No. 14-1095

In the Supreme Court of the United States

MICHAEL MUSACCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a sufficiency-of-the-evidence challenge to a criminal conviction must be analyzed in light of a jury instruction that added an unnecessary element to the offense charged in the indictment, when the government did not object to that instruction at trial.

2. Whether a criminal defendant may successfully raise a statute-of-limitations defense for the first time on direct appeal.

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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, and was granted on June 29, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent statutory provisions and rules are reproduced in the appendix to this brief. App., *infra*, 1a-25a.

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

1. Petitioner served as President of Exel Transportation Services (ETS), a shipping-logistics company. Pet. App. A1. While still holding that position, he told Joseph Roy Brown, the head of ETS's information-technology (IT) department, that he might leave ETS and start a rival company. ROA 1545-1547. Brown's position at ETS made him a "god on the [ETS] network," with unlimited access to the company's computer system, including the ability to access employees' e-mail accounts. ROA 2023. Petitioner made clear that he wanted Brown to join him at the new company. ROA 1546-1547.

In 2004, petitioner resigned from ETS. ROA 1353. Soon thereafter, petitioner asked Brown—who was still working at ETS—to exploit his access to ETS's computer system and pass along information that would help petitioner in starting the new company to compete with ETS. ROA 1550-1552. Brown agreed and began providing petitioner with confidential details of ETS's revenue projections, its personnel decisions, and its contractual relationships with outside agents through whom ETS conducted its operations.

See ROA 1552, 1563-1566, 1613, 1620-1622, 1640. In most cases, Brown obtained the information by covertly accessing and reviewing the email accounts of top ETS executives without authorization. ROA 1347, 1572-1573, 1866-1867. During this period, petitioner lauded Brown as a "Master" and referred to him as "007." ROA 1569-1570. Brown responded by agreeing that he was "becoming an excellent spy." ROA 1569.

In October 2005, petitioner formed his rival company, Total Transportation Services (TTS). Pet. App. A1. Brown joined TTS later that same month. *Id.* at A1-A2. Nonetheless, Brown continued to access ETS's computer system without authorization by using Microsoft Outlook Web Access and "a backdoor password" that "no one else [could] change." ROA 1347, 1630-1631, 2036-2037, 2448, 2620, 2629. Brown also supplied petitioner with the password so that petitioner could access the ETS system himself. ROA 1659-1660. Petitioner used ETS's confidential information to interfere with ETS's efforts to sign new contracts with its outside agents and for other purposes. ROA 1645-1646; Pet. App. A2.

Petitioner and Brown continued to access the ETS system until March 2006, when ETS discovered the breach and changed the administrative passwords. ROA 1731-1732, 2041-2042. ETS sued TTS, petitioner, Brown, and others involved, and the parties eventually settled for $10 million. Pet. App. A2.

2. a. In 2010, a grand jury indicted petitioner for his improper accessing of ETS's computer system. Count 1 charged him with "Conspiracy To Make 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). J.A. 49. Counts 23 and 24 charged him with (1) unauthorized access of ETS's e-mail server "[o]n or about" November 24, 2005, in violation of 18 U.S.C. 1030(a)(2)(C) (2006); and (2) unauthorized access of the e-mail account of ETS's legal counsel "[o]n or about" January 21, 2006, also in violation of 18 U.S.C. 1030(a)(2)(C) (2006). J.A. 70-71; see generally J.A. 46-79; Pet. App. A2-A3.[1]

In 2012, the government filed a superseding indictment that revised the conspiracy charge. The superseding indictment removed references to "[e]xceed[ing] [a]uthorized [a]ccess" in the count's summary of the offense. J.A. 79; Pet. App. A2-A3, A6. It continued to allege acts of "exceed[ing] authorized access" in defining the objects as well as the manner and means of the conspiracy. J.A. 81-82; Pet. App. A2, A6.

The superseding indictment also modified the charge relating to petitioner's unauthorized access of ETS's e-mail server in November 2005. As relevant here, Count 2 of the superseding indictment identified the targets of the access as the e-mail accounts of ETS's president and legal counsel (replacing the reference to ETS's e-mail server), and it stated that the offense had been committed "[o]n or about" November 23-25, 2005. J.A. 83-84; Pet. App. A2-A3. In 2013, the government filed a second superseding indictment that was materially identical to the first superseding indictment in all relevant respects. J.A. 92, 111-112; Pet. App. A3.

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[1] Section 1030(a)(2)(C) makes it unlawful for a person to "intentionally access[] a computer without authorization or exceed[] authorized access, and thereby [to] obtain[] * * * information from any protected computer." 18 U.S.C. 1030(a)(2)(C) (2006).

b. In February 2013, petitioner proceeded to a jury trial. At no time before or during the trial did petitioner contend that his prosecution on any of the counts violated the five-year statute of limitations set forth at 18 U.S.C. 3282(a). Pet. App. A8-A9. Nor did he ever request that the jury be instructed with respect to the statute of limitations. See Doc. 134, 154.

Both before and during the trial, the government submitted proposed jury instructions addressing the conspiracy count. J.A. 85-88 (Sept. 7, 2012), 115-119 (Feb. 1, 2013), 120-124 (Feb. 26, 2013). Each of those proposed instructions identified that charge as involving "Unauthorized Access to Protected Computer[s]," and none required the jury also to find that the conspiracy involved *exceeding* authorized access to such computers. *Ibid.* Petitioner did not propose his own instructions addressing the conspiracy count. See Doc. 134, 154.

On February 26, 2013, following the close of the government's evidence, petitioner moved for an acquittal under Federal Rule of Criminal Procedure 29. J.A. 8. His motion did not address the elements of the crime or assert that the government had failed to prove that he had conspired to exceed authorized access to the ETS computer system. See Doc. 164.

On February 27, 2013—immediately after petitioner rested his case—the district court held a charging conference to discuss a draft of the jury instructions that the court had prepared. See J.A. 141-143. At that conference, neither the government, petitioner, nor the district court expressed the view that the jury should be required to find that petitioner had exceeded authorized access to a protected computer in order to find him guilty of the conspiracy charge. *Ibid.*

The following day, the district court provided a revised draft of the jury instructions to the parties. J.A. 144. As revised, the instruction on the conspiracy count stated 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*." J.A. 168, 177 (emphasis added). It later stated that to find petitioner guilty on the conspiracy charge, the jury would need to find that petitioner and at least one other person had "made an agreement to commit the crime of unauthorized access to a protected computer in violation of 18 U.S.C. § 1030(a)(2)(C) *as defined above*." J.A. 168 (emphasis added).

That jury instruction was erroneous: Section 1030(a)(2)(C) expressly states that a person can violate the statute either by (1) intentionally accessing a protected computer without authorization *or* (2) 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"). By using the conjunction "and" when referring to both ways of committing the offense, the instruction appeared to require the government to prove an extra element to establish the crime. J.A. 168; Pet. App. A5. Neither the government nor petitioner objected to that error in the charge, which was subsequently given to the jury. Pet. App. A3.[2]

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[2] The district court's inclusion of the extra element was an inadvertent error not intended by the parties or the court. See, *e.g.*, Pet. App. A6; J.A. 86-88, 116-119, 121-124 (government's proposed instructions omitting that element); Pet. C.A. Br. 17-18 (arguing that government "abandoned" conspiracy charge based on "ex-

c. On March 1, 2013, the jury found petitioner guilty on all three counts. Pet. App. B1-B2; Doc. 166. Two weeks later, petitioner moved for a new trial under Federal Rule of Criminal Procedure 33. Doc. 170. At a sentencing hearing held in July 2013, the district court denied petitioner's pending motions under Rules 29 and 33. Pet. App. D2. In September 2013, the district court imposed concurrent 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.[3]

3. The court of appeals affirmed the convictions in an unpublished, per curiam opinion. Pet. App. A1-A16. It rejected the two challenges that petitioner now advances in this Court.

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ceeding authorized access" by omitting that element from its "thrice proposed instructions"); see also J.A. 180 (September 2013 colloquy in which district court and government mistakenly recollected that jury had been "charged * * * only on unauthorized access," and not on "exceeding authorized access").

[3] After the district court denied the Rule 29 motion in July 2013, petitioner filed two "supplement[s]" to that motion on August 29, 2013, and November 19, 2013. J.A. 11, 14. Those supplements were the first occasions on which petitioner sought an acquittal on the conspiracy charge on the grounds that the government had failed to introduce sufficient evidence that he had conspired to exceed authorized access to ETS's computer system. See Doc. 199, at 1-12; Doc. 221, at 1-7. As the government pointed out in response, petitioner's supplements were both moot (because the original Rule 29 motion being supplemented had already been denied) and untimely (under Fed. R. Crim. P. 29(c)). Doc. 225, at 1-3. The court did not take any action on either of petitioner's supplements to his Rule 29 motion.

a. As to Count 1, petitioner argued that the evidence was insufficient to support his conviction for conspiracy. Pet. C.A. Br. 15-27. 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 *ibid.*; Pet. App. A5, A7. But he asserted that (1) the erroneous jury instruction requiring the government also to prove that the conspiracy encompassed "exceed[ing] authorized access" to ETS's computers was "law of the case" on direct appeal, and (2) the evidence was insufficient to prove such a conspiracy. Pet. App. A5.

The court of appeals declined to apply law-of-the-case principles to evaluate petitioner's challenge to the sufficiency of the evidence under the incorrect jury instruction. Pet. App. A5-A7. The court acknowledged circuit precedent establishing that, "[i]n general," unobjected-to jury instructions that increase the government's burden are treated as "law of the case" on direct appeal. *Id.* at A5-A6 (quoting *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 erroneous," and (2) "the issue is not misstated in the indictment." *Id.* at A6 (citation omitted).

