’s waiver of his right to prosecution by indictment to play any role in the determination of when the statute of limitations is tolled.<sup>142</sup> And, of course, Congress knew of that 1988 amendment to 18 U.S.C. § 3288 when it last amended 18 U.S.C. § 3282(a) in 2003, yet it did not alter or amend the phrase the “information is instituted.”<sup>143</sup>

Accordingly, 18 U.S.C. § 3282(a) provides a mechanism for prosecutors to toll the statute of limitations without a grand jury.<sup>144</sup> But tolling the statute of limitations only begins a case’s journey down its path to adjudication. The Fifth Amendment right to prosecution by indictment still has to be upheld during a time when there

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<sup>137</sup> 18 U.S.C. § 3282(a).

<sup>138</sup> Act of Aug. 30, 1964. 88-520, § 1, 78 Stat. 699 (1964).

<sup>139</sup> 18 U.S.C. § 3288; 134 Cong. Rec. 13660, 13785 (daily ed. June 8, 1988).

<sup>140</sup> 18 U.S.C. § 3288.

<sup>141</sup> 18 U.S.C. § 3288; 134 Cong. Rec., *supra* note 139.

<sup>142</sup> *See* 18 U.S.C. § 3288.

<sup>143</sup> 18 U.S.C. § 3282(a).

<sup>144</sup> *See id.*; 18 U.S.C. § 3288.

are no grand juries.<sup>145</sup> Under Federal Rule of Criminal Procedure 7(b), a district court can adjudicate charges brought in an information only if the defendant knowingly waives his right to prosecution by indictment.<sup>146</sup> Thus, for defendants who invoke their Fifth Amendment right to prosecution by indictment during a grand jury suspension, their cases can proceed no further on the information. Prosecutors are again placed in a situation where they would usually turn to a grand jury for assistance, but there are none. Thus, again, prosecutors need a novel solution in already-existing legislation to continue to solve the pandemic riddle. Fortunately, such a solution exists in the combination of Federal Rule of Criminal Procedure 48(a) and 18 U.S.C. §§ 3288 and 3289.<sup>147</sup>

B. *After that Information Tolls the Statute of Limitations, Prosecutors Can Uphold a Defendant's Fifth Amendment Right by Dismissing that Information Without Prejudice under Federal Rule of Criminal Procedure 48(a)*

Under Federal Rule of Criminal Procedure 48(a), “[t]he government may, with leave of the court, dismiss an indictment, information, or complaint.”<sup>148</sup> While Federal Rule of Criminal Procedure 48(a) requires “leave of the court,” the Supreme Court has been clear that phrase confers no substantial role for the judiciary.<sup>149</sup> Instead,

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<sup>145</sup> See 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.”).

<sup>146</sup> FED. R. CRIM. P. 7(b).

<sup>147</sup> See FED. R. CRIM. P. 48(a); 18 U.S.C. §§ 3288, 3289.

<sup>148</sup> FED. R. CRIM. P. 48(a).

<sup>149</sup> *Rinaldi v. United States*, 434 U.S. 22, 29, n.15, 30 (1977); see also *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975) (“The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest.”); *United States v. Goodson*, 204 F.3d 508, 512 (4th Cir. 2000) (“While [Rule 48(a)] confers discretion on the district court to deny the government’s motion to dismiss a charging document, this discretion is not broad.”). This narrow grant of judicial authority preserves the separation of powers. *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”); *Cowan*, 524 F.2d at 513 (“The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a

prosecutors have wide authority to dismiss an information under this Rule, and, “unless a contrary intent is clearly expressed, Rule 48(a) dismissals are without prejudice[,]” allowing prosecutors to bring the charges in a subsequent indictment.<sup>150</sup> Indeed, in resolving a Federal Rule of Criminal Procedure 48(a) motion brought by a prosecutor, the district court can deny that motion—by either dismissing the information with prejudice or refusing to dismiss the information—only where the district court finds that the defendant sufficiently demonstrated that the prosecutor sought to dismiss the information in “bad faith.”<sup>151</sup>

To demonstrate that a dismissal is sought in bad faith, the defendant must show that the prosecutor is seeking it “to achieve a tactical advantage in derogation of the defendant’s rights or for the purpose of harassment.”<sup>152</sup> Courts have found bad faith only where

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pending prosecution should be terminated.”); *see also* *United States v. Fokker Services*, 818 F.3d 733, 737 (D.C. Cir. 2016) (“The Constitution allocates primacy in criminal charging decisions to the Executive Branch . . . It has long been settled that the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences.”); *United States v. Hamm*, 659 F.2d 624, 628, n.13 (5th Cir. 1981) (“In balancing the rights and powers of the Executive Branch with those of the Judiciary, we must keep in mind that the exercise of prosecutorial discretion is to be given great deference by the courts.”). Those settled principles countenance against interpreting rules to impinge on the Executive’s constitutionally rooted primacy over charging decisions.

