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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL MUSACCHIO, :

Petitioner : No. 14-1095

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.  
Monday, November 30, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

ERIK S. JAFFE, ESQ., Washington, D.C.; on behalf of Petitioner.

ROMAN MARTINEZ, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 14-1095, Musacchio v. United States.

Mr. Jaffe.

ORAL ARGUMENT OF ERIK S. JAFFE

ON BEHALF OF THE PETITIONER

MR. JAFFE: Mr. Chief Justice, and may it please the Court:

This case presents two questions concerning the consequences of the failure to object or raise an issue at trial.

On the question of whether jury instructions not objected to by the government become the baseline for measuring the sufficiency of the evidence at later stages in the case, the critical point here is that only the jury can determine that a defendant is guilty. And if a jury does so under a particular framework, it should be evaluated under that framework. And if it cannot sustain that verdict on the reasons it used in its own deliberations, that verdict is not rational.

In --

JUSTICE SCALIA: Well, there -- there's -- there's no doubt in this case, is there, that the jury

1 found beyond a reasonable doubt that the defendant had  
2 committed a crime set forth in the indictment?

3 MR. JAFFE: Your Honor, I think that is not  
4 entirely correct. There is no doubt there was  
5 sufficient evidence that they could have done that.  
6 Whether they did that is --

7 JUSTICE SCALIA: They -- they had to.

8 MR. JAFFE: -- a different matter.

9 JUSTICE SCALIA: They had to find that, plus  
10 something else, isn't -- wasn't that --

11 MR. JAFFE: So --

12 JUSTICE SCALIA: -- that the issue?

13 MR. JAFFE: It was the issue.

14 JUSTICE SCALIA: So if -- if they came in  
15 and said both are true, the first has to -- has to have  
16 been true.

17 MR. JAFFE: In the Fifth Circuit, we pointed  
18 out that there was the potential for confusion the way  
19 "and" could have been misread by them as "or," and they  
20 would not have necessarily had unanimity on -- on which  
21 elements of the "and" added up.

22 JUSTICE SCALIA: I didn't read that as being  
23 a part of your case here.

24 MR. JAFFE: It is only so indirectly. So we  
25 raised this as plain error, and we lost that because we

1     couldn't demonstrate prejudice because there was some  
2     uncertainty.

3                     Our point in this Court is that, if the  
4     government wants to ignore or have a court disregard the  
5     instructions, it would then be its burden to prove  
6     harmlessness, and that same uncertainty about unanimity  
7     would then redound to our benefit.

8                     JUSTICE SCALIA: Well -- well, the -- the  
9     "or" would have been accurate, wouldn't it have?

10                    MR. JAFFE: Well, the "or" would have been  
11     accurate, but would have required a unanimity  
12     instruction to be clear which of the "ors" they agreed  
13     on. If six thought it was "exceeding" and six thought  
14     it was "unauthorized," that is a -- not a valid verdict.

15                    JUSTICE SOTOMAYOR: On the basis of the  
16     argument in this case, I didn't think there was any  
17     argument that the government tried this case solely on  
18     the theory that he encourage others to exceed their  
19     authority.

20                    MR. JAFFE: I think --

21                    JUSTICE SOTOMAYOR: That's how they argued  
22     the case. That's how it was indicted. So why isn't it  
23     harmless error?

24                    MR. JAFFE: Well, because the evidence is  
25     not sufficient to actually support that conclusion. The

1 government certainly argued that.

2 JUSTICE SOTOMAYOR: It's not sufficient to  
3 support the conclusion that he exceeded authority.

4 MR. JAFFE: Yes.

5 JUSTICE SOTOMAYOR: But it is more than  
6 sufficient, if not the only theory they could have  
7 convicted on, was that they -- that he had encouraged  
8 others to exceed their authority.

9 MR. JAFFE: No. I -- I -- I disagree, Your  
10 Honor. We argue that what he encouraged others to do,  
11 if one accepts all those facts as true, still would not  
12 constitute exceeding authority.

13 That the government's --

14 JUSTICE ALITO: Could I ask you -- I'm  
15 sorry.

16 MR. JAFFE: Yes.

17 JUSTICE ALITO: You wanted to finish that.

18 MR. JAFFE: I was saying the government's  
19 theory about what is and is not exceeding authority is  
20 somewhat confused in this case as it was confused in the  
21 presentation at the trial level; and therefore, it  
22 wouldn't have been clear that that evidence would have  
23 been sufficient to show conspiracy to exceed.

24 JUSTICE ALITO: It doesn't seem clear to me  
25 that these two theories are actually separate. They --

1 they -- when Congress enacts a criminal statute, it  
2 often adds a lot of synonyms. So, you know, in the --  
3 in a theft statute, whoever embezzles, steals, or  
4 unlawfully and willfully extracts or converts,  
5 et cetera, they're not necessarily all distinct. And I  
6 don't really see a difference between making  
7 unauthorized access and exceeding authorized access.

8           Let's take the first, making unauthorized  
9 access. Let's say somebody has access to some -- an  
10 employee here in the building has access to -- lawful  
11 access, proper access to some records. If that employee  
12 at night sneaks into some other place in the building  
13 and starts looking through files, that person is making  
14 unauthorized access.

15           And in the other situation, exceeding  
16 authorized access, let's say a person doesn't have  
17 any -- any access to any files in the court, but sneaks  
18 in and looks at those files. That person had zero  
19 authorized access and, therefore, exceeded authorized  
20 access.

21           I just think these are -- it seems to me,  
22 reading them, they're two ways of saying the same thing.  
23 So the issue that's presented here may not -- the issue  
24 that you've asked us to decide may not actually be  
25 presented by the facts of this case.

1           MR. JAFFE: Your Honor, that question is  
2 actually not before this Court. The government does not  
3 dispute that exceeding and unauthorized are discrete and  
4 independent means of accomplishing a crime. The Ninth  
5 Circuit has held that they are discrete. Even the Fifth  
6 Circuit agrees that they're discrete. It just disagrees  
7 as to what the content of those two separate elements  
8 are.

9           But for this Court's purposes, you need not  
10 ever go there. We've invited that in a footnote in our  
11 brief. You declined the invitation, which is entirely  
12 your prerogative, but that is an issue that will have to  
13 be briefed.

14           I agree with you, it is not the clearest of  
15 statutes, but suffice it to say, the way this issue has  
16 been brought to this Court, it has been assumed by the  
17 Fifth Circuit, assumed by the government, and I believe  
18 assumed by the Ninth Circuit that they are discrete and  
19 independent elements that would be separately and  
20 distinctly proven.

21           JUSTICE KAGAN: If I could go back to your  
22 main argument. You seem to be suggesting that the  
23 inquiry that we should be undertaking really focuses on  
24 this jury and how this jury made its decision. But I  
25 had thought that some of our prior cases, in particular,



1 Jackson, suggests that that's not the correct inquiry.  
2 That the correct inquiry really is -- is as to a  
3 hypothetical jury, any jury. And so your focus on,  
4 well, the way that these instructions might have  
5 affected this particular jury just really isn't the  
6 right one at all.

7 MR. JAFFE: I partially agree with you, Your  
8 Honor. It is not that we are asking what the  
9 individuals on the jury thought or what their literal  
10 thought process was in the jury room; but it is, indeed,  
11 could any jury in the position of this jury, with the  
12 facts this jury received, with the instructions this  
13 jury received, could possibly have come to this  
14 conclusion?

15 And our point is no rational jury facing the  
16 facts and instructions this jury faced could have  
17 convicted on the exceeding portion of the charge.

18 JUSTICE GINSBURG: But they convicted on the  
19 first portion and that was enough.

20 MR. JAFFE: They convicted on a combined --

21 JUSTICE GINSBURG: They found, beyond a  
22 reasonable doubt, intentionally accessing a computer  
23 without authorization, period. And they were told they  
24 had to find that unanimously. So what -- what else is  
25 there?

1 MR. JAFFE: It is not clear they understood  
2 that because the unanimity instruction did not  
3 distinguish between unauthorized access and exceeding  
4 authorized access.

5 JUSTICE SCALIA: That -- that -- that's what  
6 your case comes down to: Failure to instruct the jury  
7 that they had to be unanimous as to both?

8 MR. JAFFE: No, that is what our objection  
9 to the government's harmlessness argument comes down to,  
10 which is the government cannot resolve the uncertainty  
11 in the jury room.

12 JUSTICE SCALIA: It isn't a harmlessness  
13 argument. It -- it's an argument that the jury was told  
14 you can convict if A plus B. They came back and said,  
15 beyond a reasonable doubt, A plus B, he's guilty.

