No. 04-711

In the Supreme Court of the United States

ALFRED J. KOONIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, for a conspiracy offense, the first day counted in calculating the five-year limitations period under 18 U.S.C. 3282 is the date of the last overt act or the day after that date.

2. Whether the conspiracy in this case ended for statute-of-limitations purposes when one co-conspirator failed in his attempt to murder the intended target and was arrested, or continued at least until a subsequent telephone call between two other co-conspirators about the progress of the conspiracy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

Miscellaneous:

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OPINIONS BELOW

The court of appeals issued two opinions on petitioner's appeal. One of the opinions of the court of appeals (Pet. App. 1-9) is reported at 361 F.3d 1250. Another opinion of the court of appeals (Pet. App. 10-12) addressing different issues is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2004. A petition for rehearing was denied on August 31, 2004 (Pet. App. 13). The petition for a writ of certiorari was filed on November 23, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiracy to travel and cause others to travel in foreign commerce in the commission of a murder-for-hire, in violation of 18 U.S.C. 1958(a); traveling and causing others to travel in foreign commerce in the commission of a murder-for-hire, in violation of 18 U.S.C. 1958(a) and 2; using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2; using extortionate means to collect a debt, in violation of 18 U.S.C. 894 and 2; and making a false declaration before a grand jury, in violation of 18 U.S.C. 1623. Petitioner was sentenced to 181 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-12; C.A. E.R. Doc. 3, at 2-10; *id.* Doc. 21; Gov't C.A. Br. 3.

1. This case involves a conspiracy initiated by Ronald Abel, a South African businessman, to murder his former business partner, Sydney Kahn. Abel and his clients had invested in a business venture with Kahn. In 1986, that business venture collapsed. Kahn fled South Africa for La Jolla, California, leaving Abel and his clients with significant losses. Pet. App. 2; Gov't C.A. Br. 3-4.

Over the following years, Abel pursued Kahn for repayment. Kahn repeatedly promised to repay his debt, but made only token payments. To appease Abel, Kahn made Abel the beneficiary on three life insurance policies. If Kahn died, Abel would stand to collect $425,000 on those policies. Pet. App. 2; Gov't C.A. Br. 4.

By February 1996, Abel began pursuing a plan to collect on the life insurance. He hired Valter Nebiolo to travel from South Africa to California to murder Kahn. Nebiolo insisted that Abel share the policy proceeds with him and that Abel provide him with airline tickets, expense money, a car, a gun, and a place to stay in California. Abel agreed and told Nebiolo that petitioner, one of Abel's childhood friends who lived in California, would provide the gun, car, and lodging. Pet. App. 2; Gov't C.A. Br. 4-5.

On February 18, 1996, Nebiolo flew to Los Angeles. Petitioner met Nebiolo at the airport and drove him to petitioner's apartment. There, petitioner provided Nebiolo with a choice of two weapons. He also helped Nebiolo rent a car and provided him with directions to La Jolla. Pet. App. 2-3.

After surveilling Kahn's home and office for a few days, Nebiolo returned to petitioner's apartment. The two discussed Nebiolo's surveillance, and Nebiolo told petitioner he would need a smaller, quieter gun. During this discussion, petitioner assured Nebiolo that Kahn was actively defrauding people in the United States, just as he had done in South Africa, and that Kahn deserved to be killed. Petitioner left his apartment for a few hours and returned with a .25 caliber semi-automatic pistol for Nebiolo. Nebiolo examined the pistol and confirmed that it was operational. Pet. App. 3.

On February 23, 1996, Nebiolo returned to La Jolla to kill Kahn. Nebiolo fired four shots at Kahn from close range through an office window. Kahn suffered facial cuts from the shattered glass and a bullet wound to the back. He was able to crawl to safety, however, and survived the attack. Nebiolo immediately fled the scene, returning to petitioner's apartment. As he was fleeing,

he was observed by a civilian witness and a police officer. He was arrested later that day. He was subsequently indicted by a grand jury and pleaded guilty. Pet. App. 3; Gov't C.A. Br. 7.