<sup>150</sup> *United States v. Matta*, 937 F.2d 567, 568 (11th Cir. 1991); *United States v. Wellborn*, 849 F.2d 980, 983 (5th Cir. 1988) (explaining that the presumption that a prosecutor seeks dismissal of an indictment or information in good faith “is rooted in a proper respect for the constitutional division of power between the executive and judicial branches of government”).

<sup>151</sup> *Matta*, 937 F.2d at 568. In addition, in the United States Court of Appeals for the Eleventh Circuit, district courts have authority to retroactively dismiss an information or indictment with prejudice under Federal Rule of Criminal Procedure 48(a) after initially granting the prosecutor’s motion to dismiss without considering the reason for the dismissal. *See id.* A district court can dismiss a superseding indictment with prejudice where the defendant demonstrates that he “had been prejudiced in his ability to challenge the prosecutor’s motives because the government failed to articulate its reasons for the dismissal.” *Id.* Here, this second narrow avenue for denying a Federal Rule of Criminal Procedure 48(a) motion is inapplicable as the prosecutor’s reason for the dismissal—the defendant’s decision not to waive his right to prosecution by indictment as required by Federal Rule of Criminal Procedure 7(b)—is obvious and stated.

<sup>152</sup> *United States v. Dyal*, 868 F.2d 424, 428–29 (11th Cir. 1989).

the prosecutor sought dismissal: (1) because he was bribed to do so<sup>153</sup>; (2) because he wanted to attend a social event at the time of trial<sup>154</sup>; (3) because he disliked the victim<sup>155</sup>; (4) because he wanted to pick different jurors after he made his selection<sup>156</sup>; and (5) because he failed to conduct forensic testing on evidence that he had for months before the speedy trial clock expired.<sup>157</sup> Further, the “bad faith” analysis is only concerned with the prosecutor’s reason for dismissing that charging document; it does not consider the validity of the prosecutor’s reason for bringing that charging document or the prosecutor’s strategy for the case.<sup>158</sup> In sum, prosecutorial bad faith only arises in the rarest circumstances, and Federal Rule of Criminal Procedure 48(a) motions are freely and regularly granted by the district courts.<sup>159</sup>

Dismissing an information because the defendant did not enter a waiver of prosecution by indictment as required by Federal Rule of Criminal Procedure 7(b) is not one of the rare times the district court has authority to deny a Federal Rule of Criminal Procedure 48(a) motion to dismiss without prejudice.<sup>160</sup> There is no bad faith in seeking to dismiss an information on which adjudication cannot be rendered, and a dismissal followed by single renewed prosecution via the defendant’s preferred charging document is not prosecutorial harassment.<sup>161</sup> Thus, when a defendant declines to be prosecuted on an information, while the statute of limitations is tolled on the charges, the prosecutor can and must move to dismiss the

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<sup>153</sup> *Hamm*, 659 F.2d at 630.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *United States v. Salinas*, 693 F.2d 348, 353 (1982).

<sup>157</sup> *United States v. Pitts*, 331 F.R.D 199, 204–05 (D.D.C. 2019).

<sup>158</sup> *See Rinaldi v. United States*, 434 U.S. 22, 30 (1977) (“The salient issue . . . is not whether the decision to maintain the federal prosecution was made in bad faith but rather whether the Government’s later efforts to terminate the prosecution were similarly tainted with impropriety.”).

<sup>159</sup> *See Hamm*, 659 F.2d at 629 (explaining judiciary’s authority to deny a Federal Rule of Criminal Procedure 48(a) motion to dismiss without prejudice is confined to “extremely limited circumstances in extraordinary cases.”); *United States v. Ammidown*, 497 F.2d 615, 621 (D.C. Cir. 1973) (Rule 48(a) motions must be granted “in the overwhelming number of cases.”).

<sup>160</sup> *Hamm*, 659 F.2d at 629–30.

<sup>161</sup> *See id.* at 628–30.

information without prejudice and then prosecute the defendant with an indictment bringing the same allegations and charges.

But, of course, once prosecutors dismiss such an information, they still need a grand jury to find an indictment at a time when there are none.<sup>162</sup> Thus, for a third time, prosecutors need a solution in already-existing legislation to solve the pandemic riddle. Fortunately, the savings clauses in 18 U.S.C. § 3288 and 3289 permit prosecutors to obtain a timely indictment no matter how long a grand jury suspension lasts.<sup>163</sup>

C. *Prosecutors Have Six Months from the Date on Which the Next Regular Grand Jury is Convened to Indict the Defendant on Those Dismissed Charges under 18 U.S.C. §§ 3288 or 3289*