The court of appeals found both of those conditions satisfied here. Pet. App. A5-A7. It emphasized that the jury instructions' "replacement of 'or' with 'and' was an obvious clerical error, not a possible alternative description of the offense." *Id.* at A6. It further noted that petitioner "does not dispute the sufficiency of the evidence" of unauthorized access of the computers at issue, and it rejected petitioner's insufficiency challenge on that basis. *Id.* at A7. Relatedly, the

court made clear that petitioner had not been prejudiced by any error or confusion with respect to the jury instruction, stating that "[i]f that error affected the trial at all, it benefited [petitioner] and does not justify reversal." *Id.* at A10.[4]

b. As to Count 2, 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. Petitioner pointed out that the first superseding indictment was issued in September 2012, nearly seven years after the conduct charged in Count 2. Pet. C.A. Br. 48. He asserted that the second superseding indictment did not relate back to the original indictment—which was filed within the limitations period on November 2, 2010—because the latter indictment "broadened and substantially amended the charges" set forth in Count 2. *Id.* at 48-50 & n.114. Specifically, petitioner pointed out that the second superseding indictment alleged (1) that the offense occurred on or about November 23-25, instead of on or about November 24; and (2) that petitioner unlawfully accessed "Exel email accounts of Exel President and Exel legal counsel" instead of "Exel server." *Id.* at 49.

Petitioner acknowledged that because he had not raised his statute-of-limitations defense at trial, review should be only for "plain error." Pet. C.A. Br. 48

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[4] Judge Haynes concurred in the court of appeals' judgment with respect to the conspiracy charge but declined to address the merits of petitioner's "law of the case" argument. Pet. App. A16. She concluded 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.*

n.114. He conceded that in most circumstances, a defendant "waive[s]" such a defense—and thereby renders it unreviewable—by failing to raise it at trial. Pet. C.A. Reply Br. 28 & n.19. But he asserted that this principle should not bar review of his particular claim because that claim turns on a pure legal defect evident "upon the face of the indictment." *Id.* at 28 n.19; see Pet. Br. 55; Pet. 21; Pet. C.A. Br. 48-50.

The court of appeals rejected petitioner's argument that Count 2 was barred by the statute of limitations. Pet. App. A8-A9. The court explained that petitioner had waived the defense by failing to raise it at trial. *Ibid.* (citing *United States* v. *Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (per curiam), cert. denied, 503 U.S. 908 (1992)). It rejected petitioner's request for an exception to the waiver rule "where the issue can be resolved on the face of the indictment." *Id.* at A9.

SUMMARY OF ARGUMENT

I. The jury in this case unquestionably found that the government established petitioner's guilt on every element of conspiring to obtain unauthorized access to computers, in violation of 18 U.S.C. 1030(a)(2)(C) (2006). Petitioner concedes that the government presented sufficient evidence to prove those statutory elements. See Pet. App. A5, A7. Petitioner nonetheless contends that he is entitled to a judgment of acquittal because of the government's failure to prove an *extra* element of the offense that was included in the jury instructions as the result of an "obvious clerical error." *Id.* at A6. According to petitioner, the government's failure to object to the extra element renders that element binding for purposes of sufficiency-of-the-evidence review. That argument fails for two independent reasons.

First, sufficiency review requires a court to assess whether the government has introduced enough proof of the established statutory elements of the crime for which the defendant was charged in the indictment. The instructions given to the jury—whether correct or incorrect—do not bear on the proper resolution of such a challenge. Accordingly, the government's failure to object to an erroneous instruction does not affect the sufficiency analysis. Those conclusions follow from both the constitutional underpinnings of sufficiency review and this Court's analysis of the parallel issue in civil cases. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513 (1988); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion of O'Connor, J.).

Second, even if jury instructions do ordinarily bear on the sufficiency analysis, the government's failure to object to an obvious instructional error does not prevent a reviewing court from applying the correct legal standard on appeal. Settled principles of appellate review allow the reviewing court to take account of the error—regardless of any failure to object—because an appellee can defend a judgment on a ground not raised below and, in any event, a reviewing court can notice such a plain error. See, *e.g.*, *Greenlaw* v. *United States*, 554 U.S. 237, 250 n.5 (2008); Fed. R. Crim. P. 52(b).

Petitioner argues that the law-of-the-case doctrine requires an appellate court to review his sufficiency challenge under the erroneous jury instructions. That is incorrect. As this Court has recognized, the law-of-the-case doctrine does not apply to an appellate court's review of trial court holdings. See *United States* v. *Wells*, 519 U.S. 482, 487 n.4 (1997) (calling

the doctrine a "misnomer" in this context). And even if it did, that doctrine does not require an appellate court to apply a patently erroneous jury instruction. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997); *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006). The government's inadvertent failure to object to the jury instructions thus does not entitle petitioner to a windfall acquittal in this case.

II. Petitioner also challenges the court of appeals' rejection of the statute-of-limitations defense that he belatedly raised for the first time on appeal. He argues that such a defense raises a non-waivable jurisdictional question and that, in any event, he can obtain relief under Federal Rule of Criminal Procedure 52(b)'s plain-error standard.

Petitioner is mistaken. As this Court has consistently held for over 140 years, the statute of limitations is a non-jurisdictional affirmative defense that becomes part of a case if—and only if—it is raised by the defendant. See *Smith* v. *United States*, 133 S. Ct. 714, 719-720 (2013); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 173-181 (1872). The text of the statute does not clearly state that it is a jurisdictional limit, and treating it as jurisdictional is inconsistent with numerous precedents of this Court.

A district court's failure to address a statute-of-limitations defense that a defendant never raised can never constitute a "plain error" for purposes of Rule 52(b). The defendant's failure to raise the defense—whether or not it is characterized as a "waiver"—means that the government was not required to establish compliance with the statute of limitations. And the government's failure to satisfy a non-existent

burden is not an error. Petitioner's contrary theory contradicts this Court's analysis in *Cook* and the longstanding practice of the majority of courts of appeals. His conviction should be affirmed.

ARGUMENT

I. PETITIONER'S SUFFICIENCY-OF-THE-EVIDENCE CHALLENGE IS CORRECTLY ANALYZED IN LIGHT OF THE STATUTORY ELEMENTS OF THE CRIME

A. The Sufficiency Of The Evidence Is Measured Against The Statutory Elements Of The Offense Charged In The Indictment

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). In a federal prosecution, the "essential elements" of the crime refers to the elements as defined by Congress, because Congress—not courts or prosecutors—has the authority to define the elements of federal crimes. See, *e.g.*, *Whalen* v. *United States*, 445 U.S. 684, 689 (1980); see also *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is * * * dispositive" unless the statute is unconstitutional.).[5]

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[5] Facts that enhance a mandatory minimum or maximum sentence must, as a matter of constitutional law, be treated as elements. See *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013); *Ap-*

The purpose of the *Jackson* analysis is to ensure that the conviction comports with the constitutional guarantee of due process of law. See 443 U.S. at 313-316. Due process does not require that the evidence presented at trial be sufficient to establish a non-element that was erroneously included in the jury instructions. As this Court's decisions make clear, sufficiency-of-the-evidence review turns on whether the case should have been submitted to the jury in the first place—not on whether the evidence satisfies an erroneous jury instruction. Jury instructions are not a relevant component of the sufficiency analysis, and the government's failure to object to an erroneous instruction thus has no bearing on that analysis.

1. The *Jackson* standard for assessing the sufficiency of the evidence supporting a criminal conviction implements two core due process principles. First, *Jackson* requires the government to introduce affirmative evidence of the defendant's guilt. 443 U.S. at 314. That requirement reflects the principle "that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Ibid.* As this Court explained, "a *meaningful* opportunity to defend" against criminal charges does not exist unless "a total want of evidence to support a charge will conclude the case in favor of the accused." *Ibid.* (emphasis added). Second, *Jackson* requires not merely *some* evidence of guilt, but rather enough evidence capable of persuading a rational jury "beyond a reasonable doubt." *Ibid.* That heightened standard of proof gives "'concrete substance' to the presumption of innocence" as a means of "ensur[ing]

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prendi v. *New Jersey*, 530 U.S. 466 (2000). No such facts are at issue in this case.

against unjust convictions" and "reduc[ing] the risk of factual error in a criminal proceeding." *Id.* at 315 (citation omitted).

Neither of the two due process principles animating *Jackson* is threatened by a jury instruction that requires the government to prove *more* than is required by the statute. So long as the instruction requires the jury to find evidence of guilt with respect to the actual, statutory elements of the crime, the defendant will have had a "meaningful opportunity to defend" against the charge. *Jackson*, 443 U.S. at 314. And so long as the jury is required to find those statutory elements "beyond a reasonable doubt," the defendant has been accorded the constitutionally required procedure to protect the presumption of innocence. *Id.* at 314-315.

Petitioner suggests (Br. 34-35) that sufficiency review is also designed to protect against jury irrationality or the jury's failure to understand the jury instructions, which, he asserts, is better judged by measuring the evidence against the instructions given. But sufficiency review asks whether "*any*" rational jury could have found the "essential elements," *Jackson*, 443 U.S. at 319; it does not seek to probe the workings of the actual jury, see *id.* at 319 n.13 (noting that "[t]he question whether the evidence is constitutionally sufficient is * * * wholly unrelated to the question of how rationally the verdict was actually reached"); see also *United States* v. *Powell*, 469 U.S. 57, 61-69 (1984) (inconsistent verdict does not justify setting aside a conviction supported by sufficient evidence under *Jackson*, even when the inconsistency violates the jury instructions).

For those reasons, the government's failure to introduce sufficient evidence of a non-element does not implicate the due process interests protected by *Jackson*. Whether the jury instructions erroneously required proof of such a non-element—and whether the government objected to any such instructions—therefore have no effect on sufficiency analysis.

2. This Court's decisions confirm that the sufficiency of the evidence does not turn on the content of jury instructions. For example, in *Burks* v. *United States*, 437 U.S. 1 (1978), this Court likened a court's decision to overturn a jury verdict because of insufficient evidence to a determination "that the government's case was so lacking that it should not have even been *submitted* to the jury." *Id.* at 16. Similarly, the Court has stated that an appellate court's "reversal for insufficiency of the evidence *is equivalent to a judgment of acquittal*." *McDaniel* v. *Brown*, 558 U.S. 120, 131 (2010) (per curiam) (emphasis added); see *Lockhart* v. *Nelson*, 488 U.S. 33, 39 (1988) (same).

Those statements make clear that a party's right to an acquittal based on insufficient evidence does not turn on the particular instructions given to the jury. Indeed, Federal Rule of Criminal Procedure 29(a) allows a party to seek a judgment of acquittal at the close of the government's evidence—well before the instructions are usually finalized or delivered to the jury. Although sufficiency analysis and jury instructions require the court to consider the elements of the crime, they are procedurally and analytically distinct components of a criminal trial. The government's inadvertent failure to object to an erroneous jury instruction should therefore have no implication what-

soever for the proper adjudication of a motion for acquittal.