On February 28, 1996, Abel telephoned petitioner to determine whether Nebiolo had left the United States. During that call, petitioner informed Abel that Nebiolo had been arrested. According to petitioner, Abel was stunned at the news. Pet. App. 5.

2. On February 23, 2001, the fifth anniversary of the date of the shooting, a federal grand jury returned a superseding indictment that charged petitioner for the first time. Petitioner was charged in five counts of a six-count indictment. He was charged with one count of conspiracy to travel and cause others to travel in foreign commerce in the commission of a murder-for-hire, in violation of 18 U.S.C. 1958(a); one count of traveling and causing others to travel in foreign commerce in the commission of a murder-for-hire, in violation of 18 U.S.C. 1958(a) and 2; one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2; one count of using extortionate means to collect a debt, in violation of 18 U.S.C. 894 and 2; and one count of making a false declaration before a grand jury, in violation of 18 U.S.C. 1623. C.A. E.R. Doc. 3, at 2-10. A jury found him guilty on all five counts. Pet. App. 3. The district court sentenced petitioner to a total of 181 months of imprisonment. C.A. E.R. Doc. 21.

3. The court of appeals affirmed. Pet. App. 1-12. As relevant here, petitioner "argu[ed]—for the first time on appeal—that the February 23, 2001 indictment was returned one day too late," thus barring prosecution of

every count except the perjury count. *Id.* at 4.[1] The petitioner contended that the five-year statute of limitations began to run on February 23, 1996, the day Nebiolo failed in his attempt to kill Kahn, and thus expired on February 22, 2001, one day before the return of the indictment. Pet. App. 5, 6-7. Although the court of appeals acknowledged that statute-of-limitations defenses generally are waived if not raised before trial, the court nevertheless addressed petitioner's contention de novo, explaining that it presented purely a question of law and had been fully briefed by the parties. *Id.* at 4.

The court of appeals rejected petitioner's argument. Assuming that the last overt act of the conspiracy was the February 23, 1996, shooting of Kahn, the court held that the indictment was timely. Pet. App. 6-7. Expressly agreeing with decisions of the Second and Eleventh Circuits, the court reasoned that the limitations period "did not begin to run until the day *after* the shooting," and therefore the indictment returned on the fifth anniversary of that shooting "was filed on the last possible day of the limitation period." *Id.* at 7-8 (citing *United States* v. *Guerro*, 694 F.2d 898 (2d Cir. 1982), cert. denied, 459 U.S. 1222 and 461 U.S. 907 (1983); *United States* v. *Butler*, 792 F.2d 1528 (11th Cir.), cert. denied, 479 U.S. 933 (1986)). The court noted that "[t]he long-established general rule is that a statute of limitations begins to run on the day following the day on which

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[1] Although in the court of appeals petitioner challenged his convictions for the conspiracy count and three of the substantive counts on statute-of-limitations grounds, petitioner's question presented and argument in this Court (Pet. i, 5-12), which focuses on the last "overt act" and cases involving conspiracies, is limited to a challenge to the timeliness of the conspiracy conviction.

the event giving rise to the cause of action occurred," and that this rule has "been applied in criminal as well as civil cases." *Id.* at 7 (quoting *Guerro*, 694 F.2d at 901) (brackets in original). The court relied upon decisions applying that general principle to statutes of limitations for substantive crimes: "[t]his Circuit has long held that the day of the offense is excluded when determining the trigger date for the statute of limitations." See *id.* at 8-9 (citing *Wiggins* v. *United States*, 64 F.2d 950, 950-951 (9th Cir. 1933); *United States* v. *Tawab*, 984 F.2d 1533, 1534 (9th Cir. 1993) (per curiam)).