In 18 U.S.C. §§ 3288 and 3289, Congress created savings clauses under which prosecutors can file a timely indictment bringing the same charges raised in an “information charging a felony” that was “dismissed for any reason” either within six months of the otherwise-applicable statute of limitations expiring or after that statute of limitations expired.<sup>164</sup> Prosecutors can bring the charges in a new indictment, which will be timely, within the latter of: (1) “six calendar months of the expiration of the applicable statute of limitations”; (2) “six calendar months of the date of dismissal” of the charges; (3) “if no regular grand jury is in session in the appropriate jurisdiction when the . . . information is dismissed, within six calendar months of the date when the next regular grand jury is convened”; or (4) “in the event of an appeal, within 60 days of the date the dismissal of the . . . information becomes final.”<sup>165</sup> The only exceptions to these savings clauses are that they do not “permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.”<sup>166</sup>

Under their plain and unambiguous language, 18 U.S.C. §§ 3288 and 3289 apply to an information that was instituted—which, as

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<sup>162</sup> U.S. CONST. amend V; *see also* FED. R. CRIM. P. 7.

<sup>163</sup> 18 U.S.C. §§ 3288–3289.

<sup>164</sup> *Id.*

<sup>165</sup> 18 U.S.C. § 3289.

<sup>166</sup> *Id.*; 18 U.S.C. 3288.

explained above, means filed with the court—and then dismissed without prejudice because the defendant did not waive prosecution by indictment as required by Federal Rule of Criminal Procedure 7(b).<sup>167</sup> That procedural reason falls within the broad category of “*any reason* after the period prescribed by the applicable statute of limitations has expired” and neither exception to the savings clauses applies.<sup>168</sup> The information was filed within the limitations period, and a failure to comply with Federal Rule of Criminal Procedure 7(b) does not bar a new prosecution on the charges.<sup>169</sup> Indeed, the purpose of 18 U.S.C. §§ 3288 and 3289 is to permit prosecutors to re-charge cases if a legal or procedural deficiency arises in the indictment or information just before or after the limitations period expires.<sup>170</sup> That is precisely what occurs when a defendant declines to consent to be prosecuted by a filed information just before or after the statute of limitations expires.

Thus, so long as an information is filed with the court within the five-year limitations period, prosecutors can dismiss that information if the defendant does not waive prosecution by indictment.<sup>171</sup> Prosecutors then have six months from the date that the next grand jury meets in that judicial district to indict the defendant on the same charges.<sup>172</sup> This permits prosecutors to timely indict defendants even when grand juries are suspended for months before and after the statute of limitations on their criminal conduct expires.

Combining 18 U.S.C. § 3282(a), Federal Rule of Criminal Procedure 48(a), and 18 U.S.C. §§ 3288 and 3289, provides a solution to the pandemic riddle that upholds both a defendant’s Fifth Amendment right to prosecution by indictment and a defendant’s statutory

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<sup>167</sup> 18 U.S.C. §§ 3288, 3289.

<sup>168</sup> 18 U.S.C. § 3288 (emphasis added).

<sup>169</sup> See *United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976) (holding that 18 U.S.C. § 3288 applies to an “information that was a nullity because only an indictment would suffice”).

<sup>170</sup> *United States v. Clawson*, 104 F.3d 250, 252 (9th Cir. 1996) (stating the “very purpose for which § 3288 was enacted” was to allow “a second indictment to remedy legal deficiencies present in the first.”); see also *United States v. Italiano*, 894 F.2d 1280, 1286, n. 10 (11th Cir. 1990) (“We agree with other courts of appeals that have addressed the issue that § 3288 is available to correct legal defects as well as grand jury defects or irregularities.”).

<sup>171</sup> See *id.*

<sup>172</sup> 18 U.S.C. § 3288.

privilege to timely notice of criminal charges against him when a judicially-mandated grand jury suspension prevents prosecutors from obtaining indictments. That solution is supported at every turn by the words of Congress.<sup>173</sup> But that solution has not yet garnered post-pandemic approval from the federal appellate courts, and the federal district courts have split on whether filing an information tolls 18 U.S.C. § 3282(a).<sup>174</sup> Indeed, in the District Court for the Southern District of Florida, where several cases were charged via information as the limitations period in 18 U.S.C. § 3282(a) expired during the COVID-19 grand jury suspension,<sup>175</sup> it is an open question of law as to what “instituted” requires, as to whether a dismissal due to a lack of a Federal Rule of Criminal Procedure 7(b) waiver is a dismissal sought in bad faith under Federal Rule of Criminal Procedure 48(a), and as to whether 18 U.S.C. §§ 3288 and 3289 can be used to file a timely indictment where an information is dismissed just before or after the statute of limitations ran because the defendant did not waive prosecution by indictment as is required by Federal Rule of Criminal Procedure 7(b).

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<sup>173</sup> 18 U.S.C. § 3282(a); FED. R. CRIM. P. 48(a); 18 U.S.C. §§ 3288–3289.