3. In the civil context, this Court has held that the sufficiency of the evidence supporting a jury verdict must be judged with reference to a correct understanding of the law—regardless of a party's failure to object to jury instructions. The Court's analysis in those cases tracks the logic set forth above, and it expressly rejects the law-of-the-case theory advanced by petitioner here. No reason exists to apply a different analysis to the relationship between sufficiency challenges and jury instructions in the criminal context.

In civil cases, a party can seek judgment as a matter of law based on the insufficiency of the evidence by filing a motion under Federal Rule of Civil Procedure 50. See Fed. R. Civ P. 50(a) and (b). The legal standard that applies to such motions is essentially the same one that applies to a district court's ruling on a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29, and to an appellate court's review of a judgment of conviction for sufficiency of the evidence under *Jackson*.[6] In each of those contexts, the court's role is to consider the evidence and assess whether any rational jury could find the facts necessary to establish a claim or defense in light of

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[6] See Fed. R. Civ. P. 50(a)(1) (requiring court to grant motion if court finds that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party"); Fed. R. Crim. P. 29(a) (stating that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction"); *Jackson*, 443 U.S. at 319 (requiring appellate court to assess "whether * * * *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

the evidence presented at trial. "In terms of the nature of the inquiry," a court's analysis of a motion for summary judgment or a directed verdict in a civil case "is no different from the consideration of a motion for acquittal in a criminal case." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

This Court has twice confronted whether a party's failure to object to an erroneous jury instruction renders that instruction binding "law of the case" for purposes of appellate review of the denial of a motion for judgment as a matter of law. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513 (1988); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion of O'Connor, J.). In *Praprotnik*, the plurality rejected such a law-of-the-case argument, and in *Boyle*, the plurality's analysis became law.

The *Praprotnik* plurality noted that "the focus of [the plaintiff's] challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict." 485 U.S. at 120. It explained that "[a]lthough the same legal issue was raised both by those motions and by the jury instruction, the failure to object to an instruction does not render the instruction the law of the case for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict." *Ibid.* (citation and internal quotation marks omitted).

In *Boyle*, the Court relied on that explanation to hold that review of the sufficiency of the evidence takes place under the correct legal standard despite a failure to object to jury instructions containing an incorrect standard. It held that "even though (as [the plaintiff] claims) [the defendant] failed to object to jury instructions that expressed the [military-

contractor] defense differently," the defendant was entitled to challenge sufficiency under the correct legal test. *Boyle*, 487 U.S. at 513-514 (citing *Praprotnik*, 485 U.S. at 118-120 (plurality opinion of O'Connor, J.)).

Boyle's holding relied directly on the analysis earlier offered by Judge Friendly and other lower courts. See, *e.g.*, *Ebker* v. *Tan Jay Int'l, Ltd.*, 739 F.2d 812, 825 n.17 (2d Cir. 1984) (Friendly, J.) (cited in *Boyle*, 487 U.S. at 514), cert. denied, 502 U.S. 853 (1991); see also 9B Charles Alan Wright et al., *Federal Practice and Procedure* § 2537, at 625 n.37 (3d ed. 2008) (citing cases) (*Federal Practice and Procedure*); 9C *id.* § 2558, at 142, 181 n.11 (same). As the Ninth Circuit has explained, *Boyle* and *Praprotnik* rest on the recognition that a "motion for directed verdict, although sometimes overlapping with the points of law reflected in the jury instructions, is distinct" from any dispute over those instructions. *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 183 (1989), cert. denied, 493 U.S. 1058 (1990). Whether a party is entitled to a directed verdict "depends upon the sufficiency of the evidence up to that point in the trial," and "the jury instructions on the points of law contained in the motion for directed verdict are simply outside the scope of that analysis." *Ibid.* It follows that "a party's failure to object to relevant jury instructions does not prevent it from challenging the sufficiency of the evidence on a legal basis different from that contained in the instructions." *Id.* at 182. This Court should apply that same analysis here.[7]

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[7] In one unusual situation, some courts have stated that the jury instructions are relevant to sufficiency analysis: where the law has been clarified after trial to narrow the scope of a criminal offense,

B. The Government's Inadvertent Failure To Object To Jury Instructions Does Not Require An Appellate Court To Perpetuate The Error When Reviewing A Conviction For Sufficiency Of The Evidence

Even if courts should generally look to jury instructions when assessing the sufficiency of the evidence—which they should not—that principle would not mean that courts are always bound to apply instructions that reflect a clear error of law. Petitioner appears to agree that if the government objects to erroneous jury instructions adding an extra element of the offense, that objection can be resolved by the court of appeals before the court considers whether the evidence was sufficient to sustain the defendant's conviction. Petitioner's version of the law-of-the-case doctrine applies only if the government *fails* to object.

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and thus require proof of an element not required at the time of trial. In that situation, some courts have evaluated sufficiency under the jury instructions given at trial. See, *e.g.*, *United States* v. *Houston*, 792 F.3d 663, 669-670 (6th Cir. 2015); see also U.S. Br. in Opp. at 12-15, *McWane, Inc.* v. *United States*, No. 08-364 (Oct. 30, 2008). The rationale underlying that analysis is that the Double Jeopardy Clause's preclusion of retrial when evidence is insufficient, see *Burks*, *supra*, should not bar retrial when the government introduced sufficient evidence under the law as understood at the time of trial; otherwise, the government would be held to "a standard it did not know it had to satisfy." *Houston*, 792 F.3d at 670. But even in that situation, the more accurate description is not that the jury instructions at trial control the sufficiency analysis; rather, the law at the time of trial (which is usually reflected in the instructions) controls the sufficiency analysis in order to avoid a windfall acquittal that does not serve double-jeopardy purposes. *Ibid.* Petitioner's approach, in contrast, would produce a windfall acquittal when the law *never* required proof of the erroneous element in the jury instructions.

See, *e.g.*, Pet. Br. 14, 19-20, 24, 33 (describing his doctrine as "an estoppel of sorts").

That means, however, that—on petitioner's own view—the question of which elements govern the sufficiency analysis in any particular case ultimately turns on principles of waiver, forfeiture, and estoppel relating to erroneous jury instructions. That approach is unsound, for the reasons described above. But if that approach did apply, then standard doctrines of waiver, forfeiture, and estoppel would govern. And those doctrines—as recognized in this Court's decisions and in Federal Rule of Criminal Procedure 52(b)—establish that the government's failure to object does not altogether foreclose its opportunity, as appellee, to challenge a plainly erroneous jury instruction on the elements of the offense for the first time on appeal.

1. This Court has long made clear that an appellee may defend a judgment in its favor on any ground supported by the existing record. See, *e.g.*, *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924). That rule permits an appellee to invoke new legal arguments on appeal to support the judgment. As the Court recently explained in *Greenlaw* v. *United States*, 554 U.S. 237 (2008), "[a]n appellee or respondent may defend the judgment below on a ground not earlier aired." *Id.* at 250 n.5. The Court has regularly applied that rule and ruled in favor of appellees based on arguments that they did not advance in the district court.[8]

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[8] See, *e.g.*, *Schweiker* v. *Hogan*, 457 U.S. 569, 584-585 & n.24 (1982) ("Although appellees did not advance this argument in the District Court, they are not precluded from asserting it as a basis on which to affirm that court's judgment" based on the "well

The Court has also noted that appellate courts have discretion *not* to address an appellee's new arguments, on a case-by-case basis. See, *e.g.*, *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976). Restraint may be appropriate when the proper resolution is doubtful, *id.* at 121, or resolving it would unfairly deprive the opposing party of the chance to introduce evidence or contest the relevant issues, *id.* at 120; *Giordenello* v. *United States*, 357 U.S. 480, 487-488 (1958). But that is ordinarily not a concern when the government, as appellee, raises a purely legal argument to support a judgment, to which the defendant can respond in a reply brief.

When a defendant asks a court of appeals to reverse a conviction for insufficiency based on an incorrect statement of the offense elements in the jury instructions, an appellate court thus has discretion to apply the correct rule of law despite the government's failure to object to an erroneous standard below. Although petitioner argues (Br. 33) that the government's failure to object to the jury instructions' erroneous statement of the elements operates as an "estoppel of sorts," this Court has emphasized that "[t]here can be no estoppel in the way of ascertaining the existence of a law." *United States Nat'l Bank of*

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accepted" rule that "an appellee may rely upon any matter appearing in the record in support of the judgment below.") (citation omitted); *Helvering* v. *Gowran*, 302 U.S. 238, 245-247 (1937) (allowing government to raise a new argument as appellee); *United States* v. *Williams*, 278 U.S. 255, 255-256 (1929) (affirming based "upon a ground urged here by the [appellee], but apparently, it is fair to say, not suggested to either court below"); see also *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (noting that respondent may "rely on any legal argument in support of the judgment below," even if "made for the first time in this Court").

Or. v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (brackets in original) (quoting *Town of S. Ottawa* v. *Perkins*, 94 U.S. 260, 267 (1877)). The same should be true in correctly defining the elements of the offense against which the sufficiency of the evidence is measured.

2. Alternatively, even setting aside normal appellate principles permitting an appellee to raise a new argument to defend the judgment, Federal Rule of Criminal Procedure 52(b) allows a court of appeals to consider a plain instructional error adding an extra element to a criminal offense when reviewing a defendant's conviction for sufficiency of the evidence.

a. Rule 52(b) establishes a general principle governing the circumstances in which a court may consider an unwaived error despite a party's failure to object at the appropriate time during trial. It states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court held that to qualify as "plain," an error must be "clear" or "obvious." *Id.* at 734 (citation omitted). An error "affects substantial rights" if it is "prejudicial," *i.e.*, if it would "affect[] the outcome" of the case. *Ibid.* (brackets and citation omitted). This Court has further held that Rule 52(b) is "permissive, not mandatory," and that the rule should be employed to prevent "miscarriage[s] of justice," defined as circumstances in which "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 735-736 (second set of brackets in original) (citation and internal quotation marks omitted).