16 And now you come and say, well, you know, he  
17 really wasn't guilty on B. There wasn't enough  
18 evidence.

19 That's okay. He's still guilty on A.

20 MR. JAFFE: Let me give you --

21 JUSTICE SCALIA: I -- I just don't see how  
22 you get around that.

23 MR. JAFFE: I'll give an example that may  
24 help clarify it: In murder charges, it is typically  
25 charged that one knowingly and intentionally killed a

1 person. If the government fails to prove intentionally  
2 but had sufficient evidence for knowingly, you cannot  
3 support a murder conviction because they proved  
4 manslaughter unless it was specifically charged as a  
5 separate instruction to the jury. You can't just save  
6 it because yes, of course, they found manslaughter by  
7 implication.

8 JUSTICE KENNEDY: But that's not this case.  
9 What you -- you -- what you have hypothesized is an  
10 erroneous instruction that -- or -- or a -- a -- a  
11 failure to find what was necessary. There's no failure  
12 to find what was necessary here, so your hypo doesn't  
13 work.

14 MR. JAFFE: Well, the "what was necessary"  
15 sort of begs the question a bit on necessary to whom.  
16 To the jury, it was necessary to find both. And they  
17 only, at best, could have found one. We do not concede  
18 that they did find one accurately, because there is --

19 JUSTICE KENNEDY: I can see that your  
20 argument might work in some cases if the jury was  
21 confused, if -- if this meant that it took their  
22 attention away from a critical element. But I -- I  
23 don't see that that's a possibility here, even assuming  
24 that Justice Alito's comments, which I think have  
25 considerable merit, are inapplicable, but you -- that

1 they're quite different.

2 MR. JAFFE: Well, as I said, I believe  
3 Justice Alito's comments are a fair issue to be  
4 litigated, and it could be litigated on remand if this  
5 case goes back. It's not presented here.

6 As to whether the jury was confused, we  
7 certainly argue the jury was confused. We couldn't meet  
8 our burden of prejudice, but our point is the government  
9 couldn't meet its burden of showing that didn't happen  
10 either. That's the Olano situation, where right in the  
11 middle where there is confusion, neither side can win --

12 JUSTICE BREYER: That sounds like what  
13 you're saying -- I don't understand the point. What  
14 Justice Scalia said seems right. It's charged. You  
15 have to find A and B. Therefore, they must have found  
16 A. The indictment, superseding indictment charged A.  
17 The statute says A. Okay? So we know they found A.

18 Now, what's the problem?

19 MR. JAFFE: Well --

20 JUSTICE BREYER: The problem seems to have  
21 been that they were also charged that they had to find  
22 B. Fine. They made a mistake.

23 Did you object? No.

24 Was it harmless? It doesn't seem to me how  
25 it -- how could it have been harmful.

1 I mean, I -- I think your problem is the  
2 problem with the extra B in the jury instruction. And  
3 so I would look to see what's your objection to B? Did  
4 you object? No. Then it must have been plain error.  
5 Well, it was -- it was erroneous, but was it harmful?

6 Now, that I could understand, but you're  
7 arguing something else, and it is the something else  
8 that I don't understand.

9 MR. JAFFE: Sure. We -- we are not arguing  
10 that it was erroneous or harmful to include that. We  
11 are arguing that it is binding. We are defending the  
12 jury instruction; not rejecting it. It is the  
13 government seeking to reject the jury instruction; and  
14 therefore, we think it is incumbent upon the government,  
15 if they want to analyze the verdict on grounds different  
16 than the instruction, to prove that doing so --

17 JUSTICE BREYER: Is there anybody -- well --  
18 well, I don't see the theory of it. The jury is  
19 instructed. You -- he is guilty of murder if he killed  
20 someone, da-da-da, and he had -- and he was looking at  
21 the ceiling. Okay? Doesn't make any sense.

22 Okay. That was wrong.

23 So now you're saying if the judge makes a  
24 mistake there, nobody objects, he says the wrong thing,  
25 and he was looking at the ceiling, you have to let the

1     guy go because -- although he didn't hurt anybody, no  
2     harm, you still have to let him go. And I just need the  
3     "why."

4                   MR. JAFFE: Sure. So the "why," I think,  
5     comes from Jackson v. Virginia. So let's say they said  
6     -- and he was --

7                   JUSTICE BREYER: It was not a case involving  
8     a jury instruction.

9                   MR. JAFFE: It was a case involving  
10    sufficiency of the evidence --

11                   JUSTICE BREYER: To show that the charge  
12    met -- the charge -- the evidence proved the crime on  
13    either the statute or the indictment.

14                   MR. JAFFE: But the reasons behind Jackson  
15    explain that we are looking to whether or not the jury  
16    could have rationally reached that conclusion. And the  
17    reason we do so is to enforce the presumption of  
18    innocence and to enforce the reasonable doubt  
19    instruction.

20                   So if a jury instructed erroneously that the  
21    person needed to be wearing a green hat, had zero  
22    evidence that that person was wearing a green hat, yet  
23    found that they were wearing a green hat anyway, there  
24    is a problem in that verdict, and we know there's a  
25    problem in that verdict. No rational jury could find

1 that a fellow with a red hat was wearing a green hat.

2 JUSTICE SOTOMAYOR: My problem is that I  
3 don't know that it's rational to say that a jury in --  
4 that sufficiency of the evidence has to do with what was  
5 charged as -- what was charged to the jury as opposed to  
6 what was laid out in the statute and/or in the  
7 indictment.

8 If it's sufficient under both, what you're  
9 trying to say now is it may be sufficient under both.  
10 You're conceding it is. You're conceding it is a  
11 possibility the jury found what was charged in the  
12 indictment, but the government now has added an element  
13 to the crime.

14 MR. JAFFE: Absolutely. So the -- the fact  
15 that that --

16 JUSTICE SOTOMAYOR: Do you have any case  
17 where we've held that or anything close to it?

18 MR. JAFFE: This Court, no.

19 JUSTICE SOTOMAYOR: Have you had any case  
20 discussing sufficiency of the evidence where we look to  
21 the jury instruction as opposed to the statute and the  
22 indictment?

23 MR. JAFFE: I'm not aware of one where that  
24 has come up. However, in the circuits, every circuit to  
25 consider the issue, as a general rule, accepts this

1 so-called law-of-the-case doctrine.

2 JUSTICE ALITO: Suppose that there's a --  
3 that there's a two-count indictment and there's plenty  
4 of evidence to convict on Count I and zero evidence, not  
5 one scintilla of evidence, on Count II, and the jury  
6 convicts on both counts; so the -- defendant is entitled  
7 to a judgment of acquittal on Count II.

8 But you seem to be saying in that situation,  
9 the court would say, this is a crazy jury. This is an  
10 irrational jury because their verdict on Count II is  
11 totally ridiculous; and therefore, the defendant is  
12 entitled to judgment of acquittal on Count I as well,  
13 despite the fact that there's plenty of evidence on  
14 Count I.

15 Is that what you're saying?

16 MR. JAFFE: Not entirely. It is certainly a  
17 reasonable conclusion from the implications of Jackson  
18 v. Virginia. However --

19 JUSTICE ALITO: Well, what's different --  
20 what's the difference between that and the argument you  
21 just made?

22 MR. JAFFE: This Court has treated separate  
23 counts as significant and distinct -- the Smith case,  
24 for example, that the government cites. And given  
25 that -- I'm not sure that's the right answer in an



1 abstract term, but given that, I believe the same thing  
2 would be true where the jury made a terrible decision on  
3 one count and an acceptable decision on another count,  
4 that you wouldn't cross, in fact, from one count to the  
5 other.

6 I could see the argument perfectly well, if  
7 this Court were inclined to go there, that yes, a jury  
8 that went that off the rails on one count is  
9 questionable on everything it did. And one might well  
10 question under the Jackson rationale whether or not they  
11 properly applied the presumption of innocence and the  
12 reasonable doubt standards.

13 JUSTICE ALITO: That -- that would be a  
14 revolutionary holding.

15 MR. JAFFE: It would. But I'm not asking  
16 this Court to make --

17 JUSTICE ALITO: But, now, I don't see a  
18 difference, other than a purely formal difference,  
19 between that situation and what you're -- what you're  
20 arguing.

21 MR. JAFFE: At some level, there is a  
22 certain formality to it, but that is Smith. And Smith  
23 made that formal distinction, I believe, to cabin the  
24 implications of Jackson. And if, at the end of the day,  
25 Jackson makes a good point, but one doesn't want to

1 extend it to its furthest logical reaches, that's  
2 reasonable. But within a count --

3 JUSTICE SCALIA: Of course, this --

4 MR. JAFFE: Yes.

5 JUSTICE SCALIA: -- this case is even -- is  
6 even worse than the hypothetical that Justice Alito  
7 posits in that -- in his hypothetical, Count II was a  
8 real count. In this case, the equivalent of Count II in  
9 the hypothetical was not real at all. It was a  
10 misinstruction which you did not object to.

11 MR. JAFFE: It was not our burden to object.

12 But the reason it's not worse is --

13 JUSTICE GINSBURG: You didn't object because  
14 it was favorable to your client. I mean, it's always  
15 better to -- if you have two than just one.