<sup>174</sup> See *United States v. B.G.G.*, No. 20-cr-80063, slip op. at 12 (S.D. Fla. Jan. 11, 2020) (“I decline to conclude that the unconsented Information in this case was ‘instituted’ within the meaning of § 3282”); *United States v. Sharma*, No. 414-CR-61, 2006 WL 2926365, at \*4 (S.D. Tex. May 19, 2016) (holding that an information lacking a waiver of indictment does not mean a case was “initiated”). *But see* *United States v. Briscoe*, No. CR-RDB-20-0139, 2020 WL 5076053, at \*2 (D. Md. Aug. 26, 2020) (“An information is ‘instituted’ when it is properly filed, regardless of the Defendant’s waiver.”); *United States v. Holmes*, No. 18-cr-00258, 2020 WL 6047232, at \*8 (N.D. Cal. Oct. 13, 2020) (“[T]he Court holds that the filing of an information without an accompanying waiver is sufficient to toll the statute of limitations—even though it may not be effective for other purposes”).

<sup>175</sup> See, e.g., *United States v. Sanfilippo*, No. 21-60006-CR-ALTMAN, 2021 WL 5414945 (S.D. Fla. Nov. 19, 2021); *United States v. Webster*, 2021 WL 4952572, at \*2 (S.D. Fla. Sept. 27, 2021); *United States v. Xavier*, No. 20-cr-80054, (S.D. Fla. Sept. 8, 2021); *United States v. Rosecan*, 528 F. Supp. 3d 1289 (S.D. Fla. 2021); *B.G.G.*, No. 20-cr-80063.

#### IV. THE JUDICIAL REACTION TO THE PROPOSED SOLUTION TO THE PANDEMIC RIDDLE IN FLORIDA

In the District Court for the Southern District of Florida, prosecutors charged multiple cases that had expiring limitations periods under 18 U.S.C. § 3282(a) via an information during the eight-month COVID-19 grand jury suspension, and, as a result, the issue of what “instituted” means is being litigated in that court.<sup>176</sup> In several of those cases, the defendants, after the statute of limitations expired, stated that they would not waive their right to prosecution by indictment, meaning the cases could not be adjudicated on an information.<sup>177</sup> Those defendants then either opposed the prosecutors’ requests to dismiss their informations under Federal Rule of Criminal Procedure 48(a) for failure to comply with Federal Rule of Criminal Procedure 7(b)<sup>178</sup> or moved to dismiss the subsequent indictments as untimely.<sup>179</sup> The defendants’ arguments hinged on reading “instituted” in 18 U.S.C. § 3282(a) and “failure to file” in 18 U.S.C. §§ 3288 and 3289 as requiring both the filing of the information and either the defendant’s entrance of a waiver of prosecution by indictment compliant with Federal Rule of Criminal Procedure 7(b) or, if the defendant did not enter such a waiver, the return of an indictment within the five-year limitations period proscribed by 18 U.S.C. § 3282(a).<sup>180</sup>

##### A. *The District Court for the Southern District of Florida Judges Split on Whether Filing an Information Tolls the Statute of Limitations in 18 U.S.C. § 3282(a)*

At the time this article was published, four District Court for the Southern District of Florida judges had addressed whether filing an information with the district court “instituted” it under 18 U.S.C.

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<sup>176</sup> See, e.g., *Sanfilippo*, 2021 WL 5414945, at \*3; *Webster*, 2021 WL 4952572 at \*2; *Rosecan*, 528 F. Supp. 3d at 1283; *B.G.G.*, No. 20-cr-80063, slip op. at 12.

<sup>177</sup> See *supra* note 176.

<sup>178</sup> See *B.G.G.*, No. 20-cr-80063, slip op. at 12.

<sup>179</sup> See, e.g., *Webster*, 2021 WL 4952572 at \*2; *Rosecan*, 528 F. Supp. 3d at 1292.

<sup>180</sup> See, e.g., *Webster*, 2021 WL 4952572 at \*2; *Rosecan*, 528 F. Supp. 3d at 1292–93.

§ 3282(a), and thus tolls the limitations period.<sup>181</sup> Three judges held that filing an information with the district court institutes it,<sup>182</sup> but one judge disagreed, holding that “instituted” requires both that the information be filed and that the defendant enter a waiver of prosecution by indictment compliant with Federal Rule of Criminal Procedure 7(b).<sup>183</sup>

