No. 14-1095

In the Supreme Court of the United States

MICHAEL MUSACCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
PRAVEEN KRISHNA
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a sufficiency-of-the-evidence challenge to a criminal conviction is properly analyzed in light of the statutory elements of the offense charged in the indictment, where a jury instruction to which the government did not object added a patently erroneous element to the charged offense.

2. Whether a statute-of-limitations defense is waived on direct appeal, absent good cause, if not raised before trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is not published in the *Federal Reporter* but is reprinted in 590 Fed. Appx. 359.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2014. A petition for rehearing was denied on December 9, 2014 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on March 9, 2015. 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 Northern District of Texas, petitioner was convicted on one count of conspiracy to access without authorization a protected computer, in vio-

lation of 18 U.S.C. 371 and 18 U.S.C. 1030(a)(2)(C) (2006); and on two counts of the underlying unauthorized-access offense, in violation of 18 U.S.C. 1030(a)(2)(C) (2006). Pet. App. B1-B2. He was sentenced to a total of 63 months of imprisonment, to be followed by three years of supervised release. *Id.* at B3, B5. The court of appeals affirmed. *Id.* at A1-A16.

1. Until 2004, petitioner was president of Extel Transportation Services (ETS), a shipping-logistics company. In 2005, petitioner formed a rival company, Total Transportation Services (TTS). Pet. App. A1; Gov't C.A. Br. 3-4. After recruiting employees in ETS's information-technology department, petitioner accessed ETS's e-mail servers for TTS's benefit. Pet. App. A1-A2; Gov't C.A. Br. 3-6.

In 2010, a grand jury returned an indictment against petitioner charging him with, *inter alia*, (1) conspiracy to obtain unauthorized access to a protected computer and to exceed authorized access to a protected computer, in violation of 18 U.S.C. 371 and 18 U.S.C. 1030(a)(2)(C) (2006); (2) unauthorized access of ETS's e-mail server on or about November 24, 2005, in violation of 18 U.S.C. 1030(a)(2)(C), (c)(2)(B)(i) and (iii) (2006); and (3) unauthorized access of the e-mail account of ETS's legal counsel on or about January 21, 2006, also in violation of 18 U.S.C. 1030(a)(2)(C), (c)(2)(B)(i) and (iii) (2006). Pet. App. A2-A3; Gov't C.A. Br. 6-7.

In 2012, the government filed a superseding indictment clarifying that the conspiracy charge involved unauthorized access to a protected computer and no longer alleging "exceed authorized access" in the count's summary of the offense. Pet. App. A2; see

id. at A2-A3. The superseding indictment also modified the charge relating to petitioner's unauthorized access of ETS's computers in November 2005. Specifically, it identified the targets of the access as the e-mail accounts of ETS's president and legal counsel, and it changed the offense date to on or about November 23 to 25, 2005. *Id.* at A2-A3. In 2013, the government filed a second superseding indictment that kept those changes. *Id.* at A3.

Petitioner proceeded to a jury trial. On the conspiracy count, the district court instructed the jury that 18 U.S.C. 1030(a)(2)(C) (2006), the statute providing the object of the conspiracy, "makes it a crime for a person to intentionally access a protected computer without authorization *and* exceed authorized access." Pet. App. A6 (emphasis added). That jury instruction was erroneous: Section 1030(a)(2)(C) makes clear that a person can violate the statute (1) by intentionally accessing a protected computer without authorization *or* (2) by intentionally exceeding authorized access. 18 U.S.C. 1030(a)(2)(C) (2006); Pet. App. A5; see Pet. 4 (noting that these are "two discrete means of committing the crime).[1] By using the conjunction "and," the instruction appeared to require the government to prove an extra element to establish the crime. Pet. App. A5. Neither the government nor petitioner objected to that error in the charge. *Id.* at A3.