16 MR. JAFFE: We didn't object because we were  
17 confused. The trial counsel was actually confused and  
18 thought this was a case about both, as the government  
19 itself sort of acknowledges towards the end of trial  
20 where they -- where trial counsel makes a motion,  
21 assuming both were in play, and the government  
22 understands that trial counsel was confused.

23 JUSTICE GINSBURG: Didn't the -- didn't the  
24 government correct the indictment so it would be "or"  
25 not "and"?

1           MR. JAFFE: They corrected the formal  
2 portion of the charge, but all of the allegations, the  
3 means, the mechanisms of the conspiracy, the particular  
4 facts charged as being supporting acts, all of that  
5 included, continued to include "exceeding," just as the  
6 prior indictment had.

7           And so, understandably or not, there was  
8 some confusion both on the part of counsel, I believe on  
9 the part of the court, potentially on the part of the  
10 government that continued to argue "exceeding" even  
11 through its closing.

12           CHIEF JUSTICE ROBERTS: Counsel, I'd like to  
13 hear your argument on the statute of limitations  
14 question at this point.

15           MR. JAFFE: Yes, Your Honor.

16           On the statute of limitations, both parties  
17 agree that it is inevitable that a court will review a  
18 forfeited limitations bar. Whether it comes at habeas  
19 or sooner is really the only question before this Court  
20 because the government concedes that it can be raised as  
21 an ineffective assistance-of-counsel claim if it is a  
22 meritorious limitations bar.

23           Our point is, doing it sooner, doing it on  
24 direct appeal, doing it while you still have counsel, so  
25 take -- in -- in point-of-counsel cases, is the better

1 and more efficient way of doing that.

2 JUSTICE SCALIA: That's a -- that's a --  
3 that's a rule that will have application in a lot of  
4 other situations. You're saying whenever an error can  
5 be raised on habeas, we -- we should accord -- no matter  
6 that it's been waived, no matter what else exists, we  
7 should allow that point to be raised in initial review.

8 MR. JAFFE: No, Your Honor, that is not what  
9 we are saying.

10 JUSTICE SCALIA: Well, why -- why wouldn't  
11 it? I mean --

12 MR. JAFFE: Several reasons.

13 JUSTICE SCALIA: Why doesn't it follow?

14 MR. JAFFE: Because that's --

15 JUSTICE SCALIA: That's your argument:  
16 Since it can be raised in habeas, why not do it now?

17 MR. JAFFE: Because statutes of limitations  
18 can be distinguished from those other types of  
19 arguments. The habeas argument is merely a reason not  
20 to wait.

21 But it can be cabined -- our point can be  
22 cabined to limitations issues for several reasons. If  
23 you look at the habeas cases we cite at the tail end of  
24 our blue brief, one, it is taking it for granted that  
25 the failure to raise a meritorious statute of

1 limitations argument is indeed ineffective assistance.

2 JUSTICE GINSBURG: So you are, Mr. Jaffe, at  
3 least saying, in every statute of limitations case,  
4 whenever a statute of limitations is involved in every  
5 case, the defendant can raise it for the first time on  
6 appeal, every statute of limitations.

7 MR. JAFFE: Yes, though the theory under  
8 which that would happen might be different. So in some  
9 instances, it would be as a plain-error question; in  
10 other instances, it might be on a stronger theory.

11 But yes, that is basically our point, with  
12 one exception.

13 CHIEF JUSTICE ROBERTS: Maybe you should  
14 take the exception out.

15 JUSTICE SOTOMAYOR: The court below --

16 MR. JAFFE: Yes.

17 JUSTICE SOTOMAYOR: The court below --

18 CHIEF JUSTICE ROBERTS: Maybe you should --

19 MR. JAFFE: Yes.

20 JUSTICE SOTOMAYOR: -- is by waiver. I --

21 MR. JAFFE: The --

22 CHIEF JUSTICE ROBERTS: You -- you just get  
23 your exception out and then answer --

24 MR. JAFFE: The exception would be in the --  
25 the example of the Powell case, where the burden to

1 prove withdrawal was actually on the defendant and not  
2 the burden of proof complies with state of limitations  
3 on the government. The shifting in burdens of proof in  
4 that case might be an -- an exception to the general  
5 statement I gave Justice Ginsburg.

6 I'm sorry.

7 JUSTICE SOTOMAYOR: I'd like to get to the  
8 substance of your argument, but as I understand your  
9 argument, this wasn't a waiver which the court found  
10 below. You're arguing it's a forfeiture.

11 MR. JAFFE: Correct.

12 JUSTICE SOTOMAYOR: Forfeiture because it  
13 was unintentionally done.

14 MR. JAFFE: Correct.

15 JUSTICE SOTOMAYOR: And so you are going  
16 under plain error.

17 MR. JAFFE: Plain error is the -- the -- the  
18 narrowest and easiest of the theories.

19 JUSTICE SOTOMAYOR: All right.

20 MR. JAFFE: You have to call up --

21 JUSTICE SOTOMAYOR: So you're saying when  
22 there is plain error, when there isn't an intentional --  
23 you don't disagree with the government that there are  
24 intentional waivers that you can't raise on appeal of  
25 the statute of limitations. We've gotten a few of them

1 here.

2 MR. JAFFE: For purposes of our case, we  
3 would be perfectly content to accept that. Some of our  
4 theories, in fact, would be broader. This Court need  
5 not reach those broader theories --

6 JUSTICE SOTOMAYOR: All right.

7 MR. JAFFE: -- to vote in our favor.

8 JUSTICE SOTOMAYOR: So let's assume this is  
9 under plain error. Now let's go to what -- what made  
10 this plain. Okay?

11 We have a bunch of cases that say that this  
12 is a statute of limitations as opposed to a  
13 jurisdictional bar. Why would it be plain that this is  
14 jurisdictional?

15 MR. JAFFE: You need -- if you're under  
16 plain error, one need not conclude it as jurisdictional.  
17 One simply needs to conclude that the government has  
18 failed to bring the suit within the time required by a  
19 statute.

20 On its face, the date of the indictment  
21 compared to the date of the alleged crime is very  
22 simple, very plain. It's more than five years. The  
23 government may well have a defense -- relation back,  
24 whatever their defense is -- and they can raise that.  
25 But on its face --

1 JUSTICE SOTOMAYOR: I'm sorry. I --

2 MR. JAFFE: -- it's plain.

3 JUSTICE SOTOMAYOR: -- I -- I -- I'm having  
4 a very hard time accepting that argument. If we say  
5 that it -- it wasn't plain, that this was a  
6 claim-processing rule --

7 MR. JAFFE: I believe there are two separate  
8 lines of cases that are getting conflated.

9 Plain error could involve any error. It  
10 need not be jurisdictional. It can simply be contrary  
11 to statute, which is a non jurisdictional, merely a  
12 substantive statute like the statute of limitations.

13 The jurisdictional argument is a different  
14 and separate reason that need not infect -- or be  
15 decided in order to resolve plain error. The error here  
16 is simply the statute says you must bring it in  
17 five years. They brought it in seven. That's error.  
18 We failed to raise it, but that's the very purpose of  
19 the plain-error rule, is to make up for mistakes of  
20 counsel who failed to raise things they should  
21 otherwise have raised, and so one gets to raise it as  
22 plain error. That's --

23 CHIEF JUSTICE ROBERTS: Your -- your -- your  
24 argument really does -- this is true of all  
25 jurisdictional defenses, but I think it's particularly



1 problematic here, which is it encourages gamesmanship.  
2 I mean, if you have what you think is an arguable  
3 statute-of-limitations argument, you know, take your  
4 chance at trial, and if you win, fine, but if you lose,  
5 then raise this statute-of-limitations argument.

6 MR. JAFFE: I guess what I'd say is that no  
7 sane lawyer would do that because they subject  
8 themselves to claims of malpractice, they subject  
9 themselves to the higher standards of plain-error  
10 review. At the end of the day --

11 CHIEF JUSTICE ROBERTS: What's malpractice?  
12 It sounds like a -- a good practice to me for his  
13 client.

14 MR. JAFFE: Well, in subject on appeal to  
15 the higher standards of plain-error review is still a  
16 negative. If they end up losing and there was some  
17 chance they could have won had they brought it timely,  
18 that lawyer has now sent a man to jail based on not  
19 merely a mistake, but an intentional decision.

20 JUSTICE GINSBURG: That's not true of your  
21 jurisdictional categorization if it's jurisdictional and  
22 it's not plain error --

23 MR. JAFFE: That's true.

24 JUSTICE GINSBURG: And your jurisdictional  
25 argument surprised me because you cite a line of cases

1 that were meant to cabin the use of jurisdiction.

2 MR. JAFFE: Correct.

3 JUSTICE GINSBURG: The distinction between  
4 claim processing and jurisdictional was to cut back on  
5 exorbitant use of jurisdiction, and you just seemed to  
6 switch it.