On January 11, 2021, in *United States v. B.G.G.*, Judge Middlebrooks was the first District Court for the Southern District of Florida judge to evaluate whether prosecutors can toll the statute of limitations in 18 U.S.C. § 3282(a) by filing an information.<sup>184</sup> The prosecutors filed an information with the district court just before the statute of limitations expired, the defendant stated that he would not waive his right to prosecution by indictment after the limitations period expired, and the prosecutors moved to dismiss the information without prejudice under Federal Rule of Criminal Procedure 48(a).<sup>185</sup> Judge Middlebrooks denied the prosecutors’ Federal Rule of Criminal Procedure 48(a) motion and, instead, dismissed the information with prejudice based on his conclusion that the charges alleged therein were untimely because the statute of limitations expired before either the defendant waived prosecution by indictment or the grand jury returned an indictment.<sup>186</sup> Specifically, Judge Middlebrooks held, based on his interpretation of the legislative history of 18 U.S.C. § 3282(a), that filing an information was not sufficient to institute it because that information could not support a prosecution.<sup>187</sup> Instead, Judge Middlebrooks held “instituted” required both that the information was filed and also that the court could render an adjudication upon that information, meaning that the statute of limitations was not tolled until the defendant entered a waiver of prosecution by indictment as required by Federal Rule of Criminal Procedure 7(b).<sup>188</sup>

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<sup>181</sup> See *Sanfilippo*, 2021 WL 5414945 at \*3; *Webster*, 2021 WL 4952572 at \*2; *Rosecan*, 528 F. Supp. 3d at 1283; *B.G.G.*, No. 20-cr-80063, slip op. at 12.

<sup>182</sup> See, e.g., *Sanfilippo*, 2021 WL 5414945 at \*8; *Webster*, 2021 WL 4952572 at \*4; *Rosecan*, 528 F. Supp. 3d at 1293.

<sup>183</sup> *B.G.G.*, No. 20-cr-80063, slip op. at 12.

<sup>184</sup> *Id.* at 9.

<sup>185</sup> *Id.* at 2.

<sup>186</sup> *Id.* at 12.

<sup>187</sup> *Id.* at 12–19.

<sup>188</sup> *Id.*

Judge Middlebrooks acknowledged that the United States Court of Appeals for the Seventh Circuit and at least six federal district courts had contrarily held that, under the plain language of 18 U.S.C. § 3282(a), filing an information institutes it, but he declined to adopt the reasoning in those cases because he believed that it was inconsistent with the Fifth Amendment and Federal Rule of Criminal Procedure 7 to recognize an invalid charging document as a mere mechanism for extending a statute of limitations period where that document could not initiate criminal proceedings on the charges contained therein or confer subject matter jurisdiction.<sup>189</sup>

Judge Middlebrooks concluded:

I appreciate that the historical moment we are living through, which gave rise to the temporary suspension of grand juries, prevented the Government from obtaining indictments in this District from approximately March 26, 2020 to November 17, 2020. But our legal system has experienced public emergencies before, and it will experience them again. Allowing the applicability of our constitutional norms to ebb and flow with the times is not becoming of a democracy under the rule of law. Indeed, if our laws are to carry any force, they must stand despite the trials and tribulations of society. Congress can certainly make exceptions; however, it has not done so here. In fact, in March of 2020 when the Department of Justice asked it to suspend criminal statutes of limitations during the coronavirus pandemic and for one year thereafter, Congress declined to make such a special dispensation.<sup>190</sup>

The prosecutors appealed that determination to the United States Court of Appeals for the Eleventh Circuit on January 14, 2021. At the time of this article's publication, that appeal remains pending.<sup>191</sup>

On March 17, 2021, Judge Ruiz issued a contrary order in *United States v. Rosecan*, holding that an information is "instituted"

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<sup>189</sup> *Id.* at 10–14.

<sup>190</sup> *Id.* at 19.

<sup>191</sup> *United States v. B.G.G.*, No. 21-10165 (11th Cir. 2021).

and tolls the statute of limitations in 18 U.S.C. § 3282(a) when it is filed with the district court.<sup>192</sup> Judge Ruiz reasoned that, under the plain language of 18 U.S.C. § 3282(a), the statute of limitations is tolled when an information is filed and that nothing more, including the defendant's entry of a waiver of prosecution by indictment in compliance with Federal Rule of Criminal Procedure 7(b), is required.<sup>193</sup> Judge Ruiz disagreed with Judge Middlebrooks, explaining that Judge Middlebrooks' ruling "appears to depart from a plain reading of section 3282 and instead divines the meaning of the statute through a survey of legislative history," which Judge Ruiz believed was unnecessary and improper given the plain and unambiguous text used by Congress in 18 U.S.C. § 3282.<sup>194</sup>

Judge Middlebrooks, however, was unconvinced, and, on September 8, 2021, he again rejected the argument that filing an information tolls the statute of limitations in 18 U.S.C. § 3282(a) in *United States v. Xavier*.<sup>195</sup> The procedural posture of *Xavier* was different than that of *B.G.G.*<sup>196</sup> In *Xavier*, neither the prosecutors nor the defendant moved to dismiss the information under Federal Rule of Criminal Procedure 48(a).<sup>197</sup> Instead, the prosecutors left the information, which was filed on June 29, 2020, in place until grand juries resumed meeting in late November 2020.<sup>198</sup> Then, on December 8, 2020, the prosecutors brought the same charges before a grand jury, which found a superseding indictment against Xavier.<sup>199</sup> Xavier moved to dismiss the superseding indictment as untimely, arguing that the filing of the information did not institute it and, thus, the statute of limitations expired before the grand jury indicted him.<sup>200</sup> Judge Middlebrooks partially agreed, holding that filing the information did not institute it but finding that the superseding indictment was timely because the COVID-19 pandemic equitably tolled the

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<sup>192</sup> *United States v. Rosecan*, 528 F. Supp. 3d 1289, 1293–94 (S.D. Fla. 2021).