The jury convicted petitioner on all three counts. Pet. App. B1-B2. The district court imposed concur-

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[1] Section 1030(a)(2)(C) provides, in relevant part, that "[w]hoever * * * intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains * * * information from any protected computer * * * shall be punished as provided in [18 U.S.C. 1030(c)]." 18 U.S.C. 1030(a)(2)(C) (2006).

rent terms of 60 months of imprisonment for the conspiracy count and the first unauthorized-access count, and a consecutive term of three months of imprisonment for the remaining unauthorized-access count, to be followed by three years of supervised release. *Id.* at B3, B5.

2. On appeal, petitioner raised two arguments that are relevant to his petition for certiorari. First, petitioner argued that the evidence was insufficient to support his conviction on the conspiracy count. He did not dispute that the evidence was sufficient to prove the charged offense of conspiracy to obtain unauthorized access to ETS's computers. See Pet. App. A5. But he asserted that the erroneous jury instruction was "law of the case" on direct appeal and that the evidence was insufficient to prove a conspiracy to "exceed authorized access" to ETS's computers. *Ibid.* Second, petitioner argued that his prosecution for the November 2005 unauthorized-access offense was barred by the five-year statute of limitations in 18 U.S.C. 3282(a). Pet. App. A8. The court of appeals rejected those arguments and affirmed the conviction in an unpublished, per curiam opinion. *Id.* at A1-A15.

a. The court of appeals declined to apply law-of-the-case principles to evaluate his challenge to the sufficiency of the evidence under a patently incorrect jury instruction. Pet. App. A5-A7. The court acknowledged that, "[i]n general," unobjected-to jury instructions that increase the government's burden are generally treated as "law of the case" on direct appeal. *Id.* at A5-A6 (citing *United States* v. *Jokel*, 969 F.2d 132, 136 (5th Cir. 1992) (per curiam)). But the court also noted that this rule does not apply where (1) the jury instructions are "patently errone-

ous," and (2) "the issue is not misstated in the indictment." *Id.* at A6 (quoting *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006)).

The court of appeals explained that both of those conditions were satisfied here. The court noted that the second superseding indictment correctly stated the conspiracy charge, and it emphasized that the jury instructions incorrectly required the government to prove both that petitioner had conspired to access a computer without authorization *and* that petitioner had conspired to exceed authorized access. Pet. App. A5-A7. The court observed that the instruction's "replacement of 'or' with 'and' was an obvious clerical error, not a possible alternative description of the offense." *Id.* at A6. The court noted that petitioner "does not dispute the sufficiency of the evidence" with respect to unauthorized access of the computers at issue, and it rejected petitioner's insufficiency challenge on that basis. *Id.* at A7.[2]

b. The court of appeals also rejected petitioner's statute-of-limitations argument with respect to the November 2005 unauthorized-access offense. Pet. App. A8-A9. The court explained that petitioner had waived any statute-of-limitations defense by failing to raise it at trial. *Ibid.* (citing *United States* v. *Arky*,

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[2] Judge Haynes concurred in the court of appeals' judgment with respect to the conspiracy charge, but declining to address the merits of petitioner's "law of the case" argument. Pet. App. A16. She held that even if the jury instruction was binding, the evidence was sufficient to establish that petitioner violated "both prongs ('exceeds authorized use' and 'unauthorized access')" of Section 1030(a)(2)(C). *Ibid.*

938 F.2d 579, 582 (5th Cir. 1991) (per curiam), cert. denied, 503 U.S. 908 (1992)).

ARGUMENT

Petitioner contends (Pet. 10-24) that the court of appeals erred by rejecting his sufficiency-of-the-evidence and statute-of-limitations claims. Neither issue warrants this Court's review.