The court also discussed the government's argument that, as expressly alleged in the superseding indictment, the conspiracy continued at least until February 28, 1996. Pet. App. 5-6. On that date, Abel called petitioner to ask, "in effect, if Nebiolo had successfully accomplished the object of the conspiracy," and Abel discovered to his surprise that Nebiolo had instead been arrested. *Id.* at 6. Citing this Court's decision in *United States* v. *Recio*, 537 U.S. 270 (2003), the court of appeals suggested that the conspiracy could have continued beyond Nebiolo's arrest, despite the fact that the police had frustrated the conspiracy's specific objective. Pet. App. 6. The court further suggested that, as of that call, neither Abel nor petitioner had abandoned or withdrawn from the conspiracy. *Ibid.* The court explained that the government's argument, if accepted, would place the indictment "well within the five-year statute of limitation." *Ibid.* Nevertheless, given its holding that the indictment was timely even if the conspiracy continued only until the date of the shooting, the court did not base

its decision on the February 28, 1996, telephone call. *Id.* at 6-7.[2]

ARGUMENT

Petitioner first argues (Pet. 5-12) that a conspiracy indictment is untimely under the five-year statute of limitations of 18 U.S.C. 3282 (2000) if the indictment is returned on the fifth anniversary of the commission of the last overt act, which petitioner contends was the date that Nebiolo shot the intended victim. Second, petitioner argues (Pet. 12-15) that the Ninth Circuit erred in suggesting that the conspiracy at issue could have continued, for statute-of-limitations purposes, beyond the date of the shooting and of Nebiolo's arrest. With respect to both contentions, the court of appeals' decision is correct, and further review of the two questions presented by the petition (Pet. i) is unwarranted. Nevertheless, because the body of the petition (Pet. 15) purports to "preserve[]" a right to seek vacatur of petitioner's sentence in light of this Court's decisions in *United States* v. *Booker*, No. 04-104, and *United States* v. *Fanfan*, No. 04-105, the Court may wish to grant the petition for a writ of certiorari on that issue, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the decision that the Court issued, after the petition was filed, in *United States* v. *Booker*, 125 S. Ct. 738 (2005).

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[2] Although petitioner states in this Court that this discussion occurred in a telephone call on February 26, 1996, see Pet. 3, the superseding indictment alleged and the government contended at trial and on appeal that it occurred on February 28, 1996, see C.A. E.R. Doc. 3, at 7 para. 19; Gov't C.A. Br. 25. The court of appeals so treated it. See Pet. App. 5-6. In either event, the telephone call would have been within the five-year statute-of-limitations period, even assuming that period began to run on the date of the telephone call.

1. The court of appeals correctly applied the general rule that the day of the triggering event is omitted in calculating a statute-of-limitations period, and there is no conflict between that holding and the decisions of this Court or any court of appeals.

a. Petitioner was convicted of, among other offenses, conspiracy to commit murder-for-hire, in violation of 18 U.S.C. 1958(a). Because that offense does not specify a statute of limitations, the five-year period in Section 3282 applies:

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

18 U.S.C. 3282 (2000) (emphasis added).

Applying the general rule for the calculation of limitations periods, the court below held that "when computing the time within which a prosecution for conspiracy may be commenced, the statute of limitations begins to run the day *after* the last overt act is committed." Pet. App. 1. That general rule has been clear at least since this Court's decision in *Burnet* v. *Willingham Loan & Trust Co.*, 282 U.S. 437 (1931). That case involved civil tax assessments made by the government on the anniversary of the filing of tax returns, and thus squarely presented the one-day issue raised here by petitioner. In *Burnet*, the Court held that "the day on which the event happened may be regarded as an entirety * * * and so may be excluded from the computation." *Id.* at 439 (citation omitted). The Court reasoned that, otherwise, part of the day that the triggering

event occurred would have to be included in the limitations period, which would be contrary to the common usage of treating the day as a unit, "because people generally measure periods of more than one day by days, months or years." *Ibid.* As Justice Holmes explained, "[w]hen we say 'four years after the return was filed' by common usage we think of four years after the day on which the return was filed." *Ibid.*

Nothing in the text of Section 3282 suggests that Congress intended to diverge from this general rule. To the contrary, the plain text provides that an indictment must be filed "within five years *next after* such offense shall have been committed." 18 U.S.C. 3282 (2000) (emphasis added). Even more so than the "after" language at issue in *Burnet*, the "next after" language suggests that the limitations period is calculated beginning the day following the date that the offense (or the last overt act) is committed.