<sup>193</sup> *Id.* at 1293–94.

<sup>194</sup> *Id.* at 1294.

<sup>195</sup> *United States v. Xavier*, No. 20-cr-80054, slip op. at 5–6 (S.D. Fla. Sept. 8, 2021).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1–2.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 2.

<sup>200</sup> *Id.* at 1.

statute of limitations.<sup>201</sup> Judge Middlebrooks noted that he was the first federal judge to equitably toll 18 U.S.C. § 3282(a), and he explained that he took that extraordinary step because “[t]he pandemic was unforeseeable and the impact has been unprecedented in terms of the disruption to normal societal functioning. The court closure in this district, including the suspension of federal grand juries, impeded the Government’s ability to seek a timely indictment.”<sup>202</sup>

Later in September 2021, Judge Gayles weighed in, joining Judge Ruiz when he adopted a report and recommendation issued by Magistrate Judge Torres in *United States v. Webster*, holding that filing an information tolls the statute of limitations in 18 U.S.C. 3282(a).<sup>203</sup> That report and recommendation directly addressed the split between Judge Middlebrooks and Judge Ruiz, explaining that the plain statutory text took precedence over any inferences gleaned from the legislative history.<sup>204</sup> The report and recommendation also explained that the determination that an information is instituted when it is filed is “supported by the central policy underlying the statutes of limitations that focuses on giving a defendant fair notice of the charges against him within a reasonable amount of time,” which an information does when it is filed with the court.<sup>205</sup>

Finally, on November 19, 2021, Judge Altman issued an extensive order in *United States v. Sanfilippo*, denying a motion to dismiss an indictment as untimely and agreeing with Judge Ruiz and Judge Gayles that filing an information institutes it, although Judge Altman based that conclusion on both the plain meaning and the legislative history of 18 U.S.C. § 3282(a).<sup>206</sup> First, Judge Altman held that an information is instituted when it is filed with the district court because that is all that the plain language of the 18 U.S.C. § 3282(a) requires.<sup>207</sup> Judge Altman specified that “instituted” means “caus[ing] to come into existence,”<sup>208</sup> whereas “prosecuted” means “[t]o institute *and* pursue a criminal action against (a person.)”<sup>209</sup>

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<sup>201</sup> *Id.* at 5–8.

<sup>202</sup> *Id.* at 7–8.

<sup>203</sup> *Webster*, 2021 WL 4952572, at \*2.

<sup>204</sup> *Id.* at \*3.

<sup>205</sup> *Id.* at \*4.

<sup>206</sup> *Sanfilippo*, 2021 WL 5414945, at \*3.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993)).

<sup>209</sup> *Id.* (citing BLACK’S LAW DICTIONARY (11th ed. 2019)).

Thus, he concluded, because an information comes into existence when it is filed, an information is instituted when it is filed.<sup>210</sup> Judge Altman also explained, contrary to the conclusion reached by Judge Middlebrooks in *B.G.G.*, that the legislative history of 18 U.S.C. § 3282(a) demonstrated that, from 1790 through the present, Congress intended “instituted” to require nothing more than the filing of the information with the district court.<sup>211</sup> Judge Altman explained that Congress had amended 18 U.S.C. § 3282(a) four times since Federal Rule of Criminal Procedure 7(b) was enacted and once since the United States Court of Appeals for the Seventh Circuit held that filing an information instituted it, yet it elected in each instance “*not* to alter, amend, or delete the phrase ‘information is instituted’ in *any way*.”<sup>212</sup> Accordingly, Judge Altman concluded, Congress was clear by 2003, when it last amended 18 U.S.C. § 3282(a), that a prosecutor filing an information, not a defendant entering a waiver of prosecution by indictment, is what tolls the statute of limitations.<sup>213</sup>

B. *The United States Court of Appeals for the Eleventh Circuit Could Be the First Post-Pandemic Appellate Court to Evaluate the Proposed Solution*

As is evident from the split between the District Court for the Southern District of Florida judges, what “the information is instituted” means in 18 U.S.C. § 3282(a) is an open question of law in the United States Court of Appeals for the Eleventh Circuit. Indeed, the only United States Court of Appeals to answer that question—the United States Court of Appeals for the Seventh Circuit—did so in a short opinion over twenty years ago,<sup>214</sup> which has only been

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at \*6–8.

<sup>212</sup> *Id.* at \*7.