1. Petitioner argues (Pet. 10-20) that the evidence was insufficient to support his conviction for conspiracy to violate 18 U.S.C. 1030(a)(2)(C) (2006). Specifically, he asserts (Pet. 19-20) that under the "law of the case" doctrine, the government should be held to an extra, erroneous element in the jury instructions that required the government to establish that he conspired to exceed authorized access, even though he concedes that the evidence was sufficient support the jury's finding that he conspired to obtain unauthorized access. See Pet. App. A5, A7. Petitioner is wrong to argue that the sufficiency of the evidence in this case must be measured against the erroneous but unobjected-to jury instruction, instead of against the statutory elements of the crime. The judgment of the court of appeals is correct, and no clear split of authority among the courts of appeals warrants this Court's review.

a. When a criminal defendant challenges a conviction on grounds of insufficient evidence, a reviewing court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The purpose of that analysis is "to guarantee the fundamental protection of due process of law," *ibid.* (foot-

note omitted), by ensuring that the defendant's guilt has been established by "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970).

Here, petitioner was charged with conspiracy to gain unauthorized access to a protected computer, in violation of 18 U.S.C. 371 and 18 U.S.C. 1030(a)(2)(C) (2006). Pet. App. A2-A3; Second Superseding Indictment 4 (Jan. 8, 2013). Section 1030 (a)(2)(C) provides, in relevant part, that "[w]hoever * * * intentionally accesses a computer without authorization * * * and thereby obtains * * * information from any protected computer * * * shall be punished as provided in [18 U.S.C. 1030(c)]." 18 U.S.C. 1030(a)(2)(C) (2006).

Petitioner does not dispute that the evidence was sufficient to establish that he conspired to intentionally access a computer without authorization and thereby obtained information from that protected computer. Pet. App. A5, A7. Nor does he dispute that the jury instructions correctly required the jury to find that the government had established each of these statutory elements. See Pet. 5-6. The jury therefore "could have found"—and did find—"the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. Petitioner's conviction on the conspiracy charge was consistent with due process of law, and the court of appeals' judgment upholding that conviction was correct.

b. Petitioner argues (Pet. 19-20) that the evidence was insufficient *not* because the government failed to establish the statutory elements of the offense, but rather because the government failed to establish an extra element that was erroneously included in the

jury instructions. According to petitioner (Pet. 19-20), the government's failure to object to the erroneous instruction rendered that instruction the "law of the case," and heightened the government's burden, on appellate review for purposes of considering the sufficiency of the evidence on appeal.

Petitioner is mistaken. In *United States* v. *Wells*, 519 U.S. 482 (1997), this Court acknowledged that several courts of appeals had ruled that "when the [g]overnment accepts jury instructions treating a fact as an element of an offense, the 'law of the case' doctrine precludes the [g]overnment from denying on appeal that the crime includes the element." *Id.* at 487.[3] But the Court nonetheless held that the law-of-the-case doctrine did not preclude the government from arguing that materiality was not an element of the offense of making false statements to a bank, in violation of 18 U.S.C. 1014, even though the government had asked the district court to instruct the jury that withholding a "material" fact made a statement false, thus effectively treating materiality as an "element." *Wells*, 519 U.S. at 485-488 & nn.4-5. The Court explained that, whatever utility the "law of the case" doctrine may have for the courts of appeals, it is insufficient to prevent the Court from applying its traditional rule permitting review of a legal issue that had been resolved in the court of appeals. *Id.* at 487-488.

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[3] This Court observed that "[i]n this context, the 'law of the case' doctrine is something of a misnomer. It does not counsel a court to abide by its own prior decision in a given case, but goes rather to an appellate court's relationship to the court of trial." *Wells*, 519 U.S. at 487 n.4 (citing 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4478 (1st ed. 1981)).

Both the holding and rationale of *Wells* are inconsistent with petitioner's argument that the government is categorically required to show that the evidence at trial was sufficient to prove an extra offense element that was erroneously included in the jury instructions. On the contrary, *Wells* suggests that the law-of-the-case doctrine is best viewed as a prudential measure that appellate courts may, but are not required to, apply depending on the particular context at issue.