Rule 52(b) makes no distinction between errors raised by the government and those raised by criminal defendants. Courts have generally recognized that the government may obtain plain-error review under Rule 52(b) in appropriate circumstances.[9]

b. No textual reason precludes applying Rule 52(b) in the situation presented here, where an appellee is invoking that rule—defensively—to correct a plain error (here, the extra element in the jury instructions) that the appellant is relying upon in order to establish a different error (here, the alleged insufficiency of the evidence with respect to that element). Rule 52(b) establishes that an appellate court may "consider" an instructional error requiring the government to prove an extra element of the crime—even if the government failed to "br[ing] [that error] to the court's attention"—so long as the error satisfies the *Olano* standard. Here, that means that an appellate court can ignore the extra element erroneously included in the instructions when reviewing the conviction for sufficiency of the evidence.

3. Under settled principles of review or under Rule 52(b), the court of appeals did not abuse its discretion when it considered the instructional error at issue

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[9] See generally U.S. Br. at 44-46, *Greenlaw*, *supra*, No. 07-330 (Nov. 13, 2007) (analyzing text of Rule 52(b) and surrounding provisions, and citing cases from 12 circuits); *United States* v. *Jackson*, 207 F.3d 910, 917 (7th Cir.), vacated on other grounds, 531 U.S. 953 (2000). Petitioner points out (Br. 27) that "plain-error review is typically invoked by defendants, not the government," but this empirical observation reflects the limited bases on which the government may appeal an interlocutory or final decision, 18 U.S.C. 3731, 3742, coupled with the screening process within the government before approving appeals. It does not reflect any legal barrier preventing the government from invoking the rule.

here. First, as that court recognized—and as petitioner does not dispute—the requirement that the jury find an extra element of the offense was "an obvious clerical error." Pet. App. A6; see pp. 5-6, 8-9, *supra*; *Olano*, 507 U.S. at 734.

Second, petitioner seeks to rely on the instructional error in order to establish that the evidence was insufficient—and thus to obtain a judgment of acquittal. That error plainly threatens to "affect[] the outcome" of the case, the normal test for showing that an error affects substantial rights. *Olano*, 507 U.S. at 734 (citation omitted).

Third, recognizing the plain instructional error would avoid a "miscarriage of justice" and preserve the "fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citations omitted). Petitioner suggests that "manifest injustice" can never result when a defendant escapes criminal liability—even when overwhelming evidence establishes his guilt. Pet. Br. 31-32 (citation omitted). This Court has repeatedly rejected that conclusion, however, in cases decided under Rule 52(b) and *Olano*. See *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997) (rejecting defendant's plain-error argument and noting that reversing his conviction would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," given the "overwhelming" evidence of guilt as to disputed element) (citations omitted); *United States* v. *Cotton*, 535 U.S. 625, 634 (2002) (similar).

Here, the evidence establishing that petitioner committed the crime of conspiring to obtain unauthorized access to the ETS computer system was overwhelming. See Gov't C.A. Br. 3-21; Pet. App. A7.

Petitioner does not—and cannot—dispute that point. And the jury found all of the statutory elements of that crime beyond a reasonable doubt. The court of appeals correctly determined that, to the extent that the instructional error had any effect on the trial at all, it operated to petitioner's advantage. Pet. App. A5-A7, A10. Allowing petitioner to escape criminal liability in these circumstances would be unjust.

C. The Law-Of-The-Case Doctrine Does Not Apply, But In Any Event It Supports The Government Here

Although petitioner concedes (Br. 14, 19-20, 24) that his argument turns entirely on the government's failure to raise a timely objection at trial, he does not address the settled principles—discussed above—that ordinarily govern such forfeitures. Instead, he urges this Court to embrace (Br. 20) what he calls a "specialized version" of the law-of-the-case doctrine. In his view, the government's failure to object to jury instructions in a criminal case should render those instructions binding in sufficiency-of-the-evidence review. Petitioner's law-of-the-case theory does not present the right analytical framework for considering this issue. But even if it did, the law-of-the-case doctrine would not foreclose an appellate court from taking notice of a plain instructional error in the circumstances present here.

1. The law-of-the-case doctrine has no application here. That doctrine generally posits that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper* v. *United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona* v. *California*, 460 U.S. 605, 618 (1983)). The doctrine "merely expresses the practice of courts generally to refuse to

reopen what has been decided." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.).

In its standard application in the courts of appeals, the law-of-the-case doctrine constrains an appellate court from changing its decision on a matter already decided by that court in a previous appeal in the same case. See 18B *Federal Practice & Procedure* § 4478, at 646 n.16 (2d ed. 2002) (citing cases). But it does not prevent a party from raising—on a first appeal—an issue that had been decided against him only in the trial court. Applying the doctrine in that circumstance would contradict the entire theory of appellate review.

Petitioner seeks to apply his "specialized version" (Br. 20) of the law-of-the-case doctrine to preclude the court of appeals from considering the validity of the jury instructions. But the court of appeals had not previously addressed that issue, and so law-of-the-case principles do not apply. As this Court explained in *United States* v. *Wells*, 519 U.S. 482 (1997), reliance on the "law of the case" doctrine to govern the situation at issue here—based simply on the government's failure to object at trial—involves "something of a misnomer." *Id.* at 487 n.4. Whether to permit appellate review in this situation implicates "an appellate court's relationship to the court of trial." *Ibid.* It does not involve the law-of-the-case principles, which instead "counsel a court to abide by its own prior decision in a given case." *Ibid.*[10]

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[10] See 18B *Federal Practice and Procedure* § 4478.6, at 815 (explaining that law-of-the-case terminology is inappropriate "to address the question whether to deny appellate review of an issue that has not been properly preserved" because "[t]he question is not whether a court should adhere to its own prior ruling without

2. Even if traditional law-of-the-case principles were generally relevant here, they would not support petitioner's "specialized version" of that doctrine (Br. 20). The law-of-the-case doctrine "directs a court's discretion," but it "does not limit the tribunal's power." *Pepper*, 562 U.S. at 506 (quoting *Arizona*, 460 U.S. at 618); see *Messenger*, 225 U.S. at 444. Most importantly, the doctrine "does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997) (brackets and internal quotation marks omitted) (quoting *Arizona*, 460 U.S. at 618 n.8).

Petitioner's law-of-the-case theory violates those principles because it is mandatory and categorically precludes an appellate court from addressing even the most obvious, inadvertent, and prejudicial instructional errors. See Pet. Br. 26-27 (rejecting established exception to law-of-the-case doctrine for rulings that are plainly wrong and manifestly unjust).

3. Petitioner appears to concede (Br. 20 & n.3) that his version of the law-of-the-case doctrine has little, if anything, to do with the traditional law-of-the-case doctrine previously recognized by this Court. The only independent authority he identifies (Br. 20-24) for his theory is a series of cases from the courts of appeals that use law-of-the-case terminology to require the government to establish the sufficiency of the evidence in light of jury instructions to which the government did not object at trial. Those cases do not help him.

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reexamination, but whether a different court should refuse its ordinary reviewing responsibility to encourage compliance with fair and efficient procedure").

a. Petitioner is correct (Br. 19-24) that various circuits have discussed the issue presented in this case using law-of-the-case terminology. Although the origins of this practice are somewhat opaque, upon closer inspection, petitioner's cited cases ultimately appear to rest on waiver and forfeiture principles.

As one leading treatise explains, "[j]ury instructions present an[] area in which law-of-the-case language is frequently used to express ideas that have nothing to do with law-of-the-case theory." 18B *Federal Practice and Procedure* § 4478.6, at 834. When courts use "law of the case" terminology with respect to unobjected-to jury instructions, therefore, that is "merely one way of phrasing the general principle that a failure to object at the proper time ordinarily bars a later challenge to an instruction and will be considered a form of waiver for purposes of review on appeal." 9C *id.* § 2558, at 179.

To the extent that the circuit decisions that petitioner invokes ultimately turn on waiver and forfeiture principles, no compelling reason justifies the use of inapposite law-of-the-case terminology. Such terminology adds nothing to the analysis other than a high risk of confusion for litigants and courts.

b. In any event, petitioner's circuit decisions do not support his argument. None of the relevant circuits embraces the mandatory law-of-the-case rule that petitioner now urges this Court to adopt. As the government has explained, the First, Fifth, and Eighth Circuits refuse to treat jury instructions as binding law of the case if the instruction is patently erroneous and the crime was correctly charged in the indict-

ment.[11] To the extent that what matters here is the "generally accepted rule" (Pet. Br. 19) in the courts of appeals, that rule—including its plain-error exception—supports the government. Indeed, the court of appeals applied that rule and affirmed petitioner's conviction based on the exception. Pet. App. A5-A7.[12]

4. In any event, a mandatory, no-exceptions version of the law-of-the-case doctrine has little to commend it in this context. Petitioner's policy arguments cannot overcome this Court's precedent permitting an appellee to defend a judgment on grounds not raised below or the express terms of Rule 52(b), see pp. 21-24, *supra*, and they fail on the merits as well.

a. Petitioner argues (Br. 21, 24, 31-32, 36) that his version of the law-of-the-case doctrine is necessary to prevent the government from deliberately changing positions on its way from the trial court to the court of appeals. But even absent such a rule, the government has strong incentives to maintain a consistent litigating position. It also has strong incentives to avoid adding extra elements to the jury instructions. After

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[11] See *United States* v. *Inman*, 558 F.3d 742, 748 (8th Cir.), cert. denied, 558 U.S. 916 (2009); *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006); *United States* v. *Zanghi*, 189 F.3d 71, 79 (1st Cir. 1999), cert. denied, 528 U.S. 1097 (2000); Pet. App. A5-A7 (applying that exception here); see generally Br. in Opp. 12-16 (discussing circuit cases).