Nor is there any reason to deviate from the general rule with respect to criminal conspiracies. Courts repeatedly have applied the general rule of *Burnet* to criminal cases. See, *e.g.*, *United States* v. *Tawab*, 984 F.2d 1533, 1534 (9th Cir. 1993) (per curiam); *United States* v. *Butler*, 792 F.2d 1528, 1531-1533 (11th Cir.), cert. denied, 479 U.S. 933 (1986); *United States* v. *Guerro*, 694 F.2d 898, 901-903 (2d Cir. 1982), cert. denied, 459 U.S. 1222 and 461 U.S. 907 (1983); *Wiggins* v. *United States*, 64 F.2d 950, 951 (9th Cir.), cert. denied, 290 U.S. 657 (1933); see also Model Penal Code § 1.06(4) (1985) (noting that, in calculating a statute-of-limitations period, the "[t]ime starts to run on the day after the offense is committed"); N.J. Marini, *Inclusion or Exclusion of First and Last Day for Purposes of Statute of Limitations*, 20 A.L.R.2d 1249, 1252 (1951)

("The weight of authority also supports the general proposition that the day upon which a crime was committed is to be excluded in the computation of the statute of limitations."). As the Second Circuit reasoned, there is "no sound basis for concluding that the general rule excluding the day of the offense should be inapplicable to conspiracy cases. Certainly the language of § 3282 does not distinguish between conspiracies and other crimes." *Guerro*, 694 F.2d at 903.

In applying the general rule to criminal cases, courts have rejected the argument—similar to that made by petitioner (Pet. 12)—that criminal statutes of limitations should be read differently on the ground that "the statute should be liberally construed in favor of the accused." *Wiggins*, 64 F.2d at 951; cf. *Burnet*, 282 U.S. at 439 (rejecting argument in a civil case that "a taxpayer is entitled to the most favorable construction of taxing acts"). Shortening the limitations period by one day (or part of one day) by including the date of the triggering event not only would violate well-accepted rules of construction, but would provide negligible additional protection for defendants' interests in repose or in avoiding the use of stale evidence.

b. Contrary to petitioner's contention (Pet. 6), this Court's decision in *Grunewald* v. *United States*, 353 U.S. 391 (1957), does not mandate a different result. The Court in *Grunewald* was not faced with, and did not resolve, the question whether an indictment filed on the anniversary date of the last overt act would be timely. To the contrary, the indictment in that case was either well within or well outside the limitations period, depending on which acts were determined to be in furtherance of the conspiracy. See *id.* at 397-399.

Nevertheless, petitioner relies (Pet. 6) on dictum from *Grunewald* stating that, to establish that the indictment filed on October 25, 1954, was timely, the government had to show that "the conspiracy * * * was still in existence on October 25, 1951, and that at least one overt act in furtherance of the conspiracy was performed *after* that date." *Grunewald*, 353 U.S. at 396 (emphasis added). Petitioner's reliance on that sentence, however, is undercut by the remainder of the relevant passage, which makes clear that no overt act need be performed *after* the date on which the conspiracy is shown to exist: "For where substantiation of a conspiracy charge requires proof of an overt act, it must be shown both that the conspiracy still subsisted within the three years prior to the return of the indictment, and that at least one overt act in furtherance of the conspiratorial agreement was performed *within that period*." *Id.* at 396-397 (emphasis added). In other words, a conspiracy indictment returned on the relevant anniversary date of the last overt act is timely.[3]