No reason exists to apply the law-of-the-case doctrine when a criminal defendant seeks to overturn a conviction by claiming that the prosecution introduced insufficient evidence to prove a non-element. Congress defines the elements of a criminal offense, not courts or prosecutors. See, *e.g.*, *Whalen* v. *United States*, 445 U.S. 684, 689 (1980). The public interest in the just administration of the criminal law favors adhering to the due process standard embraced in *Jackson*, which focuses on whether the trial evidence is sufficient to prove the elements of an offense. "A defendant has no due process right * * * to proof beyond a reasonable doubt of elements *not* necessary to constitute the crime charged, including elements erroneously or unnecessarily charged to the jury." *United States* v. *Inman*, 558 F.3d 742, 748 (8th Cir.), cert. denied, 558 U.S. 916 (2009). Sufficiency-of-the-evidence review should hew to the elements as Congress defined them, and a defendant should not be entitled to acquittal—foreclosing any subsequent prosecution—when the government has proved the statutory elements of the offense.[4]

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[4] If the inclusion of the erroneous element prejudiced the defendant's defense by confusing the jury, a defendant might be able

c. Even if it were proper for the courts of appeals to hold that—in general—the law-of-the-case doctrine requires the government to satisfy jury instructions to which it has acquiesced, that rule should not apply when the instructions contain an obvious mistake and no prejudice would result to the defendant. As this Court has explained, the law-of-the-case doctrine "directs a court's discretion, it does not limit the tribunal's power." *Pepper* v. *United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona* v. *California*, 460 U.S. 605, 618 (1983)). Crucially, the doctrine "does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." *Id.* at 506-507 (quoting *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997)) (internal quotation marks and brackets omitted).

The court of appeals' decision below is consistent with those principles. The court upheld petitioner's conviction after concluding that (1) the crime was properly charged in the indictment; (2) the extra element included in the jury instructions was patently erroneous; (3) the instructions required the jury to find that the government had established all of the actual, statutory elements of the offense; and (4) the evidence was sufficient for the jury to find that petitioner committed all of those statutory elements. Pet. App. A6-A7. The court of appeals recognized that the

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to argue that he should receive a new trial. See *United States* v. *Zanghi*, 189 F.3d 71, 80 n.11 (1st Cir. 1999) (patently erroneous jury instruction could "infect the charge" and confuse the jury on the elements so as to warrant relief on plain-error review), cert. denied, 528 U.S. 1097 (2000). But an outright acquittal because the government did not prove an element that it was not required to prove is not justified.

jury instruction's inclusion of an extra element reflected "an obvious clerical error," *id.* at A6, and it properly declined to consider the extra element when assessing the sufficiency of the evidence. Justice would not be served by granting petitioner an acquittal despite the sufficiency of the evidence to support the jury's finding that he committed every statutory element of the crime.[5]

Petitioner urges (Pet. 19-20) this Court to embrace a categorical law-of-the-case rule under which a criminal defendant is always entitled to a judgment of acquittal if the government fails to prove an element erroneously included in the jury instructions without objection from the government. He argues (*ibid.*) that because a defendant may sometimes "forfeit potentially valid claims through procedural default at multiple stages in criminal proceedings, * * * surely the government should be required to meet such burdens as it has assumed or acquiesced in when not objecting to a jury instruction setting a higher bar than the statute or indictment."

Petitioner's rationale for his proposed categorical rule does not withstand scrutiny. It is true that some claims are waived when a defendant does not object at the appropriate time. But under Federal Rule of Criminal Procedure 52(b), a defendant may be able to

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[5] Other courts of appeals have likewise recognized that erroneous jury instructions should not become the law of the case in similar circumstances. See *Inman*, 558 F.3d at 748; *United States* v. *Sisk*, 87 Fed. Appx. 323, 328 (4th Cir. 2004) (per curiam) (unpublished); *Zanghi*, 189 F.3d at 79 (explaining that jury instruction is not law of the case when it is "patently incorrect or internally inconsistent"); see also *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006).

obtain redress for a plain error that affects his substantial rights—including an erroneous jury instruction—even though the defendant failed to object to that error at the appropriate time. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 465-466 (1997). One ingredeient of such a claim is that an error is obvious. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993); see also *Henderson* v. *United States*, 133 S. Ct. 1121, 1126 (2013). Just as forfeiture does not preclude relief for a defendant in all circumstances of clear error, the court of appeals' approach recognizes that in certain instances of clear error, the government will not be foreclosed from urging an appellate court to apply the correct rule of law.

d. Petitioner is wrong to suggest (Pet. 11-16) that this Court's intervention is warranted to resolve a clear division of authority among the courts of appeals on the law-of-the-case issue.