[12] The Tenth Circuit has not yet addressed whether to apply such an exception. See Br. in Opp. 15-16 (discussing cases). Notably, however, that court treats "adherence to the law of the case doctrine at the circuit level" not as a matter of binding federal law, but rather as one "left to the discretion of the circuit courts." *United States* v. *Romero*, 136 F.3d 1268, 1272 (10th Cir. 1998). That approach is inconsistent with petitioner's theory that the rule is mandatory and must be applied in all circuits.

all, an instruction that heightens the government's burden of proof at trial increases the chances that the jury will acquit the defendant despite the existence of evidence on every actual element of the crime. In such cases, as petitioner acknowledges (Br. 25), the Double Jeopardy Clause would preclude any re-trial. See *Evans* v. *Michigan*, 133 S. Ct. 1069, 1073-1075 (2013). In the event that the government acquiesces in a jury instruction that increases its burden at trial (perhaps to avoid appellate risk when the law is uncertain), such action inures to the defendant's benefit and promotes judicial efficiency in avoiding unnecessary retrials.

b. Petitioner also argues (Br. 27-28, 31-32, 36) that his forfeiture rule will advance principles of lenity and liberty that are especially salient in the context of criminal prosecutions. But while it is true that this Court applies various criminal-law doctrines in order to zealously protect the constitutional rights of the accused, no such rights are implicated here. As petitioner acknowledges (Br. 33), his proposed rule does not claim "constitutional magnitude." Assessing his conviction under the correct legal standard is entirely consistent with due process of law. See pp. 13-16, *supra*.

Unlike other criminal-law doctrines, petitioner's rule is designed to exonerate the guilty, not to protect the innocent. It entitles a defendant to an acquittal even though (1) the jury was properly instructed with respect to all of the actual elements of the charged offense; (2) the jury unanimously found that petitioner committed that offense; and (3) the evidence in the record was sufficient to support those findings. In those circumstances, the defendant has already re-

ceived an undeserved benefit—an opportunity to have the jury itself vote to acquit him in light of that extra element. The defendant has received a trial that is not merely fair, but actually biased *in his favor*. No reason exists to give the defendant a second chance to obtain a windfall acquittal on appeal.

c. Finally, petitioner argues (Br. 22) that his forfeiture rule is necessary to mitigate potential jury confusion over the relationship between the actual elements and any extra elements incorporated in the instructions. That concern does not support his proposed rule either.

Any such jury confusion would be the product of the instructional error, and it has nothing to do with the sufficiency of the evidence. To the extent the record establishes a plausible basis for such confusion, it might justify granting a new trial—as a result of the instructional error—in accordance with Rule 52(a) or (b). See, *e.g.*, *United States* v. *Zanghi*, 189 F.3d 71, 80 n.11 (1st Cir. 1999), cert. denied, 528 U.S. 1097 (2000). In no event, however, is the appropriate response to petitioner's concerns to grant all defendants in these circumstances an outright acquittal.[13]

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[13] Petitioner speculates (Br. 29-30) that the inclusion of the extra element in this case may have confused the jury and prejudiced its deliberations with respect to the other (correctly stated) elements of the crime. Petitioner raised several versions of that factbound argument in the court of appeals as part of his request for a new trial, and they were rejected. See Pet. App. A5-A10; Pet. C.A. Br. 27-29, 50-54. Petitioner did not object to the isolated references to "exceed[ing] authorized access" at trial, despite his view that the government had already "abandoned" that aspect of the charge through its superseding indictments and various proposed jury instructions. See Pet. Br. 29-30; Pet. C.A. Br. 17-18. Any evidence that would tend to show that petitioner conspired to exceed au-

II. A STATUTE-OF-LIMITATIONS DEFENSE MAY NOT BE SUCCESSFULLY RAISED FOR THE FIRST TIME ON DIRECT APPEAL

Petitioner did not raise a statute-of-limitations defense at or before trial. On appeal, he argued—for the first time—that the indictment was untimely pursuant to the five-year criminal statute of limitations set forth in 18 U.S.C. 3282(a). Although petitioner conceded that a defendant "waive[s]" any statute-of-limitations defense that might involve disputed facts, he asserted that he was entitled to plain-error review because his defense turned on a pure legal defect in the indictment. Pet. C.A. Reply Br. 27-28; see pp. 9-10, *supra*. In this Court, he shifts gears yet again, now arguing (Br. 37-58) that the statute of limitations is a non-waivable jurisdictional constraint and that statute-of-limitations defenses may always be raised for the first time on appeal.

Petitioner's arguments lack merit. As this Court has consistently recognized for more than 140 years, the federal statute of limitations is a non-jurisdictional affirmative defense that becomes part of a case if—and only if—the defendant properly raises it at trial. When the defendant fails to raise that defense, the government has no affirmative obligation to establish compliance with the statute of limitations in the course of the case. The failure to satisfy such a non-existent obligation does not constitute a "plain error." Although it is also appropriate to say that the defendant has "waived" his right to invoke the defense in those circumstances, nothing turns on that label.

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thorized access was probative of his intent to conspire to obtain unauthorized access.

However it is characterized, he may not obtain relief under Rule 52(b). Rather, in circumstances where the defendant has a valid statute-of-limitations defense that his counsel failed to raise through accident or neglect, the proper course is for the defendant to raise an ineffective-assistance-of-counsel claim in a petition for post-conviction relief.[14]

A. The Statute Of Limitations Is A Non-Jurisdictional Affirmative Defense That Must Be Raised By The Defendant

1. The statute of limitations applicable to federal criminal offenses is an affirmative defense that must be raised by the defendant in order to become part of the case. If and when the defense is properly raised, the government bears the burden of proving that the crime was committed within the limitations period. See *Smith* v. *United States*, 133 S. Ct. 714, 721 (2013); *Grunewald* v. *United States*, 353 U.S. 391, 396 (1957). Until then, the government has no burden, and the defense is not in the case at all.

The Court first recognized that principle in *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872). There, an Army paymaster was indicted under a statute making it illegal to embezzle public funds. *Id.* at 171-172. The general statute of limitations imposed a two-year limitations period, but that period did not apply "to any person or persons fleeing from justice." *Id.* at 173. The defendant sought dismissal, arguing that "it appears on the face of the indictment * * * that the crime charged * * * was committed more than two

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[14] The government has previously explained why petitioner's conviction did not violate the statute of limitations. See Br. in Opp. 18-19; Gov't C.A. Br. 61-63.

years before the indictment." *Id.* at 172. He did so by means of a "demurrer"—a form of common-law pleading under which a defendant could argue that the factual allegations in the indictment, taken as true, were nonetheless insufficient to state a claim. See *id.* at 180.

This Court rejected the defendant's argument. The Court explained that when an exception to criminal liability "is not incorporated with the clause defining the offence, nor connected with it in any manner by words of reference," that exception "is not a constituent part of the offence" and the indictment need not allege facts establishing that the exception does not apply. *Cook*, 84 U.S. (17 Wall.) at 181; see *id.* at 173-177. Rather, the Court explained, in such circumstances the exception "is a *matter of defence* and must be pleaded or given in evidence by the accused." *Id.* at 181 (emphasis added). Relying on that analysis, the Court concluded that the federal statute of limitations qualifies as such an "exception" to criminal liability, and thus held that it is a "matter of defence" to be established by the defendant. *Id.* at 177-178, 181.

The Court further held that the defendant could not raise the defense by means of a demurrer, which would deprive the government of its right to rebut the defense by presenting evidence that either (1) the case fell under an exception to the statute of limitations, or (2) the crime in question was in fact committed within the limitations period. *Cook*, 84 U.S. (17 Wall.) at 179-180; see generally *United States* v. *Titterington*, 374 F.3d 453, 454-460 (6th Cir. 2004) (Sutton, J.) (explicating *Cook*), cert. denied, 543 U.S. 1153 (2005). Rather, a defendant would have to raise the defense either by entering a "special plea" before trial (in response to

which the government could introduce its own evidence), or by raising the issue during the trial itself. *Cook*, 84 U.S. (17 Wall.) at 179-180. Either way, the Court emphasized, the government was entitled to respond to the defendant's arguments and to present evidence establishing that the prosecution was timely. *Ibid.*[15]

This Court has repeatedly—and recently—reaffirmed *Cook*'s basic holding that the statute of limitations is an affirmative defense that must be raised by the defendant. In *Biddinger* v. *Commissioner of Police,* 245 U.S. 128 (1917), for example, the Court cited *Cook* and expressly stated that "[t]he statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases." *Id.* at 135. Just three terms ago, this Court cited both *Cook* and *Biddinger* in holding that commission of a federal crime within the limitations period "is not an element" of the offense, and that "*it is up to the defendant to raise the limitations defense*." *Smith*, 133 S. Ct. at 719-720 (emphasis added).[16]

2. Petitioner argues (Br. 39-48) that the statute of limitations here, 18 U.S.C. 3282(a), is not an affirmative defense that must be raised by the defendant, but

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[15] See generally 2 Joel Prentiss Bishop, *New Criminal Procedure*, §§ 734-743, 775-790, 799-801, at 581-584, 606-613, 618, 622-624 (2d ed. 1913) (discussing special pleas in bar and demurrers); Martin P. Burks, *Pleading and Practice In Actions at Common Law* §§ 197-208, at 328-367 (1913) (same).

[16] The courts of appeals universally agree that the statute of limitations is an affirmative defense that the defendant must raise. See *United States* v. *Franco-Santiago*, 681 F.3d 1, 12-13 & n.18 (1st Cir. 2012) (citing cases); Pet. Br. 40 (conceding as much).

rather a non-waivable jurisdictional limit on the court's authority. That contention fails.

a. Petitioner's argument contradicts this Court's holdings in *Cook*, *Biddinger*, and *Smith*. Those cases establish that any limitations defense must be raised by the defendant before it becomes part of the case. See pp. 34-36, *supra*. That principle is irreconcilable with petitioner's theory that the statute of limitations is a jurisdictional constraint that must be enforced regardless of whether the defendant raises the issue. Indeed, *Cook* rejected the defendant's similar argument that courts have an affirmative duty to dismiss prosecutions brought outside the statute of limitations, either *sua sponte* or "at any stage" and in "any form whatever" that the defect is raised by the defendant. 84 U.S. (17 Wall.) at 170-171 (summarizing defendant's argument); see generally, *e.g.*, *United States* v. *Doyle*, 348 F.2d 715, 718-719 (2d Cir.) (Friendly, J.) (relying on *Cook* to hold that statute of limitations is not jurisdictional), cert. denied, 382 U.S. 843 (1965).

Petitioner acknowledges (Br. 44-46) that his proposed rule conflicts with *Cook* and *Biddinger*. He argues (Br. 44-45) that this Court is not bound by those cases because (1) *Biddinger* involved a differently worded state-law statute of limitations and (2) *Biddinger* and *Cook* both addressed only "anachronistic pleading questions" involving the propriety of raising a limitations defense by demurrer.