7 MR. JAFFE: I start with the case of  
8 Bowles v. Russell, and merely point out that, on pretty  
9 much every single ground in that case and those that  
10 follow, this statute is stronger and more clearly a  
11 limitation of the court's power.

12 JUSTICE GINSBURG: I thought Bowles went on  
13 that the Court had held that before, and so it was going  
14 to adhere to its prior ruling.

15 MR. JAFFE: That was some of what Bowles  
16 went on, but it gave many other reasons, as did the  
17 follow-on cases. And if one looks at the wording of the  
18 statute, one may not try or punish is a continuing  
19 prohibition. It is not merely you can't prosecute,  
20 which might just be thought to apply to the prosecutor.  
21 This is a -- a restriction on the court.

22 JUSTICE GINSBURG: But again, you would be  
23 making all statutes of limitations, quote,  
24 "jurisdictional."

25 MR. JAFFE: No, we would not, Your Honor.

1                   We would look --

2                   JUSTICE GINSBURG: Which might that be?

3                   MR. JAFFE: -- at the wording.

4                   JUSTICE GINSBURG: Yes.

5                   MR. JAFFE: Because -- because I believe the  
6 wording of this statute is, in fact, unusually strong,  
7 particularly with the "except as otherwise expressly  
8 provided by law," meaning you cannot avoid it by  
9 implication. It is such a strongly worded statute.  
10 Others might not be that way at all, and one would not  
11 need to extend this to differently worded limitations,  
12 period.

13                   JUSTICE KAGAN: I -- I would have -- the --  
14 the most recent case that we had, which was Wong, makes  
15 clear the statute of -- of limitations generally are not  
16 jurisdictional, and I would think suggests that you  
17 really have to have language saying it is jurisdictional  
18 to overcome that presumption. In other words, just a  
19 strong-sounding statute of limitations wouldn't cut it  
20 according to Wong. That's the way I would read that.

21                   MR. JAFFE: I would read those cases as  
22 dealing with civil situations as opposed to criminal  
23 situations, where the limitations period is generally  
24 thought of as a period of repose, not as a substantive  
25 limit on the government's power. And that's the Toussie

1 case, as well as Benes, which followed that.

2 I would also point out that the -- the  
3 clarity of Congress's language goes to, are you limiting  
4 the court, as opposed to merely requiring bringing the  
5 claim within a certain period of time, but without  
6 specifying the consequence of failure.

7 Here, the language is so expressly directed  
8 to the court's power, and it does indeed specify the  
9 consequences of failure: You may not try or punish any  
10 person.

11 JUSTICE KAGAN: But are you saying that we  
12 should adopt a different interpretive rule in the  
13 criminal context? Is that what I understood you to say?

14 MR. JAFFE: I'm saying that you already  
15 have. That this Court views criminal statutes of  
16 limitations more strictly. It views them as different  
17 from civil statutes of limitations that is viewed as a  
18 limit on the government's power rather than merely a  
19 limit on a litigant's remedies. And that that's  
20 already -- that's Toussie. And I believe Benes  
21 discusses that at further depth.

22 But you need not reach jurisdiction. I  
23 believe the easiest way to reach the -- to deal with  
24 this case is on the Wood and Day line of cases, where  
25 you have already held that a limitations period cannot

1 be forfeited, only waived, and that's in the habeas  
2 context, admittedly. The -- the sides are flipped. But  
3 where the government in the habeas context inadvertently  
4 fails to raise a limitations period, it is still allowed  
5 to bring that up on appeal. The court, on appeal, is  
6 allowed to raise that sua sponte.

7 I think this case is stronger, once again,  
8 on every score than Day. And, consequently, if Day is  
9 good law, this case is almost a fortiori the same  
10 result.

11 And one need not give it any further  
12 analysis than that, that if the government has to  
13 affirmatively waive a limitations objection to a habeas  
14 petition, then Petitioner, who has so much more at  
15 stake, should have to affirmatively waive a limitations  
16 objection to indictment.

17 If I may, I'd like to reserve the remainder  
18 of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Mr. Martinez.

21 ORAL ARGUMENT OF ROMAN MARTINEZ

22 ON BEHALF OF THE RESPONDENT

23 MR. MARTINEZ: Mr. Chief Justice, and may it  
24 please the Court:

25 Petitioner is wrong that the sufficiency of

1 the evidence must be measured against an extra element  
2 in an obviously erroneous jury instruction. That rule  
3 is not consistent with the purpose of sufficiency  
4 review, it contradicts how this Court has treated the  
5 same issue in civil cases, and its whole purpose and  
6 effect is to give guilty defendants windfall acquittals.

7 JUSTICE GINSBURG: If it was obviously  
8 wrong, why did the government the first time, in the  
9 original indictment, charge "and"?

10 MR. MARTINEZ: I -- it -- it was obviously  
11 wrong to include the -- the -- the exceeding authorized  
12 access component to the case at the jury instruction  
13 stage after the superseding indictments had already made  
14 clear that the case was about a conspiracy to commit  
15 unauthorized access.

16 And I think my -- my friend on the other  
17 side pointed out that -- that -- that Petitioner's  
18 counsel was confused as to what the case was about at  
19 that stage, but if you look at what Petitioner said the  
20 case was about when he was briefing this case in the  
21 Fifth Circuit, he made very, very clear that, in  
22 Petitioner's view, the government had abandoned the  
23 conspiracy to commit exceeding authorized access, and it  
24 had abandoned that with its superseding indictments, and  
25 it had abandoned that by the fact that, when we proposed

1 three different sets of jury instructions as to the  
2 conspiracy count, the -- the instructions that we  
3 proposed were limited to a conspiracy to commit  
4 unauthorized access.

5 Petitioner's other counsel, Mr. Kendall,  
6 during his oral argument in the Fifth Circuit, over and  
7 over again -- at the beginning of his argument, in the  
8 middle of his argument, at the end of his argument --  
9 emphasized that the government had tried this case as a  
10 "unauthorized access case from start to finish."

11 JUSTICE GINSBURG: Why didn't the government  
12 ask the judge to correct his charge when the judge made  
13 the mistake of saying "and"?

14 MR. MARTINEZ: I -- Your Honor, I -- I don't  
15 know why we didn't do that. I think obviously the --  
16 it -- it would be better for -- for all of us if -- if  
17 we had -- if we had noticed the -- the change that was  
18 made.

19 I will say that the change was made at the  
20 last minute. The -- the parties had had a charging  
21 conference the day before when the erroneous language  
22 was not at issue. Petitioner had never asked for the  
23 "exceeding authorized access" language to be included in  
24 the instruction.

25 We had proposed three different sets of jury

1 instructions that didn't include that language. It was  
2 a mistake on our part, and we suffered the consequences  
3 of the mistake in the sense that, at that point, the  
4 jury was charged incorrectly. But if the jury had  
5 acquitted Mr. Musacchio based on its view that there was  
6 insufficient evidence with respect to the extra element,  
7 under this Court's decision in Evans, we wouldn't have  
8 been able to -- to appeal that. That -- that would have  
9 been the end of the case.

10 JUSTICE ALITO: Well, why was the  
11 instruction erroneous? You concede that these two  
12 methods of violating the statute are discrete? They're  
13 not just different ways of describing the same thing?

14 MR. MARTINEZ: We do think that they are  
15 discrete, and we think that's consistent with our -- our  
16 sort of general reading of the statute and with the way  
17 the courts have -- have addressed it. I think they're  
18 very closely related.

19 I think what -- we agree with what -- what  
20 Petitioner said in his petition at page 4, which was  
21 that -- that these are essentially two different ways of  
22 committing the same crime.

23 JUSTICE ALITO: Well, suppose you had an  
24 indictment charging someone with exceeding authorized  
25 access and there was a factual dispute about, let's say,



1 the date on which the employee's employment ended, so  
2 therefore, the date on which any authorized access that  
3 the employee had to records of the employer ended, you  
4 would say that, if you did not succeed in proving beyond  
5 a reasonable doubt that, as of the date when the access  
6 was obtained, the employee had ceased to be employed,  
7 that that employee would be entitled to a judgment of  
8 acquittal? That seems rather odd.

9 MR. MARTINEZ: Justice Alito, I don't -- I  
10 don't want to resist a broader reading of the statute,  
11 but I -- I would only say that -- that the statute  
12 defines the term "exceeding authorized access" in a  
13 way -- this is at page 11a of our statutory appendix.  
14 It said, "The term" -- it says, "The term 'exceeds  
15 authorized access' means to access a computer with  
16 authorization and then to use such access to obtain or  
17 alter information in the computer that the accessor is  
18 not entitled so to obtain."

19 So if there were a circumstance in which  
20 there was no authorization in the first place to -- to  
21 access the computer, I think we would be in trouble.  
22 But we would, of course, have the other -- the other way  
23 of -- of proving that the statute had been violated,  
24 which was the unauthorized access charge.