Petitioner asserts (Pet. 11) that the Eighth Circuit —unlike the First and Fifth Circuits—"appl[ies] the law-of-the-case doctrine in the same circumstances [as present here] to hold the government to any heightened burden imposed by jury instructions to which it did not object." That is not correct. As petitioner himself later acknowledges (Pet. 13-15), the Eighth Circuit's decision in *Inman* rejects that approach. There, the court explained that a defendant lacks any due process right to proof beyond a reasonable doubt "of elements *not* necessary to constitute the crime charged, including elements erroneously or unnecessarily charged to the jury." 558 F.3d at 748. It refused to apply the law-of-the-case doctrine in the manner now proposed by petitioner, and it instead "review[ed] the sufficiency of the evidence according to

the element *as defined by statute and charged in the indictment*"—not as presented in the erroneous jury instructions. *Id.* at 750 (emphasis added); see *id.* at 748.[6]

Petitioner asserts (Pet. 11-13) that the Eighth Circuit applied his preferred approach in several cases decided before *Inman*, namely *United States* v. *Torres-Villalobos*, 487 F.3d 607, 611 n.1 (2007), *United States* v. *Staples*, 435 F.3d 860, 866-867, cert. denied, 549 U.S. 862 (2006), and *United States* v. *Ausler*, 395 F.3d 918, 920, cert. denied, 549 U.S. 861 (2005). But *Torres-Villalobos* did not involve a sufficiency-of-the-evidence challenge, but instead only a dispute over whether certain evidence was properly admitted, and the court had no occasion to consider whether the

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[6] Unlike this case, *Inman* involved a circumstance in which the jury charge—in addition to including a non-statutory element—also omitted a statutory element of the offense. See 558 F.3d at 746-747 (explaining that instructions included a non-statutory element (that the materials containing the child pornography was produced using materials that had been shipped in interstate commerce) *and* excluded a statutory element (a requirement that the materials used to produce the child pornography was itself shipped in interstate commerce)). In that circumstance, the court of appeals held that

> where a statutory element of an offense is included in the indictment but erroneously omitted from instructions to the jury, and the evidence is insufficient to establish the unobjected-to [non-statutory] element used instead, the conviction may be affirmed against a sufficiency challenge where the evidence is so overwhelming or incontrovertible that there is no reasonable doubt that any rational jury would have found that the government proved the statutory element.

Id. at 749. This case is easier than *Inman*, insofar as the jury instructions expressly required the jury to find *all* statutory elements of the offense beyond a reasonable doubt.

"clear error" exception to the law-of-the-case doctrine should apply. See 487 F.3d at 611 n.1. And *Inman* itself distinguished *Staples* and *Ausler* on the grounds that neither of those cases involved instances where the trial evidence was sufficient only to support a conviction for the offense under the relevant statute, but not the offense set forth in the jury instructions. *Inman*, 558 F.3d at 749-750 & n.5.