Those arguments lack merit. Petitioner does not dispute that *Cook* involved a federal statute of limitations that is identical to the limitations provision at issue here in all relevant respects. Moreover, *Biddinger* itself relied on *Cook*, indicating that any dis-

tinction in the wording of the limitations provisions at issue in those cases was immaterial. *Biddinger*, 245 U.S. at 135. Although both cases involved outdated forms of pleading, that does nothing to undermine *Cook*'s holding that the government bears no affirmative obligation to establish compliance with the statute of limitations in the indictment and that noncompliance "is a matter of defence and must be pleaded or given in evidence by the accused." 84 U.S. (17 Wall.) at 181; see *Titterington*, 374 F.3d at 458-459.

Moreover, petitioner overlooks this Court's recent reaffirmation of *Cook* and *Biddinger* in *Smith*. That case involved the exact statute of limitations at issue here, and it had nothing to do with demurrers or other forms of common-law pleading. Nonetheless, the Court reiterated—yet again—that "it is up to the defendant to raise the limitations defense." *Smith*, 133 S. Ct. at 720. As such, the rule is not of jurisdictional dimension.

b. Petitioner's affirmative case for treating the statute of limitations as a jurisdictional requirement rests on a mistaken analysis of this Court's recent cases analyzing when statutory time limits are jurisdictional. Those cases make clear that statutes of limitations "ordinarily are *not* jurisdictional." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013) (*Auburn Regional*) (emphasis added). Courts should treat a time bar as jurisdictional "only if Congress has 'clearly state[d]' as much." *United States* v. *Wong*, 135 S. Ct. 1625, 1632 (2015) (brackets in original) (quoting *Auburn Regional*, 133 S. Ct. at 824). And that turns on the "text, context, and relevant historical treatment" of the provision at issue. *Reed Elsevier, Inc.* v *Muchnick*, 559 U.S. 154, 166 (2010).

Nothing in the text, context, or history of Section 3282(a) reflects a clear statement by Congress that its five-year time limit is jurisdictional. Section 3282(a) contains no express reference to the subject-matter jurisdiction of federal district courts. Nor does that provision appear in Chapter 211 of Title 18 of the United States Code, which establishes the rules governing "Jurisdiction and Venue" in criminal cases. Within Chapter 211, Section 3231 grants district courts subject-matter jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. 3231. That provision contains no exception for offenses committed outside the statute of limitations. See *Wong*, 135 S. Ct. at 1633 (noting that Court "has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional").

Petitioner argues (Br. 42-43) that by declaring that "no person shall be prosecuted, tried, or punished" for any offense outside the limitations period, Section 3282(a)'s text constrains the power of courts and prosecutors. 18 U.S.C. 3282(a). But the Fifth Amendment's Grand Jury Clause includes similar language ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."), yet its protections are waivable and non-jurisdictional. U.S. Const. Amend. V; see *Cotton*, 535 U.S. at 630. And a presumption of waiver is a background principle of criminal law that applies "in the context of a broad array of constitutional and statutory provisions." *United States* v. *Mezzanatto*, 513 U.S. 196, 200 (1995); *id.* at 201-202 (collecting cases).

The long tradition of treating criminal statutes of limitations as non-jurisdictional affirmative defenses that the defendant has the option to raise or waive is apparent from *Cook*, *Biddinger*, and *Smith*. It is also clear from *Spaziano* v. *Florida*, 468 U.S. 447 (1984), which held that a capital defendant has a due process right to jury instructions on lesser-included offenses that are time-barred, so long as the defendant waives the statute of limitations applicable to those offenses. *Id.* at 454-457. *Spaziano*'s holding, although involving a state and not a federal statute of limitations, presupposes that a statute-of-limitations defense is non-jurisdictional and subject to waiver.

In addition, criminal defendants sometimes choose to waive statute-of-limitations defenses to serve strategic purposes. For example, a defendant might plead guilty to a time-barred offense in exchange for avoiding a more serious, but timely, charge. *Titterington*, 374 F.3d at 459. A defendant might also waive a statute-of-limitations defense in order to avoid an immediate indictment and extend the period of time available to engage in plea-bargaining. See *United States* v. *Wild*, 551 F.2d 418, 420, 423-425 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); see also, *e.g.*, *United States* v. *Cote*, 544 F.3d 88, 103-104 (2d Cir. 2008) (Sotomayor, J.) (noting other potential benefits of waiver); 5 Wayne R. LaFave et al., *Criminal Procedure* § 18.5(a), at 193 (3d ed. 2007) (citing cases and noting that "[g]ood reason for such an intentional waiver will sometimes exist"). Petitioner's theory that the statute of limitations is jurisdictional would upend that practice—and harm defendants—by making such waivers unlawful.

If Congress had intended to repudiate *Cook* or prevent defendants from waiving limitations defenses, it would have expressly so stated in any of the various amendments it has made to the limitations provision since *Cook* was decided in 1872.[17] No reason exists to upend more than 140 years of precedent treating the statute of limitations as a non-jurisdictional affirmative defense.

B. In No Event May A Statute-Of-Limitations Defense Be Successfully Raised For The First Time On Appeal

Rule 52(b) authorizes appellate courts to consider plain errors that are apparent on the existing record. But no such error exists when a court takes no action to quash an indictment—or overturn a jury verdict—based on a statute-of-limitations defense that the defendant did not raise at trial. On the contrary, the defendant's failure to raise that affirmative defense means that the government was not required to establish its compliance with the statute of limitations in the first place. In these circumstances, it is appropriate to conclude that the defendant has waived the defense, but in any event the government's failure to satisfy a non-existent burden does not qualify as a plain error under Rule 52(b).

1. No "plain error" exists under Rule 52(b) when no statute-of-limitations defense is raised at trial

a. As explained above, Rule 52(b) allows a court to consider a "plain error that affects substantial rights,"

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[17] See, *e.g.*, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, Tit. VI, § 610(a), 117 Stat. 692; Act of Sept. 26, 1961, Pub. L. No. 87-299, § 1, 75 Stat. 648; Act of Sept. 1, 1954, ch. 1214, § 10(a), 68 Stat. 1145; Act of Apr. 13, 1876, ch. 56, 19 Stat. 32-33.

even if it was not properly raised in the lower court. See pp. 23-24, *supra*. An error must be so obvious that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). In assessing whether a "plain error" has occurred, a reviewing court must rely on the "existing record." *United States* v. *Vonn*, 535 U.S. 55, 74 (2002).

In *Cook*, this Court held that the statute of limitations is a "matter of defence" that the defendant must affirmatively raise in order to make it part of the case. 84 U.S. (17 Wall.) at 181. By putting the defense in issue, the defendant requires the government to establish compliance with the statute of limitations. The government then has the "right" to satisfy this burden—in response to the defendant's introduction of the issue—by either (1) showing that one of the statutory exceptions to the statute of limitations exists, or (2) introducing evidence at trial that shows that the crime was committed within the limitations period. See *id.* at 179-180 (explaining that government must have "the right to reply or give evidence, as the case may be, that the defendant * * * within [a statutory] exception," and that government may not be precluded "from giving evidence" at trial "to show that the offence was committed" within the limitations period).[18]

This Court's cases also indicate, however, that when a defendant fails to raise an affirmative defense

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[18] Congress has enacted various exceptions to Section 3282(a)'s general statute of limitations, see generally 18 U.S.C. 3281-3301, including an exception for "[f]ugitives from justice" similar to the one addressed in *Cook*, see 18 U.S.C. 3290.

at trial, the government never assumes the burden of refuting it in the first place.[19] In particular, absent a defendant's having raised a statute-of-limitations defense, the government is not required to establish an exception to the statute or compliance with its time limit. *Cook*, 84 U.S. (17 Wall.) at 179-180. In such circumstances, the government's failure to establish such compliance is not error. Nor is it error for a court to enter a judgment of conviction against the defendant despite the absence of proof that the crime occurred within the limitations period. Neither the government nor the court can be called "derelict," *Frady*, 456 U.S. at 163, in failing to raise an affirmative defense on the defendant's behalf.

b. The analysis set forth above tracks the way affirmative defenses are generally treated in American criminal law. As one treatise explains, "[i]n the context of criminal law defenses," the "burden of introducing a defense for consideration" generally falls on the defendant. 1 Paul H. Robinson, *Criminal Law Defenses* § 3(a), at 12 (1984). Affirmative defenses will generally "not be discussed in a case unless the defendant indicates his interest in raising the issue." *Id.* at 12-13. Requiring the defendant to raise the defense "alert[s] the prosecution to the theory of defense," as "it would be unreasonable to require the prosecution to negate every possible theory of defense, until called to do so." *Id.* § 33(a), at 130 n.2.

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[19] See, *e.g.*, *Dixon* v. *United States*, 548 U.S. 1, 13-14 (2006) (duress; noting the "settled rule" that an indictment need not "negative" an affirmative defense and that "it is incumbent on one who relies on such [a defense] to set it up and establish it") (quoting *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922)); *United States* v. *Sisson*, 399 U.S. 267, 287-288 (1970).