25 And that's why in this case, I think, there

1 was no dispute and there was no confusion whatsoever  
2 that a conspiracy to commit unauthorized access was  
3 alleged. There was overwhelming evidence that  
4 Petitioner hasn't challenged on that point, and there  
5 were, of course, two substantive convictions that --  
6 Counts II and III of the indictment -- which had to do  
7 with -- with unauthorized access.

8 JUSTICE ALITO: Well, couldn't there not be  
9 --

10 JUSTICE KENNEDY: I understand -- I  
11 understand your argument about, in effect, that this was  
12 harmless error but -- something at page 20 of your  
13 brief. You would like us to write in an opinion -- on  
14 the very first line of page 20 -- even if courts should  
15 generally look to jury instructions when assessing the  
16 sufficiency of the evidence which they should not -- you  
17 want us to write that in an opinion? It seems to me  
18 that would surprise many, many lawyers.

19 MR. MARTINEZ: We --

20 JUSTICE KENNEDY: First thing --

21 MR. MARTINEZ: -- we would --

22 JUSTICE KENNEDY: -- we look at --

23 MR. MARTINEZ: -- that you don't have to do  
24 that.

25 JUSTICE KENNEDY: -- when we -- the first

1 thing we look at in a sufficiency question is, well,  
2 what are the instructions? So you want to say, oh,  
3 well, don't look at instructions?

4 MR. MARTINEZ: Well, I think -- I think,  
5 Your Honor, in -- in the -- the vast majority of cases,  
6 the instructions are going to correctly reflect the --  
7 the State statute that's being charged.

8 JUSTICE KENNEDY: But -- but you -- but you  
9 say that we shouldn't look to jury instructions when  
10 assessing the deficiency of the evidence. I -- I -- I  
11 think that's an astounding proposition.

12 MR. MARTINEZ: I -- I don't think it's  
13 astounding at all, Your Honor, and I think that's  
14 expressly what the Court said in the Jackson case. If  
15 you look at the footnote 16 of Jackson, the Court said  
16 that, when conducting the sufficiency analysis, that --  
17 that the -- the analysis should be conducted with,  
18 "explicit reference to the substantive elements of the  
19 criminal offense as defined by state law."

20 JUSTICE KAGAN: That suggests that you  
21 wouldn't even look to the indictment. That you would  
22 just look to the statute.

23 MR. MARTINEZ: I think you would have to  
24 look to the statute, but the indictment would tell you  
25 which statute is being -- is being charged.

1 JUSTICE KENNEDY: Well, it's -- it's,  
2 frankly, a style point rather than a substantive point.  
3 But it -- it -- it does seem to me that we should not  
4 put that in the opinion.

5 MR. MARTINEZ: Well, I think that you  
6 shouldn't put that into the opinion. I -- I would agree  
7 on that -- with you on that because I think that -- I  
8 think that, on our first argument, what you should  
9 clarify and you should -- you can apply the same rule,  
10 essentially, that the Court has applied in the civil  
11 context when you've recognized that -- that jury  
12 instructions and sufficiency review are essentially  
13 on -- on two different tracks.

14 And when the -- the issue in the case is an  
15 instructional error, then I think it's fair to look to  
16 what the parties said about the instructional error.  
17 But if the issue is sufficiency and there is -- there is  
18 no dispute -- if the issue is sufficiency, then I think  
19 the place to look would be the -- the elements of the  
20 crime as defined by the statute. I think that's what  
21 Jackson says, and I think that's what the Court  
22 essentially held in -- in the civil context in these  
23 cases --

24 JUSTICE KAGAN: So Mr. Martinez, just --

25 MR. MARTINEZ: -- like Praprotnik and Boyle.

1 JUSTICE KAGAN: I'm sorry. Just going back  
2 to this question of whether it's the statute or the  
3 indictment, you think you just look to the indictment to  
4 tell you which statutes to look to, but if the  
5 indictment would, let's say, add an extra element, that  
6 doesn't matter? You should -- you should look to the  
7 statute in the --

8 MR. MARTINEZ: Yes.

9 JUSTICE KAGAN: -- in the same way that  
10 you're suggesting here we shouldn't look to the  
11 instructions?

12 MR. MARTINEZ: I -- I think what the -- the  
13 purpose of the indictment is to give the defendant  
14 notice of the -- the crime with which he is charged.  
15 But a lot of times, as the Court well knows, the  
16 indictment is going to be a lengthy document that  
17 contains a lot of allegations, a lot of different facts.  
18 And what this Court has made clear is that, just because  
19 the indictment says something happened at a certain time  
20 or -- or in the narrative of a description of the  
21 offense it includes some information, that doesn't mean  
22 that the government is required to prove everything  
23 that's identified there.

24 JUSTICE KAGAN: But -- but I guess I -- it  
25 is -- that does seem a little bit troubling to me just

1 because of the function of an indictment is providing  
2 notice, that if the indictment gets the statute wrong,  
3 that -- that the government should be stuck with that  
4 because that's what -- you know, that's what the  
5 defendant now thinks is the charge.

6 MR. MARTINEZ: I -- I think that, in a case  
7 like -- and I -- it may be that -- that in a different  
8 case where -- I would have to see the indictment  
9 that they -- you're hypothesizing, Justice Kagan. But  
10 in a case like this, where the indictment says this is  
11 the statutory offense and -- and -- and it -- and it  
12 identifies the statutory code provision and it says  
13 "unauthorized access," so it makes clear that the  
14 conspiracy being alleged here is the unauthorized access  
15 branch of a 1030(a)(2) violation.

16 I think that -- that shows you what the --  
17 you know, that points to the law that needs to be  
18 applied.

19 JUSTICE GINSBURG: I thought that the  
20 government agreed that, if the charge in the indictment  
21 was "and," A "and" B, the government would have to prove  
22 A and B -- if that was what the indictment charged.

23 MR. MARTINEZ: I think if the -- if the  
24 indictment had said that the conspiracy here was to  
25 do -- was -- was to do A and B, the normal rule is that

1 if the -- that charge says "A and B," the government  
2 could nonetheless prove the conspiracy theory under A or  
3 B, and then the jury instructions could -- could so  
4 specify.

5 And so I think -- I -- I think that's --  
6 that's fairly well-established that the government can  
7 charge in the conjunctive in that sense.

8 But I think what's important for this case  
9 is that the -- the indictment in this case was very  
10 specific. It changed from the original indictment,  
11 which had the -- alleged the broader conspiracy to -- to  
12 both commit unauthorized access and to exceed authorized  
13 access, and it went to a narrower conspiracy that just  
14 charged unauthorized access.

15 And that's why Petitioner's counsel said  
16 repeatedly in his briefs and at oral argument on appeal,  
17 this was an unauthorized access case from start to  
18 finish.

19 CHIEF JUSTICE ROBERTS: Counsel, you can --  
20 you can imagine cases, can't you, where the instruction  
21 on an additional element could cause prejudice to the  
22 defendant?

23 MR. MARTINEZ: I -- I think you -- one could  
24 imagine such a case. And I think that the proper --

25 CHIEF JUSTICE ROBERTS: Try, just for an

1 example, if the additional element would cause the  
2 reasonable jury to focus on particular evidence,  
3 particularly damning evidence that they might otherwise  
4 not have highlighted in their discussion.

5 MR. MARTINEZ: Mr. Chief Justice, I think --  
6 in a case like that, I think the -- the proper way to  
7 analyze that case would be the way you would analyze any  
8 case where the -- the root error is an instructional  
9 error. And -- and you would look to that, and if you  
10 thought it was prejudicial, you might remand the case  
11 or -- or vacate the conviction but allow for a new  
12 trial.

13 But that's not what Petitioner is asking  
14 for. What he is asking for is an acquittal, despite the  
15 fact that the jury found with respect to all of the  
16 actual elements of the crime. There was sufficient  
17 evidence as to those actual elements.

18 And I think the other point to add is -- is  
19 that this is not a case -- this particular case does not  
20 involve the kind of confusion that you're hypothesizing.

21 Petitioner argued this -- a confusion theory  
22 in the court of appeals, and the court of appeals -- and  
23 this is at page A-10 of the Petition Appendix -- the  
24 court of appeals expressly rejected the theory. The  
25 court of appeals said that -- that if, you know, the --



1 the only error here was the erroneous jury instruction,  
2 and if that jury instruction had any effect in this  
3 case, it worked only to the benefit of the defendant.

4 I mean, Petitioner here really got a trial  
5 that was -- that was biased in his favor, which is very  
6 unusual for -- for -- for a defendant. And what he's  
7 trying to do is -- is piggyback off of a trial that was  
8 biased in his favor and nonetheless, you know, sort of  
9 piggyback on that error and get -- get a -- an appeal  
10 that's -- that's in his favor.

11 JUSTICE SOTOMAYOR: Let -- let -- let me --  
12 I've been trying to break this down.

13 Let's assume that this had been charged as  
14 "or."

15 MR. MARTINEZ: In -- in the jury  
16 instruction?

17 JUSTICE SOTOMAYOR: In the jury instruction.

18 MR. MARTINEZ: Yes.

19 JUSTICE SOTOMAYOR: And you concede there  
20 was no evidence of the second prong of the "exceeding  
21 authorized." How would we look at the case then? It's  
22 not A plus B, and we know they had to have found A and  
23 B, and if they were wrong on B, they still found A.