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[3] Even under petitioner's reading of *Grunewald*, the indictment here was timely. The existence and timing of the last overt act is determinative for statute-of-limitations purposes only if "an overt act is necessary to complete the offense." *Fiswick* v. *United States*, 329 U.S. 211, 216 (1946). Although the parties and the court below assumed that proof of an overt act is an element of the conspiracy offense here, see, *e.g.*, Pet. App. 1; Gov't C.A. Br. 14, it is not. Section 1958(a) establishes an offense for anyone who commits the substantive crime "or who conspires to do so." 18 U.S.C. 1958(a). Where the plain language of the statute does not require an overt act, proof of such an act is not an element of the offense. See, *e.g.*, *Whitfield* v. *United States*, 125 S. Ct. 687, 691 (2005). The language upon which petitioner relies from *Grunewald* states that the indictment filed on October 25, 1954, was timely if the government proved that the conspiracy "was still in existence on October 25, 1951." *Grunewald*, 353 U.S. at 396. Here, the

c. Petitioner's claim (Pet. 5-12) that there is a "genuine conflict among (and within) the Circuits" is also unavailing. The government is aware of three courts of appeals that have squarely faced the question whether an indictment returned on the anniversary date of the last overt act is timely under Section 3282. In each of those cases, the court held that the indictment was timely, applying the general rule that the day of the event is omitted in calculating the limitations period. See Pet. App. 1, 5-9; *Butler*, 792 F.2d at 1531-1533; *Guerro*, 694 F.2d at 901-903.

In an attempt to demonstrate a conflict, petitioner cites (Pet. 6-10) cases in which courts have used language suggesting that the date of the last overt act is included when calculating the limitations period. Those cases generally make statements to the effect that, when an indictment is returned on April 14, 1989, for example, the government must show that "at least one overt act in furtherance of the conspiracy occurred *after* April 14, 1984." *United States* v. *Lash*, 937 F.2d 1077, 1081 (6th Cir.) (emphasis added), cert. denied, 502 U.S. 949 (1991) and 502 U.S. 1061 (1992); see, *e.g.*, *United States* v. *Brown*, 332 F.3d 363, 373 (6th Cir. 2003); *United States* v. *Fitzpatrick*, 892 F.2d 162, 166 (1st Cir. 1989); *United States* v. *Pinto*, 838 F.2d 426, 435 (10th Cir. 1988).[4]

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indictment was filed on February 23, 2001, and there is no dispute that the conspiracy "was still in existence" on February 23, 1996, when Nebiolo attempted to kill Kahn.

[4] Other times, courts have used language indicating that an indictment filed on the anniversary date would be timely. See, *e.g.*, *United States* v. *Hitt*, 249 F.3d 1010, 1015 (D.C. Cir. 2001) (stating that, for indictment returned October 19, 1999, government must show an overt act in furtherance of the conspiracy "at a point no earlier than October 19, 1994"); *United States* v. *Dolan*, 120 F.3d 856, 864 (8th Cir.

Those statements, however, are all dicta. None of the cases cited by petitioner involved an indictment returned on the anniversary date.[5] As such, those cases are not in conflict with the decision below.

The experience in the three circuits that have decided the issue suggests that other circuits, when squarely presented with the question, are likely to hold that an indictment is timely when returned on the fifth anniversary of the last overt act. The Second, Ninth, and Eleventh Circuits each had precedents with dicta similar to that relied upon by petitioner for the purported conflict. See, *e.g.*, *United States* v. *Brasco*, 516 F.2d 816, 818 (2d Cir.), cert. denied, 423 U.S. 860 (1975); *United States* v. *Charnay*, 537 F.2d 341 (9th Cir.), cert. denied, 429 U.S. 1000 (1976); *United States* v. *Bethea*, 672 F.2d 407, 419 (5th Cir. 1982); see also Pet. 8, 9-10, 11 (citing *Brasco*, *Bethea*, and *Charnay*). Nevertheless, when squarely faced with the issue, each held that the general rule applies and that the date of the last overt act is excluded when calculating the limitations period under Section 3282. See Pet. App. 9 (9th Cir.); *Butler*,

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1997) (stating that, for indictment returned August 18, 1994, government must show "at least one overt act that occurred on or after August 18, 1989"); *United States* v. *Davis*, 533 F.2d 921, 926 (5th Cir. 1976) (stating that, for indictment returned on September 5, 1974, "the government must have alleged and proved an overt act in furtherance of the conspiracy occurring on or after September 5, 1969").