The courts of appeals have recognized that "trial courts generally are under no duty to raise affirmative defenses on behalf of a criminal defendant." *Government of V.I.* v. *Lewis*, 620 F.3d 359, 371 n.10 (3d Cir. 2010). A trial court is not required, for example, to introduce an entrapment or duress defense into the case; that action may alter the structure of the trial and impinge on defense strategy. See *ibid.* ("[B]y raising affirmative defenses *sua sponte*, a trial court might actually harm a criminal defendant by undermining defense counsel's strategic decisions."); see also *United States* v. *Simmonds*, 931 F.2d 685, 688 (10th Cir.), cert. denied, 502 U.S. 840 (1991). The same is true of a limitations defense, which defense counsel may sometimes elect to forgo to avoid prompting the government to conduct additional investigation that may identify additional criminal conduct or lead to distracting litigation on peripheral issues. Because a trial court has no duty to raise affirmative defenses, its failure to do so "is not plain error" for purposes of Rule 52(b). *United States* v. *Montgomery*, 150 F.3d 983, 996 (9th Cir. 1998).[20]

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[20] See, *e.g.*, *United States* v. *Delgado*, 672 F.3d 320, 343 (5th Cir.) (adopting Ninth Circuit's analysis in *Montgomery*), cert. denied, 133 S. Ct. 525 (2012); *United States* v. *Scott*, 642 F.3d 791, 797-798 (9th Cir.) (per curiam) (no plain error not to instruct on affirmative defense because defendant "did not present or rely upon the [defense] theory at trial"), cert. denied, 132 S. Ct. 440 (2011); *United States* v. *Malachowski*, 415 Fed. Appx. 307, 313 (2d Cir. 2011) (no plain error to "fail[] to provide an instruction *sua sponte* on a defense [the defendant] did not even actively advance at trial"); *United States* v. *George*, 448 F.3d 96, 100 (1st Cir. 2006) (adopting *Montgomery*); *United States* v. *Matzkin*, 14 F.3d 1014, 1018 (4th Cir. 1994) ("A finding of plain error when a court failed to sua sponte include an instruction relating to an affirmative defense

In this respect, affirmative defenses differ from legal rules that can be violated by the trial court even absent an objection. Under Rule 52(b), a "legal rule" that governs trial court proceedings can be violated even absent action by the defendant. See *Olano*, 507 U.S. at 733 ("Although in theory it could be argued that if the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review, this is not the theory that Rule 52(b) adopts.") (brackets, citation, and internal quotation marks omitted). But no "legal rule" exists that a trial court has an obligation to raise an affirmative defense that the defendant has not raised. A court thus commits no error by failing to raise such issues *sua sponte*.

c. Even if Rule 52(b) somehow authorized an after-the-fact inquiry into whether the government would have been able to negative a statute-of-limitations defense (had one been raised), a reviewing court would be hard pressed to conclusively resolve that issue in the defendant's favor based on the "existing record." *Vonn*, 535 U.S. at 74. The defendant's failure to raise the defense at trial means that the government would have lacked any incentive to introduce the facts necessary to refute the defense. Because the record was generated at a time when the limitations issue was not part of the case, it could not serve as a reliable guide to resolving that issue. In such circumstances, the record could not provide a sufficient basis by which a reviewing court could find it "plain" or "obvious" that the statute of limitations was violated.

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would place an unnecessary and intolerable burden upon the trial court."); see also *United States* v. *Gutierrez*, 745 F.3d 463, 472-473 (11th Cir. 2014).

Olano, 507 U.S. at 734. No relief under Rule 52(b) would therefore be appropriate.

d. In this case, the court of appeals stated that petitioner had "waived" the statute-of-limitations defense by failing to raise it at trial. Pet. App. A9; see *United States* v. *Franco-Santiago*, 681 F.3d 1, 12 n.18 (1st Cir. 2012) (noting that most courts of appeals likewise consider this a "waiver" and will not grant relief under Rule 52(b) on that basis). That statement simply expresses the legal conclusion that, by choosing to present his case at trial without raising the affirmative defense, and thereby depriving the government of any opportunity to contest that defense, the defendant's actions preclude him from raising the defense for the first time on appeal. See generally, *e.g.*, *United States* v. *Lewis*, 774 F.3d 837, 845 (5th Cir. 2014) (per curiam); *United States* v. *Siegelman*, 561 F.3d 1215, 1232 (11th Cir. 2009) (per curiam), vacated on other grounds by 561 U.S. 1040 (2010). Whether analyzed as a "waiver" or the absence of "plain error" under Rule 52(b), the result is the same.

Below, petitioner conceded that a statute-of-limitations defense should often be treated as "waive[d]" in these circumstances. Pet. C.A. Reply Br. 27. He argued that when a defendant raises that defense for the first time on appeal—and when his claims turns on potentially disputed facts—"it makes sense to find waiver because the Government would be prejudiced by not having been given a chance to establish or rebut the facts." *Ibid.* (citing *Siegelman*, 561 F.3d at 1232, for proposition that "[r]equiring the defendant to assert a limitations defense at trial gives the prosecution a fair opportunity to rebut the defense through additional evidence or during summation").

In this Court, petitioner argues that a "waiver" requires the "intentional relinquishment or abandonment of a known right." Pet. Br. 48 (quoting *Olano*, 507 U.S. at 733). While that is generally the case, it is not always true. See *United States* v. *Broce*, 488 U.S. 563, 573 (1989) (recognizing that "conscious waiver" is not "necessary with respect to each potential defense relinquished by a plea of guilty"); *Doyle*, 348 F.2d at 718-719 (holding that a guilty plea waives any statute-of-limitations defense). As used in the present context, "waiver" refers to extinguishing any right to rely on the affirmative defense because of the failure to raise it, and it thus produces the same conclusion as analysis under Rule 52(b): No error, let alone "plain error," exists.[21]

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[21] Petitioner goes further and argues (Br. 52-53) that the waiver of a statute-of-limitations defense is akin to a waiver of important constitutional rights (such as the right to stand trial, the right to a jury, and the right to testify on his own behalf), and that such a waiver requires "the express and knowing consent of the defendant." That is incorrect. Raising a particular affirmative defense is a strategic decision for counsel to make, akin to the many other tactical and strategic decisions that counsel must make in conducting the defense. See, *e.g.*, *New York* v. *Hill*, 528 U.S. 110, 114-115 (2000) ("[D]ecisions by counsel are generally given effect as to what arguments to pursue * * * . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.") (citations and internal quotation marks omitted). Counsel "undoubtedly has a duty to consult with the client regarding important decisions, including question of overarching defense strategy," but he "has authority to manage most aspects of the defense without obtaining his client's approval." *Florida* v. *Nixon*, 543 U.S. 175, 187-189 (2004) (citation and internal quotation marks omitted) (holding that concession of guilt at capital trial, in order to focus on the penalty phase, did not require defendant's express approval).

e. Finally, Rule 52's history and purpose confirm that it cannot justify relief on a statute-of-limitations defense raised for the first time on appeal. Adopted in 1944, Rule 52(b) "merely restated existing law" permitting plain-error review in certain circumstances. *Frady*, 456 U.S. at 163 n.13. But before 1944, courts regularly rejected efforts by criminal defendants to raise new statute-of-limitations defenses for the first time after trial or on appeal.[22] Rule 52(b) should be interpreted consistently with that settled practice.

2. Petitioner's theory would deprive the government of its right to introduce evidence

Under petitioner's theory, any criminal defendant is entitled to raise any statute-of-limitations defense on appeal for the first time. Moreover, once the defendant raises that defense, the government bears the burden of establishing compliance with the statute of limitations. See Pet. Br. 55 (arguing that in this case, "[i]t is the government's burden to argue and prove that the superseding indictments relate back, not [p]etitioner's burden to preempt such an anticipated response"). As petitioner once recognized, that approach would "prejudice[]" the government by denying it a fair chance "to establish or rebut the facts." Pet. C.A. Reply Br. 27.

a. Petitioner does not explain how the government can litigate factual issues for the first time on appeal. He does not argue that the trial court should reopen

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[22] See, *e.g.*, *Forthoffer* v. *Swope*, 103 F.2d 707, 709 (9th Cir. 1939); *Capone* v. *Aderhold*, 65 F.2d 130, 131 (5th Cir. 1933); *Evans* v. *United States*, 11 F.2d 37, 39 (4th Cir. 1926); see also *United States* v. *Kaiser*, 138 F.2d 219, 220 (7th Cir. 1943) (entrapment defense), cert. denied, 320 U.S. 801 (1944).

the record to hear evidence of the kind identified in *Cook*, 84 U.S. (17 Wall.) at 179-180. Such reopening would be impossible—the trial is over, the jury has been dismissed, and the case is on appeal. And the court of appeals is not the proper forum in which to introduce new evidence or resolve new factual disputes. See, *e.g.*, *DeMarco* v. *United States*, 415 U.S. 449, 450 n.* (1974) (per curiam). That leaves adjudicating the statute-of-limitations defense on the basis of the existing record, as is standard practice for claims raised under Rule 52(b). See *Vonn*, 535 U.S. at 74.

As explained, see pp. 41-43, *supra*, it would be unfair to require the government to discharge its burden of proof based on a trial record that was developed at a stage in the case where the government did not bear that burden. That result would contradict *Cook*'s holding that the government must have the opportunity to introduce evidence in response to any statute-of-limitations defense raised by the defendant. 84 U.S. (17 Wall.) at 179-180. It would also invite sandbagging, especially in cases involving potentially disputed facts. By waiting to raise a limitations defense, the defendant could prevent the government from developing a factual record to counter that defense.

b. Below, petitioner asserted that his own statute-of-limitations defense does not implicate these concerns, because it does not involve "disputed facts" but rather "a question of law premised on the face of the charging instrument." Pet. C.A. Reply Br. 28. That argument is in serious tension with *Cook*, which makes clear that the government has the right to introduce evidence even when the indictment appears to allege a

crime that took place outside the statute of limitations. 84 U.S. (17 Wall.) at 173-181.

Recognizing a narrow exception for legal claims resting on undisputed facts would also be hard to administer. Statute-of-limitations defenses will often turn on disputed factual issues, and courts would thus have to develop a complicated new jurisprudence aimed at distinguishing legal claims, factual claims, and claims raising mixed questions of law and fact. That approach would necessarily require "case-by-case determination[s]" that "would leave defendants"—and courts—"without a clear rule as to when a statute of limitations defense must be raised. *Lewis*, 774 F.3d at 845.[23]

This case offers a perfect illustration of the problems with adopting petitioner's theory. Although petitioner asserts that his case involves a pure question of law and undisputed facts, he overlooks that the statute-of-limitations issue here ultimately depends on whether the second superseding indictment relates back to the original indictment. That question turns, in part, on whether the former's reference to "Exel

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[23] And if petitioner were correct that his claim were solely legal, it might implicate Federal Rule of Criminal Procedure 12. At the time of his trial, Rule 12 provided that a defendant "waive[s]" any challenge to a "defect in the indictment" or to a "defect in instituting the prosecution" unless that challenge is raised in a pre-trial motion. See Fed. R. Crim. P. 12(b)(3) and (e) (2013); *United States* v. *Baldwin*, 414 F.3d 791, 795 n.2 (7th Cir. 2005) (noting circuit split over whether Rule 12(b)(3) encompasses statute-of-limitations defenses and whether plain-error review is available if such defenses are not timely raised). The government has not invoked Rule 12 in this case, and the court of appeals did not address whether it applies.

email accounts of Exel President and Exel legal counsel" is (as petitioner asserts) broader than the latter's reference to "Exel Server." Pet. App. A2; see pp. 3-4, 9, *supra*; Br. in Opp. 18-19; Pet. C.A. Br. 49. The proper resolution of that dispute turns on a factual issue—the relationship between the "Exel server" and the identified email accounts—that the parties had no reason to litigate at trial.