24 MR. MARTINEZ: Just --

25 JUSTICE SOTOMAYOR: This is -- we're not

1 sure which they did, A or B.

2 MR. MARTINEZ: Right. And I just want to be  
3 clear. I --

4 JUSTICE SOTOMAYOR: And B is not actionable,  
5 let's just say, or there's insufficient --

6 MR. MARTINEZ: By assumption, if we assume  
7 and -- and that -- we are -- we do not concede that we  
8 think there is overwhelming evidence of both A and B.  
9 But if you were to assume that there were not evidence  
10 of the extra -- of the extra element, I think then the  
11 question would be whether there was some sort of  
12 unanimity instruction that would have been required to  
13 specify which particular theory.

14 It's not this case and, you know --

15 JUSTICE SOTOMAYOR: But that's interesting  
16 because I -- I -- I'm not sure that that's true.

17 MR. MARTINEZ: Well, I think in -- I -- I  
18 think in this case because of the fact that A and B are  
19 two different ways of committing the same crime, you  
20 would not need an -- a unanimity instruction. But I --  
21 I think -- I take it that Petitioner would have a  
22 different view of that, and that would pose a -- a legal  
23 question that obviously the parties could brief in an  
24 appropriate case. It would be a slightly more  
25 complicated --

1 JUSTICE SOTOMAYOR: My hypothetical was that  
2 B is not statutorily proper.

3 MR. MARTINEZ: Oh, that B is not a --

4 JUSTICE SOTOMAYOR: Yes.

5 MR. MARTINEZ: -- not a proper at all.

6 Well, in that case, I think that -- that --  
7 that that would posit harder questions for the  
8 government, because there, I think, there would be  
9 some -- there could potentially be confusion that it's  
10 possible that the jury might have convicted on -- on a  
11 theory that's not legally viable.

12 So just to -- to go back, Your Honors, I  
13 think that the purpose of sufficiency review, both  
14 from -- from Jackson and the due process origins of --  
15 of sufficiency review, that they make clear the jury  
16 instructions are distinct. This Court's decisions in  
17 Praprotnik and Boyle make clear that forfeiture in the  
18 context of jury instructions doesn't carry over into the  
19 sufficiency context.

20 And I think the practical point is very  
21 significant here, which is that his rule is only going  
22 to have an effect in cases where a jury has found the  
23 defendant guilty as to all the actual elements of the  
24 crime, where there's sufficient evidence as to all the  
25 actual elements of the crime, and where there's no

1 confusion.

2                   And so we think this -- this is a rule  
3 that's designed to produce -- designed to produce  
4 windfall acquittals.

5                   JUSTICE KAGAN: Suppose you took a converse  
6 case where the instructions favored the government and  
7 the defendant didn't object, is convicted, then brings a  
8 sufficiency claim. Do you again say it really is  
9 measured as against the statute? It has nothing to do  
10 with the instructions?

11                   MR. MARTINEZ: Yes. We think that if -- if  
12 there had been an obvious clerical error in -- in the  
13 defendant's favor and he had made all the right  
14 arguments at trial about sufficiency and -- and -- we  
15 don't think that the -- the error on the -- on the  
16 instructional point would carry over into -- into the  
17 sufficiency-of-the-evidence review. So we have a  
18 neutral rule that really applies equally to both sides.

19                   If there are no more questions as to the  
20 first question presented, perhaps I can turn to the  
21 statute-of-limitations issue.

22                   JUSTICE SCALIA: You know, I -- I have a --  
23 sort of a threshold question on that. Your -- your  
24 friend says that he really doesn't have to demonstrate  
25 that the statute here is jurisdictional because, even if

1 it's not jurisdictional, he wins anyway.

2 Do -- do you agree with that?

3 I don't know what the plain error is if  
4 it's -- if it's not jurisdictional.

5 MR. MARTINEZ: We don't think there is a  
6 plain error, partly because it's not jurisdictional and  
7 partly for other reasons.

8 Maybe I could step back and just give --  
9 give the Court my understanding of how I understand the  
10 arguments that he's making.

11 I think he's got basically three distinct  
12 arguments. The first is -- is that it's jurisdictional,  
13 which would mean that it's not waivable, that the court  
14 always has a duty to -- to raise it at any time.

15 The second argument --

16 JUSTICE SCALIA: In which case there would  
17 be plain error.

18 MR. MARTINEZ: In which case, I think -- I  
19 think what --

20 JUSTICE SCALIA: In -- in which case the --  
21 the -- the trial court's failure to raise it would be  
22 error.

23 MR. MARTINEZ: I -- I think it would be  
24 error, but I think what Petitioner would say is that he  
25 doesn't have to satisfy the plain-error rule because, if

1 it's a jurisdictional, then it can be raised --

2 JUSTICE SCALIA: That's true.

3 MR. MARTINEZ: -- and must be raised at any  
4 time.

5 JUSTICE SCALIA: That's true.

6 MR. MARTINEZ: So I think his second  
7 argument is that he -- he can get de novo review even if  
8 it's not jurisdictional if he raises it for the first  
9 time on appeal.

10 And I think his third argument is he has --  
11 he can get plain-error review.

12 We think each of these arguments is wrong.

13 First of all, with respect to the  
14 jurisdictional point, this Court has said for over 140  
15 years that the statute of limitations is a matter of  
16 defense that the defendant has the burden of introducing  
17 into the case. That's completely contradictory to the  
18 idea that the statute of limitations is jurisdictional,  
19 which would mean that the government, as the -- the --  
20 the party invoking the jurisdiction of the court, would  
21 have the burden of establishing compliance with the  
22 statute of limitations.

23 JUSTICE SOTOMAYOR: How do you deal with his  
24 argument that we should -- if, in a civil case, we make  
25 a presumption that a statute of limitations is a

1 claim-processing rule?

2 In a criminal case, we should have the  
3 opposite presumption because of, A, the rule of lenity  
4 and, B, because it is on the -- a question of the power  
5 of the government.

6 MR. MARTINEZ: I don't think -- I don't  
7 think you should have that presumption. I think that --  
8 that this Court -- the ship has already sailed to some  
9 extent because this Court -- again, for -- for 140  
10 years, from Cook through Biddinger to this Court's  
11 decision in Smith just a few terms ago -- has said  
12 that -- that the statute of limitations is a matter of  
13 defense that has to be introduced into the case by the  
14 defendant.

15 And I think if -- if Petitioner's primary  
16 argument, his jurisdictional argument were accepted,  
17 that rule would go out the window, and what would be  
18 required is that the government and the Court would have  
19 to establish and raise the jurisdictional -- would --  
20 would have to establish the statute of limitations was  
21 not violated in every case.

22 JUSTICE ALITO: Why shouldn't the rule in  
23 this context be the same as the rule for timely filing a  
24 Federal habeas petition?

25 MR. MARTINEZ: Well, I think that -- for --

1 for a couple reasons, the most important of which is  
2 that Rule 52(b) governs this case where Rule 52(b) does  
3 not directly govern the filing of a -- of a habeas  
4 petition.

5           And so Rule 52(b) makes clear that the --  
6 the exclusive means by which a criminal defendant can  
7 obtain appellate review of a -- of a claimed error where  
8 they didn't object below is by satisfying the four-prong  
9 Olano standard. And in the habeas context, that rule  
10 doesn't apply.

11           If you look at the Court's analysis in one  
12 of the habeas cases, which was drawn on by the other,  
13 the Day v. McDonough case, the Court emphasized that its  
14 holding was valid there because, in part, there was no  
15 rule to the contrary. Here you have a rule to the  
16 contrary.

17           I think the second point that could be made  
18 on those -- on that -- on this front is that the habeas  
19 context is special. And I think the Court's decisions  
20 in both Day and in Wood v. Milyard really emphasize that  
21 what's driving those cases is a desire to have a rule  
22 that -- that takes account of the habeas context, the  
23 desire to have finality with respect to criminal  
24 convictions, and the desire to harmonize the rule that  
25 applies to statute of limitations with the rules that



1 apply to other threshold barriers to habeas relief.

2 JUSTICE ALITO: You think that the State's  
3 interest in the habeas context in finality and comity is  
4 stronger than the defendant's interest in a direct  
5 criminal appeal in requiring that the charge be filed on  
6 time where what's at stake is -- is a criminal  
7 conviction?

8 MR. MARTINEZ: I think that -- that -- I  
9 think that criminal defendants are obviously going to  
10 have an interest in raising arguments that they think  
11 are meritorious when they didn't raise it below. I do  
12 think that there's a very significant legal difference  
13 in that those types of policy concerns don't really --  
14 are not really applicable in -- when you're talking  
15 about a direct appeal because Rule 52(b) sort of blocks  
16 that.