Petitioner also invokes (Pet. 14-15) the Eighth Circuit's post-*Inman* decision in *United States* v. *Johnson*, 652 F.3d 918 (2011). But as petitioner himself concedes (Pet. 15), that case—like *Inman* itself—rejected the categorical law-of-the-case rule that he urges the Court to embrace here. See *Johnson*, 652 F.3d at 922-924. And *Johnson* differs significantly from this case because the instructions there did not cover the correct statutory elements.[7] In any event, even if petitioner were correct (Pet. 11-16) that the Eighth Circuit cases addressing this issue are in ten-

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[7] As in *Inman*, the jury instructions in *Johnson* erred by both omitting a statutory element and including a non-statutory element. See *Johnson*, 652 F.3d at 922-924; note 6, *supra*. On those facts, *Johnson* declined to follow what it described as the rule embraced by First and Fifth Circuits, under which the court would simply consider whether the evidence would have been sufficient to establish the defendant's guilt if the jury instructions had been correct. 652 F.3d at 923-924. Notably, however, the *Johnson* court rejected that alternative standard in light of (1) the due process requirement that the prosecution prove all elements of a crime beyond a reasonable doubt, and (2) the Sixth Amendment requirement that the jury, not the judge, make the requisite findings of guilt. *Ibid.* Neither of those constitutional considerations are present in the circumstances presented here, where—unlike in both *Inman* and *Johnson*—the jury was required to find that petitioner committed all statutory elements of the crime. See note 6, *supra*.

sion with one another, "[i]t is primarily the task of a [c]ourt of [a]ppeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner also asserts (Pet. 16) a conflict with the Tenth Circuit's decision in *United States* v. *Romero*, 136 F.3d 1268 (1998). There, the government argued that it did not need to present evidence on a offense element that—according to the government—was not required by the statute and yet was erroneously included in the jury instructions. *Id.* at 1271-1274. The court of appeals rejected that argument. *Id.* at 1271. It interpreted this Court's decision in *Wells* to "h[o]ld that adherence to the law of the case doctrine at the circuit level is a matter left to the discretion of the circuit courts." *Id.* at 1272. The court of appeals then applied that doctrine and reversed the conviction on the ground that government had failed to present any evidence with respect to the disputed element of the crime. *Id.* at 1273-1274.

Romero's analysis is not necessarily inconsistent with the rule embraced by the First and Fifth Circuits. As the First Circuit explained in *United States* v. *Zanghi*, 189 F.3d 71 (1999), cert. denied, 528 U.S. 1097 (2000), "*Romero* is distinguishable because the instruction in that case was not 'patently erroneous' in light of the statutory requirements," and "[i]n fact, it may have been legally correct." *Id.* at 80 n.10; see *Romero*, 136 F.3d at 1271 (emphasizing that the dispute over the elements of the offense "raise[s] some very difficult federal Indian law questions"); see also *United States* v. *Prentiss*, 256 F.3d 971, 976-977 (10th Cir 2001) (en banc) (per curiam) (subsequently holding that, contrary to the government's argument in

Romero, the disputed element *is* a statutory element of the relevant offense). *Romero* was plainly not a case like this one, where the parties agree that the jury instruction was erroneous and where the court of appeals expressly held that it contained an "obvious clerical error." Pet. App. A6.

Notably, none of the Tenth Circuit decisions applying *Romero* has considered whether to recognize an exception to the law-of-the-case doctrine in circumstances where the offense was properly charged in the indictment and the jury instruction was patently erroneous. Indeed, the government has not yet urged it to do so. See *United States* v. *Kamahele*, 748 F.3d 984, 1003 n.13 (10th Cir. 2014). Such an exception would be consistent with the settled principle—embraced by both this Court and the Tenth Circuit—that the law-of-the-case doctrine does not apply when a prior ruling "is clearly erroneous and would work a manifest injustice." *Pepper*, 562 U.S. at 506-507 (citations omitted); see *Arizona*, 460 U.S. at 618 n.8; *Bishop* v. *Smith*, 760 F.3d 1070, 1086 (10th Cir.), cert. denied, 135 S. Ct. 271 (2014); *Johnson* v. *Champion*, 288 F.3d 1215, 1226 (10th Cir. 2002). Until the Tenth Circuit has had occasion to consider that exception to law-of-the-case principles in the particular context at issue here, any claim of a square conflict would be premature.