As this case shows, any rule that requires case-by-case determinations about the nature of the statute-of-limitations defense will be subject to manipulation and spur confusion among litigants and in the lower courts. This Court should instead apply a clear, easily administrable rule requiring all statute-of-limitations defenses to be raised at or before trial.

3. Petitioner's reliance on* Wood *and* Day *is misplaced

Petitioner invokes (Br. 49-52) *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012) and *Day* v. *McDonough*, 547 U.S. 198 (2006), to support his argument that a criminal defendant can raise a statute-of-limitations defense for the first time on appeal. In those cases, this Court recognized that federal courts may consider, *sua sponte*, a state government's statute-of-limitations defense to a petition for habeas corpus challenging a state criminal conviction—even if the state government neglected to raise that defense in the district court. *Wood*, 132 S. Ct. at 1834-1835; *Day*, 547 U.S. at 201-202.

Neither *Wood* nor *Day* advances petitioner's argument here. In those habeas cases, this Court declined to apply the forfeiture rule that applies in ordinary civil litigation in order to maintain consistency with the Court's prior treatment of other "threshold constraints on federal habeas petitioners." *Day*, 547

U.S. at 209; see *Wood*, 132 S. Ct. at 1832-1834. It emphasized that allowing courts to address forfeited limitations defenses *sua sponte* would advance basic interests in federal-state comity and the finality of state-court criminal judgments that are implicated by federal habeas corpus review of state-court judgments. *Ibid.* The Court noted that allowing courts to raise such issues on their own would not violate any "[r]ule, statute, or constitutional provision," and it indicated that the belated defense could not be raised if the "delayed focus on the limitation issue" prejudiced the habeas petitioner. *Day*, 547 U.S. at 210-211; see *Wood*, 132 S. Ct. at 1834

None of those considerations applies to the situation at issue here. This case involves the direct appeal of a federal criminal conviction, and it does not implicate habeas corpus procedures or federal-state relations in any way. In this context, Rule 52(b) sets forth the only mechanism by which defendants may seek appellate review of purported trial errors to which he did not object below—and federal courts have "no authority" to create exceptions to that rule. *Johnson*, 520 U.S. at 466; cf. *Nguyen* v. *United States*, 539 U.S. 69, 80 (2003) (invalidating decision of improperly composed court of appeals without resort to plain-error rule). Moreover, longstanding precedent makes clear that it is improper for a court to uphold a statute-of-limitations defense without giving the government an opportunity to introduce evidence—including, if necessary, at trial—establishing compliance with the applicable statutes. See *Cook*, 84 U.S. (17 Wall.) at 179-180. Petitioner is therefore wrong to suggest (Br. 49) that *Wood* and *Day* "necessarily control" the issue in this case.

4. Federal post-conviction proceedings provide an adequate mechanism for addressing statute-of-limitations defenses not raised due to ineffective assistance of counsel

This case involves whether a criminal defendant may successfully raise a statute-of-limitations defense—for the first time—in the direct appeal of his criminal conviction. For the reasons explained above, he may not. But nothing prevents a defendant from raising such a defense in the context of a collateral challenge to his conviction alleging the ineffective assistance of his trial counsel. If the defendant can show that (1) his trial counsel was deficient in failing to raise that defense, and (2) the deficiency was prejudicial, he will be entitled to a reversal of his conviction. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984); *United States* v. *Coutentos*, 651 F.3d 809, 818 (8th Cir. 2011) (granting relief on such a claim).

Litigating the statute-of-limitations defense in a post-conviction proceeding would provide significant advantages over doing so in a direct appeal. Most importantly, the proceeding would take place in a federal district court, and the parties would have the opportunity to develop a full factual record on (1) the reasons the limitations defense was not raised at trial in the first instance (*i.e.*, whether it was accidentally forfeited or deliberately waived), and (2) whether that defense would have succeeded on the merits. See generally *Massaro* v. *United States*, 538 U.S. 500, 504-506 (2003) (noting advantages of post-conviction review when trial proceedings were not directed to the matter at issue).

That approach would enhance the accuracy and reliability of any final decision, remain faithful to the

dictates of Rule 52(b), and uphold the government's right—under *Cook*—to present evidence showing why the defendant's limitations argument would fail. No reason exists to modify Rule 52(b), or settled waiver principles applicable to the failure to raise an affirmative defense, in order to provide relief for a claimed (but not previously raised) limitations defense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2015

APPENDIX

1. 18 U.S.C. 371 (2006) provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U.S.C. 1030 (2006) provides:

Fraud and related activity in connection with computers

(a) Whoever—

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or

foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer if the conduct involved an interstate or foreign communication;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period;

(5)(A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and;

(B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of

an attempted offense, would, if competed, have caused)—

(i) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value;

(ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(iii) physical injury to any person;

(iv) a threat to public health or safety; or

(v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security;

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if—

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States;[1]

(7) with intent to extort from any person any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to cause damage to a protected computer;

shall be punished as provided in subsection (c) of this section.

(b) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is—

(1)(A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

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[1] So in original. Probably should be followed by "or".

(2)(A) except as provided in subparagraph (B), a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), (a)(5)(A)(iii), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph, if—

(i) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds $5,000; and

(C) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(3)(A) a fine under this title or imprisonment for not more than five years, or both, in the case of an offense under subsection (a)(4) or (a)(7) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(4), (a)(5)(A)(iii), or (a)(7) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(4)(A) except as provided in paragraph (5), a fine under this title, imprisonment for not more than 10 years, or both, in the case of an offense under subsection (a)(5)(A)(i), or an attempt to commit an offense punishable under that subsection;

(B) a fine under this title, imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(5)(A)(ii), or an attempt to commit an offense punishable under that subsection;

(C) except as provided in subparagraph (5), a fine under this title, imprisonment for not more than 20 years, or both, in the case of an offense under subsection (a)(5)(A)(i) or(a)(5)(A)(ii), an attempt to commit an offense punishable under either sub-

section, that occurs after a conviction for another offense under this section; and

(5)(A) if the offender knowingly or recklessly causes or attempts serious bodily injury from conduct in violation of subsection (a)(5)(A)(i), a fine under this title or imprisonment for not more than 20 years, or both; and

(B) if the offender knowingly or recklessly causes or attempts to cause death from conduct in violation of subsection (a)(5)(A)(i), a fine under this title or imprisonment for any term of years or for life, or both.

(d)(1) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section.

(2) The Federal Bureau of Investigation shall have primary authority to investigate offenses under subsection (a)(1) for any cases involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data (as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)), except for offenses affecting the duties of the United States Secret Service pursuant to section 3056(a) of this title.

(3) Such authority shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section—

(1) the term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term "protected computer" means a computer—

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

(B) which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;

(3) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States;

(4) the term "financial institution" means—

(A) an institution, with deposits insured by the Federal Deposit Insurance Corporation;

(B) the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank;

(C) a credit union with accounts insured by the National Credit Union Administration;

(D) a member of the Federal home loan bank system and any home loan bank;

(E) any institution of the Farm Credit System under the Farm Credit Act of 1971;

(F) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934;

(G) the Securities Investor Protection Corporation;

(H) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); and

(I) an organization operating under section 25 or section 25(a)[2] of the Federal Reserve Act;

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[2] See Reference in Text note below.

(5) the term "financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(6) the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;

(7) the term "department of the United States" means the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of title 5;

(8) the term "damage" means any impairment to the integrity or availability of data, a program, a system, or information;

(9) the term "government entity" includes the Government of the United States, any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country;

(10) the term "conviction" shall include a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer;

(11) the term "loss" means any reasonable cost to any victim, including the cost of responding to an

offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service; and

(12) the term "person" means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity.

(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in cause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). Damages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design

or manufacture of computer hardware, computer software, or firmware.

(h) The Attorney General and the Secretary of the Treasury shall report to the Congress annually, during the first 3 years following the date of the enactment of this subsection, concerning investigations and prosecutions under subsection (a)(5).

3. 18 U.S.C. 3282 provides:

Offenses not capital

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

(b) DNA PROFILE INDICTMENT.—

(1) IN GENERAL.—In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

(2) EXCEPTION.—Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to—

(A) the limitations period described under subsection (a); and

(B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment.

(3) DEFINED TERM.—For purposes of this subsection, the term "DNA profile" means a set of DNA identification characteristics.

4. 18 U.S.C. 3290 provides:

Fugitives from justice

No statute of limitations shall extend to any person fleeing from justice.

5. Fed. R. Crim. P. Rule 12 (2013) provides:

Pleadings and Pretrial Motions

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, ob-

jection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment of information—but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule

12(B)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding motion, the court must state its essential findings on the record.

(e) Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusion of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be release or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

6. Fed R. Crim. P. Rule 12 provides:

Pleadings and Pretrial Motions

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made at Any Time. A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) Motions That Must Be Made Before Trial. The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment or information, including;

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14; and

(E) discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) Setting the Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

If the court does not set one, the deadline is the start of trial.

(2) Extending or Resetting the Deadline. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) Consequences of Not Making a Timely Motion Under Rule 12(b)(3). If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding motion, the court must state its essential findings on the record.

(e) [Reserved]

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant

to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

7. Fed. R. Crim. P. Rule 51 provides:

Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court— when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

8. Fed. R. Crim. P. Rule 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

9. Act of Apr. 40, 1790, § 32, 1 Stat. 119 provides:

SEC. 32. ***And be it further enacted***, That no person or persons shall be prosecuted, tried or punished for treason or other capital offence aforesaid, willful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or committed; nor shall any person be prosecuted, tried or punished for any offence, not capital, nor for 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 offence, or incurring the fine or forfeiture aforesaid: *Provided*, That nothing herein contained shall extend to any person or persons fleeing from justice.