<sup>213</sup> *Id.*

<sup>214</sup> *United States v. Burdix-Dana*, 149 F.3d 741, 743 (7th Cir. 1998) (explaining that, while Federal Rule of Criminal Procedure 7(b) requires a waiver of prosecution by indictment before the charges can be adjudicated, Federal Rule of Criminal Procedure 7(b) does not forbid the filing of an information without a waiver, stating simply “[t]here is nothing in the statutory language of 18 U.S.C. § 3282 that suggests a *prosecution* must be instituted before the expiration of the five year period; instead the statute states that the *information* must be instituted”). Although the Tenth Circuit has referenced *Burdix-Dana* as persuasive reasoning

considered, and either adopted or rejected, by fourteen federal district court judges in the ensuing time.<sup>215</sup> The United States Court of Appeals for the Eleventh Circuit could confront this issue in 2022 when it decides the appeal that the United States took from Judge

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in another context, it has yet to hold that filing a waiverless information tolls the statute of limitations in 18 U.S.C. § 3282(a). *United States v. Thompson*, 287 F.3d 1244, 1250–51 (10th Cir. 2002).

<sup>215</sup> In addition, to the above-described four District Court for the Southern District of Florida judges, nine other federal district court judges have adopted *Burdix-Dana* and held that filing an information tolls the statute of limitations in 18 U.S.C. § 3282(a). *See United States v. Rothenberg*, No. 20-CR-00266, 2021 WL 4704583, at \*2–3 (N.D. Cal. Aug. 13, 2021); *United States v. Kruse*, No. 20-CR-249, slip op. at 4–6 (W.D. Tex. Dec. 21, 2020); *United States v. Dixon*, No. 20-cr-00006 (W.D. Va. Oct. 26, 2020); *United States v. Holmes*, 2020 WL 6047232, at \*8 (N.D. Cal. Oct. 13, 2020); *United States v. Briscoe*, No. CR-RDB-20-0139, 2020 WL 5076053, at \*3 (D. Md. Aug. 26, 2020); *United States v. Marifat*, No. 17-0189, 2018 WL 1806690, at \*2–3 (E.D. Cal. Apr. 18, 2018); *United States v. Stewart*, 425 F. Supp. 2d 727, 734–35 (E.D. Va. 2006); *Hsin-Yung*, 97 F. Supp. 2d at 28; *Watson*, 941 F. Supp. at 603. Two federal district court judges have held that filing an information does not toll the statute of limitations in 18 U.S.C. § 3282(a), and, instead, held that the defendant’s entry of a waiver of prosecution by indictment tolls the statute of limitations. *See United States v. Sharma*, No. 4:14-CR-61, 2016 WL 292365 (S.D. Tex. May 19, 2016); *United States v. Machado*, No. CRIM.A.04–10232, 2005 WL 2886213 (D. Mass. Nov. 3, 2005). In both cases, the information was sealed until after the limitations period expired. *Machado*, 2005 WL 2886213 at \*5; *Sharma*, 2016 WL 292365 at \*4. In addition, *Machado*’s reasoning was largely premised on an error of law. *Machado*, 2005 WL 2886213 at \*2. Specifically, *Machado* reasoned that filing an information could not toll the statute of limitations because an information filed without a waiver of prosecution by indictment did not confer jurisdiction on the federal courts. *Id.* *Machado* made that jurisdictional determination based on a 1991 district court order and a 1965 opinion from the United States Court of Appeals for the Tenth Circuit, which both stated that a federal court has no jurisdiction until a defendant enters a waiver of prosecution by indictment. *Id.* After the Supreme Court decided *Cotton* in 2002 and *Kontrick* in 2004, which respectively held that all that is required to create federal subject matter jurisdiction is a charging document that alleges an offense against the law of the United States and that court-proscribed rules such as the Federal Rules of Criminal Procedure do not affect federal jurisdiction, those two cases are no longer good law. *See Daughenbaugh*, 549 F.3d at 1012 (holding that “absence of a waiver of indictment is a nonjurisdictional defect” under *Cotton* and *Kontrick*); *See generally United States v. Cotton*, 535 U.S. 625 (2002); *Kontrick v. Ryan*, 540 U.S. 443 (2004). Simply put, there are large cracks in the foundation on which *Machado*’s nearly 20-year-old holding sits.