[5] See *Guerro*, 694 F.2d at 902-903 ("In each of these cases, however, the language relied on is at most dictum, for in none of them was the indictment filed on the anniversary of the last alleged overt act * * * We know of no case in which an indictment, that would have been timely if the day of the last overt act were excluded from the computation, was dismissed as time-barred because the day of the last overt act was included.").

792 F.2d at 1532 (11th Cir.); *Guerro*, 694 F.2d at 902 (2d Cir.).

d. In any event, this case is not a suitable vehicle to review the first question presented, for at least two reasons.

First, petitioner failed to raise a statute-of-limitations defense in the district court and, therefore, the Court would not need to definitively resolve the issue presented to decide this case. As the government argued below (Gov't C.A. Br. 24), petitioner waived his statute-of-limitations defense by not raising it in the district court or, at most, his claim would be subject only to plain error review under Federal Rule of Criminal Procedure 52(b). Compare, *e.g.*, *United States* v. *Ramirez*, 324 F.3d 1225, 1227-1229 (11th Cir.) (per curiam) ("[W]e hold that when a statute of limitations defense is clear on the face of the indictment and requires no further development of facts at trial, a defendant waives his right to raise that defense by failing to raise it in a pretrial motion."), cert. denied, 540 U.S. 881 (2003); *United States* v. *Lo*, 231 F.3d 471, 480 (9th Cir. 2000) (holding that "[f]ailure to comply with the statute of limitations * * * is an affirmative defense which the defendant waives if not raised at trial"); *United States* v. *Kelly*, 147 F.3d 172, 177 (2d Cir. 1998) (holding that a statute-of-limitations defense raised for the first time on appeal was waived), with *United States* v. *Thurston*, 358 F.3d 51, 63 (1st Cir. 2004) (holding that, "[a]bsent an explicit agreement to waive the defense, we treat the issue as a forfeiture and not a waiver," and review for plain error), vacated on other grounds, No. 03-1670 (Jan. 24, 2005); *United States* v. *Ross*, 77 F.3d 1525, 1536-1537 (7th Cir. 1996) (holding that statute-of-limitations defense raised for first time on appeal is

reviewed "only for plain error"). But see *United States* v. *Crossley*, 224 F.3d 847, 858 (6th Cir. 2000) (holding that, "absent an explicit waiver, the statute of limitations presents a bar to prosecution that may be raised for the first time on appeal").[6] Even if petitioner's claim were reviewed for plain error, petitioner could not meet that standard. See, *e.g.*, *United States* v. *Cotton*, 535 U.S. 625, 631 (2002). Any error would not have been "obvious," given that the courts of appeals that have squarely decided the issue had held that an indictment returned on the anniversary date of the last overt act is timely. See pp. 12-14, *supra*.

Second, review of the first question presented is not warranted because, even if petitioner were to prevail on that question, he would not be entitled to relief. The court of appeals assumed petitioner's contention that the last overt act occurred on February 23, 1996. Pet. App. 6-7. As the government alleged in the indictment, however, the conspiracy continued and the last overt act was not taken until at least February 28, 1996, when petitioner and Abel discussed the status of the conspiracy in a telephone call, and petitioner informed Abel