2. Petitioner also seeks (Pet. 21-24) review of the court of appeals' holding that he waived his statute-of-limitations challenge to his conviction for accessing a protected computer in November 2005 without authorization. Petitioner concedes (Pet. 21) that he did not raise the limitations defense in the district court, but he argues that the court of appeals should have ap-

plied plain-error review to address the district court's failure to sua sponte instruct the jury on that issue.

Petitioner is incorrect. This Court has held that the "statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases." *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917) (citing *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872)). Although the statute of limitations "may inhibit prosecution, it does not render the underlying conduct noncriminal." *Smith* v. *United States*, 133 S. Ct. 714, 720 (2013). It is not an element of the underlying offense, and the government is not required to allege the time of the offense in the indictment. *Ibid.* Rather, "it is up to the defendant to raise the limitations defense." *Ibid.*

As petitioner acknowledges (Pet. 22-23), a majority of courts of appeals have taken the position that a criminal defendant's failure to raise a statute-of-limitations defense waives that defense and makes it unreviewable on appeal. See *United States* v. *Franco-Santiago*, 681 F.3d 1, 12 n.18 (1st Cir. 2012) (collecting cases). A minority of courts of appeals, however, have treated the failure to raise a statute-of-limitations issue at trial as forfeiture, rather than as waiver of an affirmative defense, and have thus applied plain-error review under Federal Rule of Criminal Procedure 52(b). *Ibid.* Despite the conflict of authority, this Court has previously denied review of this issue. See *Ciavarella* v. *United States*, 134 S. Ct. 1491 (2014) (No. 13-7103); *Berry* v. *United States*, 533 U.S. 953 (2001) (No. 00-8761).

This case is a poor vehicle for addressing the conflict among the circuits because the choice of approaches is not outcome-determinative. Even assum-

ing that petitioner could raise the affirmative statute-of-limitations defense for the first time after trial, he would not be entitled to relief. Under Rule 52(b),

> an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

United States v. *Marcus*, 560 U.S. 258, 262 (2010) (brackets in original) (quoting *Puckett* v. *United States*, 556 U.S. 129, 135 (2009)).

Petitioner cannot satisfy any of those requirements because his statute-of-limitations defense lacks merit. The original indictment was timely filed in 2010, within five years of the unauthorized-access offense. Pet. App. A2; Indictment 1 (Nov. 2, 2010); see 18 U.S.C. 3282(a). In 2012, the government filed a superseding indictment modifying the relevant count only by (1) no longer alleging "exceed authorized access" in the conspiracy count's summary of the offense; (2) changing the offense date from on or about November 24, 2005, to on or about November 23 to 25, 2005; and (3) changing the point of access from ETS's e-mail server to two e-mail accounts on the server. Pet. App. A2-A3; Indictment 25; First Superseding Indictment 23 (Sept. 6, 2012). In 2013, the government filed a second superseding indictment that made "no relevant changes" to the charge. Pet. App. A3.

Below, petitioner argued that the superseding indictments were outside the five-year statute of limitations because they changed the charges against him. Pet. C.A. Br. 48-50. But that argument is plainly incorrect. A superseding indictment relates back to the original indictment so long as it does not "broaden[] or substantially amend[] the charges made in the original indictment." *United States* v. *Schmick*, 904 F.2d 936, 940 (5th Cir. 1990), cert. denied, 498 U.S. 1067 (1991). The change in date—from "[o]n or about" November 24, 2005 to "[o]n or about" November 23 to 25, 2005)—did not meaningfully broaden the charges. Indictment 25; First Superseding Indictment 23. And the greater specificity provided in the superseding indictment—including by referring to two specific email accounts on the ETS server, instead of to the server as a whole—made the charges narrower, not broader. *Ibid.*

In those circumstances, there was no error, much less a "clear or obvious" error that affected the outcome of the proceedings or impugned the fairness or integrity of judicial proceedings more generally. *Marcus*, 560 U.S. at 262. Petitioner would therefore not be able to obtain relief even if he could prevail on the question presented to this Court. Further review of petitioner's statute-of-limitations challenge is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
PRAVEEN KRISHNA
Attorney

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