Middlebrooks' order dismissing the information with prejudice in *B.G.G.*<sup>216</sup>

The United States Court of Appeals for the Eleventh Circuit heard oral argument in *B.G.G.* on January 14, 2022.<sup>217</sup> Although the issue of what “instituted,” as used in 18 U.S.C. § 3282(a), means is raised in that appeal, the unique procedural posture of the case does not require the Eleventh Circuit to address that issue.<sup>218</sup> Because the prosecutors are appealing the denial of their Federal Rule of Criminal Procedure 48(a) motion to dismiss the information without prejudice on multiple grounds, the Court could reverse the order on the alternative ground that the district court exceeded its limited authority under Federal Rule of Criminal Procedure 48(a) when it denied the motion based on an improper anticipatory analysis of the timeliness of a future indictment.<sup>219</sup> The resolution of the appeal in that way, which would result in the dismissal of the information without prejudice, would allow the prosecutors, under 18 U.S.C. § 3288, to re-charge the case in an indictment within 60 days of any order of dismissal resulting from the appeal becoming final.<sup>220</sup> If *B.G.G.* moved to dismiss that indictment as untimely, then the district court could resolve whether filing an information institutes it and, if it does not, whether the statute of limitations is equitably tolled by the COVID-19 pandemic.<sup>221</sup> Or, the United States Court of Appeals for the Eleventh Circuit could decide the appeal by reaching the merits of the district court’s determination that any superseding indictment would be futile because the statute of limitations had run on the charges.<sup>222</sup>

While the United States Court of Appeals for the Eleventh Circuit will eventually be called upon to resolve the intra-district split in the District Court for the Southern District of Florida over the meaning of “instituted” in 18 U.S.C. § 3282(a), it is unclear whether

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<sup>216</sup> See generally *United States v. B.G.G.*, No. 20-cr-80063, slip op. at 12 (S.D. Fla. Jan. 11, 2020).

<sup>217</sup> *United States v. B.G.G.*, CT. LISTENER (Jan. 14, 2022) <https://www.courtlistener.com/audio/79444/united-states-v-bgg/>.

<sup>218</sup> *United States v. B.G.G.*, No. 21-10165 (11th Cir. 2021).

<sup>219</sup> *B.G.G.*, No. 20-cr-80063, slip op. at 6.

<sup>220</sup> 18 U.S.C. § 3288.

<sup>221</sup> See, e.g., *United States v. Xavier*, No. 20-cr-80054, slip op. at 6–7 (S.D. Fla. Sept. 8, 2021).

<sup>222</sup> *B.G.G.*, No. 20-cr-80063, slip op. at 5–6.

that resolution will occur at the present procedural moment or in a future appeal that raises the same issue at a different point during the lifetime of a case, whether it be via an appeal from the final adjudication in *Rosecan*,<sup>223</sup> *Webster*,<sup>224</sup> *Xavier*,<sup>225</sup> or *Sanfilippo*,<sup>226</sup> or from a second appeal in *B.G.G.*<sup>227</sup> Whenever it occurs, that opinion will affect federal prosecutions nationwide, both as the nation recovers from the COVID-19 pandemic and during any future national emergencies that could again require the suspension of grand juries.

#### CONCLUSION

Given the likelihood that a future national emergency—pandemic or otherwise—could again necessitate a grand jury suspension, and that Congress will again not grant authority to either the Chief Justice of the United States Supreme Court or the chief judges of the United States District Courts to toll statutes of limitations during such emergencies, the judicial confirmation of a lawful procedure through which prosecutors can timely charge crimes without grand juries in compliance with the Fifth Amendment using already-existing legislation is critical. The solution proposed by this article is authorized by the plain meaning of the unambiguous text of 18 U.S.C. § 3282(a),<sup>228</sup> Federal Rule of Criminal Procedure 48(a),<sup>229</sup> and 18 U.S.C. §§ 3288<sup>230</sup> and 3289;<sup>231</sup> it furthers the differing purposes served by the statutes of limitations, the Fifth Amendment,<sup>232</sup> and Federal Rule of Criminal Procedure 7(b);<sup>233</sup> and it is supported by over 200 years of legislative history.<sup>234</sup> While no one could have predicted the unprecedented years-long international public health

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<sup>223</sup> *Rosecan*, 528 F. Supp. 3d at 1293.

<sup>224</sup> *Webster*, 2021 WL 4952572 at \*2.

<sup>225</sup> *Xavier*, No. 20-cr-80054, slip op. at 6–7.

<sup>226</sup> *Sanfilippo*, 2021 WL 5414945, at \*3.

<sup>227</sup> *B.G.G.*, No. 20-cr-80063, slip op. at 5-6.

<sup>228</sup> 18 U.S.C. § 3282(a).

<sup>229</sup> FED. R. CRIM. P. 48(a).

<sup>230</sup> 18 U.S.C § 3288.

<sup>231</sup> 18 U.S.C § 3289.

<sup>232</sup> U.S. CONST. amend. V.

<sup>233</sup> FED. R. CRIM. P. 7(b).

<sup>234</sup> See, e.g., Dession, *supra* note 128, at 205; see also 134 Cong. Rec. 13660, 13785 (daily ed. June 8, 1988).

crisis caused by COVID-19, the tools to adapt the American criminal justice system to operate in such an emergency, while still upholding this nation's constitutional and statutory requirements, were hiding in the plain language of already-existing legislation. It is a surprisingly ordinary solution to a surprisingly extraordinary situation, and it is a solution that can be used far into the future in response to whatever unpredictable national emergencies may befall the United States.