17 And I also think that the -- the reasoning  
18 of cases like Day and Wood really does turn on the fact  
19 that you had a statute of limitations rule and you had a  
20 bunch of other rules governing sort of threshold  
21 barriers to habeas relief. Rules about procedural  
22 default, rules about exhaustion, rules about  
23 retroactivity. And what the Court said in both of those  
24 cases is that it's trying to harmonize those rules. And  
25 the court --

1 JUSTICE ALITO: But -- but just take a  
2 situation where, under the habeas rule, it would be  
3 proper for the -- the district court to raise the  
4 statute-of-limitations defense on its own motion. Why  
5 would that not fit within the plain-error rule?

6 MR. MARTINEZ: I think that -- that, for it  
7 to fit within the plain-error rule, and so we would be  
8 shifting, I think, to Rule 52(b), you would -- the  
9 defendant would need to show that there's both an error  
10 and that the error is obvious. And as Justice Scalia  
11 was hinting at, perhaps, with his question earlier, we  
12 don't think there is an error here. The statute of  
13 limitations is an affirmative defense; and therefore,  
14 the burden is on the defendant to raise that issue.

15 In -- in the Cook case, the Court made clear  
16 that, if there's an indictment that alleges a -- a crime  
17 that's outside the statute of limitations, that  
18 indictment is nonetheless not necessarily or inherently  
19 flawed unless the statute-of-limitations defense is  
20 raised and -- and subsequently litigated.

21 JUSTICE SCALIA: It still in all doesn't  
22 make any sense to say we're going to let him off on  
23 habeas because of inadequate assistance of counsel who  
24 failed to raise the statute of limitations and yet he  
25 cannot raise that point on appeal --

1 MR. MARTINEZ: I --

2 JUSTICE SCALIA: -- on direct appeal. Make  
3 him go through -- why? Why -- why make the society  
4 incur more expense, make him probably languish in jail  
5 when he's going to -- going to get out on habeas? Why  
6 not decide that statute-of-limitations thing in the  
7 direct appeal?

8 MR. MARTINEZ: Well, I think -- I think --

9 JUSTICE SCALIA: Bear in mind I dissented in  
10 both Day and Wood, so --

11 MR. MARTINEZ: As I recall, Your Honor, I  
12 think -- I think there's a -- there's a couple of  
13 reasons. The strongest is that the difference in the  
14 habeas context is that the record can be developed.  
15 When you're looking at a case on Rule 52(b), this Court  
16 has always treated review under 52(b) as being limited  
17 to the existing record, whereas in habeas case, the  
18 record can be developed.

19 And that's very important in two fundamental  
20 ways. First, it's important to know why the defense was  
21 not raised by the defendant at the appropriate time.  
22 The -- the defendant is going to have -- and including  
23 in this case, could have a very strategic reason for not  
24 raising the defense during the trial.

25 And I can get into that in -- in -- in this

1 particular case if the Court is interested.

2 In the second -- so that's one reason why  
3 it's important to have a record. And the second reason  
4 is the government has to have the ability to -- to  
5 introduce evidence if it wants to rebut or establish  
6 compliance with the statute-of-limitations defense.

7 That's what this Court said in Cook. In  
8 Cook the whole point of the case was that it's unfair  
9 to -- to allow for a -- a -- a indictment to be  
10 dismissed on a demurrer because that would deprive the  
11 government of its right to reply and give evidence to  
12 establish compliance with the statute of limitations  
13 once the defense is raised.

14 So on -- on direct review, the record would  
15 be frozen and you wouldn't be able to look out outside  
16 the record, whereas on habeas you would be able to look  
17 outside the record.

18 And in addition, I think the -- it's very  
19 important to -- to sort of look at the theoretical basis  
20 for the -- the error and -- and -- and recognize that it  
21 doesn't satisfy Rule 52(b) in the way that that rule  
22 has -- has traditionally been thought about.

23 First of all, Rule 52(b) is generally about  
24 things that the trial judge is supposed to notice on his  
25 own. And what this Court has said about statute of

1 limitations, including in the Day case, is that the  
2 trial court doesn't have an obligation to serve as  
3 the -- the co-counsel or the paralegal for -- for the  
4 defendant. It doesn't have an obligation to go  
5 searching through the record and finding potential  
6 defenses for the defendant. Rather, that's something  
7 that the defendant himself has an obligation to do.

8 JUSTICE ALITO: Suppose the court of appeals  
9 in -- in a direct appeal sees that the statute of  
10 limitations for a particular offense is six years and  
11 the indictment was filed 25 years after the event. Can  
12 the court of appeals say to the government, look at  
13 this. It looks like it's too late. Do you have any  
14 explanation for this? And the government says, well,  
15 no, doesn't -- we can't think of anything. Do you have  
16 to wait until habeas to correct that?

17 MR. MARTINEZ: I -- I think that the --  
18 the -- the better way is to wait until habeas to -- to  
19 correct that. And the reason for that is that  
20 Rule 52(b) is limited to the existing record. And as  
21 Your Honor, you know, made clear in your hypothetical,  
22 the only way you can figure out that there's an error in  
23 that case is by looking outside of the existing record  
24 and asking the government, well, what's your  
25 explanation? What evidence do you have? What would you

1 have done differently if this had been raised before?

2 JUSTICE KAGAN: Well, that might be true  
3 sometimes, but it doesn't seem as though that's the  
4 ordinary case. I mean, why would you have -- you  
5 could -- you can make an exception for cases in which  
6 there really -- the government has -- is able to come in  
7 and say, we really need to develop the record. But  
8 where that's not true, why wouldn't you decide this as  
9 quickly as you could?

10 MR. MARTINEZ: I think I appreciate the --  
11 I -- the sort of practical concern embedded in that  
12 question. I think as a formal matter you would still  
13 need to be looking outside the record.

14 JUSTICE BREYER: Why formal? I mean, we've  
15 been through this many times. It comes up in all kinds  
16 of instances. People are always alleging -- not always  
17 but often allege that their counsel was inadequate.  
18 Sometimes it would be possible to know that on direct  
19 appeal, but in the mine-run of cases, you want to find  
20 out from the counsel why he did it.

21 MR. MARTINEZ: Right.

22 JUSTICE BREYER: And therefore I think every  
23 circuit -- I don't know what this Court has said -- has  
24 said that you raise IAC claims in collateral  
25 proceedings.

1                   Now, if we start making exceptions from  
2 that, you're going to get a jurisprudence of when the  
3 exception comes up --

4                   MR. MARTINEZ: I think --

5                   JUSTICE BREYER: -- and when it doesn't and  
6 how clear does it have to be, and then we'll just add  
7 further delay because I guess if I were a court of  
8 appeals judge and I saw some obvious mistake, I would  
9 say, go file it tomorrow.

10                  MR. MARTINEZ: Right. And I -- and I think  
11 that's the better way to handle this because the  
12 alternative is to -- to -- because we see some cases  
13 that look like they'd be pretty easy to decide, is to  
14 say, well, let's -- let's erode what would otherwise be  
15 pretty hard-and-fast rules about how Rule 52(b) is  
16 supposed to operate.

17                  Again, we don't think there is an error  
18 under Rule 52(b) because this isn't something that the  
19 trial judge is supposed to figure out on his own. We  
20 don't think that an error is plain on the record because  
21 the record itself is not sufficient in and of itself to  
22 show that there is an error. And so we think that if  
23 you have a rule that says sometimes you should bring in  
24 on plain error, sometimes you should bring in in habeas,  
25 it's going to create a lot of confusion both for courts

1 and for litigants. You're going to be litigating about  
2 when the exception applies, when the exception doesn't  
3 apply.

4 And I think the key thing that --

5 JUSTICE GINSBURG: Of course -- of course,  
6 if there was a -- a strong statute-of-limitations bar,  
7 isn't it likely that the trial judge would suggest to  
8 defense counsel, don't you want to raise a -- a  
9 limitations defense?

10 MR. MARTINEZ: I think that's very, very  
11 likely that the trial court might do that. I -- we  
12 would think that, because there are sometimes strategic  
13 reasons for not raising the defense, you know, the --  
14 the trial judge should do it in a way that it doesn't  
15 interfere with those strategic concerns.

16 We don't think that there is a problem if  
17 the judge does it that way, but we certainly don't think  
18 there's an obligation, and we don't think it's an error  
19 if the judge doesn't do that.

20 CHIEF JUSTICE ROBERTS: What type of  
21 strategic reason are you talking about?

22 MR. MARTINEZ: Well, I think there -- there  
23 could be a couple of them. In this case, for example,  
24 the -- the original indictment was undoubtedly filed  
25 within the limitations period. Now that indictment was



1 superseded. But if the defendant had raised in a  
2 pretrial motion a motion saying, you know, that the  
3 superseded indictment's out of time because it doesn't  
4 relate back and he had won, the effect of that would  
5 have been just to resurrect the original indictment  
6 which had never been dismissed.