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[6] The court of appeals below acknowledged that petitioner failed to raise the issue in the district court and that this generally constitutes waiver. Pet. App. 4. The court nevertheless decided the issue de novo, *ibid.*, based on a statement in a civil case to the effect that, "[a]lthough the general rule in this circuit is that an appellate court will not consider an issue raised for the first time on appeal, we will reach the question if it is purely one of law and the opposing party will suffer no prejudice because of failure to raise it in the district court." *United States* v. *Thornburg*, 82 F.3d 886, 890 (9th Cir. 1996). As this Court has made clear, however, the "plain error" standard of Federal Rule of Criminal Procedure 52(b) must be applied to forfeited claims of error, and courts do not have authority to "creat[e] out of whole cloth" exceptions to Rule 52(b). *Johnson* v. *United States*, 520 U.S. 461, 466 (1997).

that Nebiolo had been arrested. See *id.* at 5-6; Gov't C.A. Br. 25. Although the court of appeals did not decide this issue, it provides an alternative ground to affirm (as petitioner acknowledges, Pet. 5), and one that (as discussed below) presents a largely factbound question not warranting this Court's review.

2. Petitioner contends (Pet. 12-15) that this Court also should grant review to resolve whether the conspiracy ended for statute-of-limitations purposes when Nebiolo failed to kill Kahn and was arrested, or whether it continued until petitioner informed Abel of Nebiolo's arrest and petitioner and Abel abandoned or withdrew from the conspiracy. See Pet. App. 5-6. According to petitioner, review is warranted because the decision below could be interpreted in future cases as having "expanded [*United States* v. *Recio*, 537 U.S. 270 (2003),] by suggesting that a telephone call between co-conspirators after the goals of the conspiracy have been defeated will extend the statute of limitations, even if the conversation did not further the conspiratorial agreement." Pet. 13. Petitioner's contentions do not warrant further review.

As petitioner acknowledges (Pet. 5, 13 n.4), the court of appeals did not definitely decide whether the conspiracy continued until the February 28, 1996 telephone call in which petitioner informed Abel of Nebiolo's arrest. It instead assumed that the last overt act occurred when Nebiolo shot Kahn. Pet. App. 6-7. Thus, with respect to the second question presented, there is no holding to review. In any event, contrary to petitioner's assertion (Pet. 14), the court of appeals did not suggest that the limitations period can be extended by acts after a conspiracy has ended. The court merely, and correctly, quoted *Recio* for the principle that a conspiracy does not

necessarily end if the government defeats the conspiracy's objective. Pet. App. 6; see *Recio*, 537 U.S. at 275 ("[T]he Government's defeat of the conspiracy's objective will not necessarily and automatically terminate the conspiracy."). To the extent that petitioner challenges the court's suggestion that petitioner and Abel did not in fact abandon or withdraw from the conspiracy until February 28, 1996, or that the telephone call between Abel and petitioner was in fact in furtherance of the conspiracy, those factbound questions do not warrant review.

3. Although neither included in the questions presented (Pet. i) nor raised or decided in the courts below, the body of the petition (Pet. 15) cites *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), and purports to "preserve[]" a right to seek vacatur of petitioner's sentence if it is affected by this Court's decisions in *United States* v. *Booker*, No. 04-104, and *United States* v. *Fanfan*, No. 04-105. Subsequent to the filing of the petition in this case, the Court decided *Booker* and *Fanfan*, holding that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *United States* v. *Booker*, 125 S. Ct. 738, 748-756 (2005) (Stevens, J., for the Court). In answering the remedial question in those cases, the Court applied severability analysis and held that the guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Id.* at 757-764 (Breyer, J., for the Court). Accordingly, with respect to the sentencing issue petitioner purports to preserve, the Court may wish to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker* and *Fanfan*. The court of appeals could then decide what effect, if any, those decisions

have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error. See *id.* at 769.

CONCLUSION

With respect to the two questions presented in the petition, the petition for a writ of certiorari should be denied. In light of petitioner's effort in the body of the petition to preserve a *Booker*/*Fanfan* issue, the Court may wish to grant the petition with respect to that issue, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005).

Respectfully submitted.

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