7           And so if he had actually raised this before  
8 trial and he had succeeded on his statute-of-limitations  
9 challenge to the superseding indictment, we would have  
10 just been back in the world where the original  
11 indictment applied. And, as the Court has noted, the  
12 original indictment was somewhat broader than -- than  
13 the superseding indictment.

14           And so that might have been a good reason.

15           In another case, the -- there may be  
16 circumstances in which a defendant's  
17 statute-of-limitations defense will be in contradiction  
18 to his defense of innocence. You know, it's one thing  
19 to say, I was in Hawaii when the crime was committed,  
20 and it's another thing to say, I committed the crime on  
21 January 1st and not on, you know, March 15th.

22           And so there may -- you know, the defendant  
23 might -- might look at those arguments and decide he's  
24 going to pick the -- the stronger horse, and he might  
25 decide he doesn't want to raise the

1 statute-of-limitations defense for that reason.

2 JUSTICE SOTOMAYOR: Could you summarize for  
3 me your position on three arguments he made.

4 MR. MARTINEZ: Sure.

5 JUSTICE SOTOMAYOR: I -- I know the  
6 jurisdictional one.

7 MR. MARTINEZ: Yes.

8 JUSTICE SOTOMAYOR: But then there's the --

9 MR. MARTINEZ: So --

10 JUSTICE SOTOMAYOR: -- the other two.

11 MR. MARTINEZ: So -- so on -- on his claim  
12 for de novo review on appeal, we think that's  
13 inconsistent with Rule 52(b), and we think that that  
14 misreads Wood and Day, the habeas cases, because those  
15 are really about the habeas context.

16 He makes another argument about Nguyen. We  
17 don't think Nguyen is a -- a kind of all-season pass  
18 for -- for ignoring Rule 52(b).

19 And then, finally, with respect to plain  
20 error, we think there are two overriding arguments. The  
21 first one is that we don't think there is an error here.  
22 For there to be an error, we think the statute of  
23 limitations would need to be something that the -- the  
24 trial court is supposed to have an obligation to sort  
25 out. We don't think the trial court has that obligation

1 because this Court's cases say that -- that the statute  
2 of limitations is an affirmative defense that has to be  
3 raised by the defendant.

4           Even if you disagree with us on that, we  
5 think that -- that Cook makes clear that, whenever a  
6 statute-of-limitations defense is raised in a case, the  
7 government has to have the opportunity to reply and give  
8 evidence. And what that means is that, if the defense  
9 is not raised, that the government has not even had the  
10 opportunity to explain what evidence it would have  
11 brought in, what that means is that the record as it  
12 stands, the existing record, is not sufficient to  
13 diagnose an error because you would have to essentially  
14 figure out, well, could the government have responded?  
15 You know, would they have argued that -- that there was  
16 tolling of the statute of limitations? Would they have  
17 introduced a different set of evidence? You would have  
18 to, essentially, reimagine how the trial would have gone  
19 if -- if the defense had been raised at the appropriate  
20 time.

21           And if you're trying to reimagine that,  
22 that's another way of saying the error is not plain on  
23 the --

24           JUSTICE SOTOMAYOR: So what would you argue  
25 if this was brought up on habeas?

1 MR. MARTINEZ: On habeas?

2 JUSTICE SOTOMAYOR: Let's assume counsel  
3 comes in and says, I just didn't notice it.

4 MR. MARTINEZ: In this particular case, Your  
5 Honor?

6 JUSTICE SOTOMAYOR: Yes. And -- and it's  
7 very clear -- and the evidence was super clear that this  
8 was past the statute of limitations.

9 I don't want to get into the facts of this  
10 case.

11 MR. MARTINEZ: Well, I -- I -- I think -- I  
12 think -- in some cases, I think it would be fair for --  
13 for the parties to litigate why the defense wasn't  
14 raised. So if there -- if it looked like there may have  
15 been a strategic reason, such as there may have been in  
16 this case, then the parties could litigate that.

17 I think as well, if there were -- if there  
18 were no dispute about the merits, then I think that  
19 would be a case in which a habeas relief may well be  
20 appropriate if -- if the party -- if the defendant could  
21 establish the requirements of ineffective assistance of  
22 counsel.

23 We ask the Court to affirm.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Four minutes, Mr. Jaffe.

1 REBUTTAL ARGUMENT OF ERIK S. JAFFE

2 ON BEHALF OF THE PETITIONER

3 MR. JAFFE: On the issue of whether or not  
4 the jury instructions are binding, several points:

5 First of all, the confusion persists to this  
6 day. Just as Justice Alito is pointing out that it's  
7 very difficult to see the difference between  
8 unauthorized and exceeding authorized access, that too  
9 would have infected the jury. We could not prove it  
10 sufficiently to show prejudice, but they cannot prove it  
11 sufficiently to show harmlessness or inevitability of a  
12 conviction had you not so instructed them.

13 Second of all, I believe that Jackson v.  
14 Virginia talks from a jury-centric perspective. The  
15 issue is not the statute. The issue is whether a  
16 rational jury could have done what they did. And that  
17 only works if you look at the instructions. It does not  
18 work if you look at some hypothetical statute that they  
19 didn't think they were applying. They thought they were  
20 doing something different.

21 Third, their objection that we -- we  
22 acknowledged that this was only about unauthorized  
23 access is curious because he cites the appellate stuff  
24 where there was new counsel, yet his own side's briefs  
25 at the trial level recognized that trial counsel was

1 confused.

2 Yes, after that confusion was resolved  
3 post-verdict, we argued. Okay. The government  
4 abandoned it. That's fine. We absolutely argued that.

5 But at trial the harm was already done.  
6 They confused themselves, they confused the jury, and  
7 apparently confused the judge.

8 Third, it seems to me that the phrase  
9 "unauthorized access" is not actually even in the  
10 statute, which just goes to my point that there would be  
11 confusion as to access without authorization and access  
12 exceeding authorization. Both could have theoretically  
13 been part of the rubric of unauthorized access. Neither  
14 would be authorized there.

15 The -- moving onto the -- well, I guess the  
16 last thing I'd say is every court to consider the  
17 question, if this had been in the original indictment  
18 where it also said "and" and in the jury instructions,  
19 every court to consider this issue, including the Fifth  
20 Circuit below, including the First Circuit, would have  
21 held the government to it.

22 I don't think the government denies that.  
23 They just say if it's in the indictment alone they can  
24 do either/or. But if it's in the indictment and in the  
25 instructions, they concede that the so-called law of the

1 case is binding.

2 The easy way for this Court to --

3 JUSTICE GINSBURG: The law of the  
4 case you -- you are -- you are asserting that, if there  
5 is a mistake but it's the law of the case, that applies  
6 on appeal. As -- and I thought that law of the case  
7 applied to the same court, different stages of  
8 litigation, not that a -- a court of appeals has to  
9 perpetuate a trial court error.

10 MR. JAFFE: Law of the case is a terrible  
11 name. We unfortunately didn't come up with it. The  
12 government -- we both agree that it's not an accurate  
13 descriptor. It's just the phrase that's been used in  
14 all the cases. At the end of the day, the issue is are  
15 the instructions binding at the sufficiency stage  
16 whatever court you're in? That's really the issue. The  
17 law-of-the-case cases don't really apply because they're  
18 misnamed.

19 Turning to the statute of limitations, what  
20 I'd say is this: There is error when something is  
21 contrary to law whether or not it was the judge's  
22 obligation to raise that. The Apprendi -- the  
23 post-Apprendi cases are the best examples of this. The  
24 judge is applying pre-Apprendi law. It did not make a  
25 mistake. We're not expected to anticipate Apprendi.

1 Yet on appeal those cases were considered erroneous  
2 because this Court adopted Apprendi.

3           Again, it is not about whether you made an  
4 objection or whether the Court should have thought of it  
5 themselves. It is about the merits of the result, and  
6 in this instance, we claim the statute of limitations  
7 was violated. That is the error regardless of who  
8 needed to raise it.

9           Talking about raising the issue: Again,  
10 calling the statute of limitations the affirmative  
11 defense is a little misleading. It is not an  
12 affirmative defense. One has to plead it. One -- but  
13 the government has to actually prove that they satisfy  
14 it. It is a hybrid kind of creature, and Cook and those  
15 cases deal with pleading because they wanted the  
16 government to have the opportunity to respond.

17           We do not disagree. The government should  
18 have the opportunity to respond, and in the First  
19 Circuit, the Seventh Circuit, and the Sixth Circuit, if  
20 there is some need for evidentiary submissions, they  
21 just remand it. Get it done more quickly with the court  
22 that actually heard the case, which makes a lot more  
23 sense than waiting till habeas.

24           CHIEF JUSTICE ROBERTS: Thank you, counsel.

25           The case is submitted.



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MR. JAFFE: Thank you.

(Whereupon, at 11:06 a.m., the case in the  
above-entitled matter was submitted.)

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