No. _____

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOE KENDALL
JODY RUDMAN
THE KENDALL LAW GROUP
3232 McKinney Avenue
Dallas, TX 75204
(214) 744-3000
jkendall@kendalllawgroup.com

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, NW
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

QUESTIONS PRESENTED

1. Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment?

2. Whether a statute-of-limitations defense not raised at or before trial is reviewable on appeal?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Michael Musacchio was the defendant in the district court and the appellant in the Fifth Circuit.

Roy Brown and Michael Kelly were co-defendants in the district court under the original indictment. They pled guilty prior to trial and were not parties to the appeal in the Fifth Circuit.

Respondent the United States of America prosecuted the case in the district court and was the appellee in the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment of conviction and sentence of the District Court for the Northern District of Texas is attached at Appendix B1-B12. The transcript of the court's oral denial of a motion for a new trial is attached at Appendix D1-D2.

The opinion of the Fifth Circuit affirming the district court's judgment is unpublished but available at 590 Fed. Appx. 359, 2014 U.S. App. LEXIS 21358, and is attached at Appendix A1-A16.

JURISDICTION

The Fifth Circuit issued its opinion on November 10, 2014. The Fifth Circuit denied rehearing and rehearing *en banc* on December 9, 2014. App. C1-C2. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 3231.

STATUTES INVOLVED

18 U.S.C. § 1030, entitled "Fraud and Related Activity in connection with computers," provides, in relevant part:

> (a) Whoever— * * *
>
> (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains— * * *
>
> (C) information from any protected computer; * * *

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

18 U.S.C. § 371, the general conspiracy statute, provides:

> 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.

18 U.S.C. § 3282(a), the general limitations statute, provides:

> 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.

STATEMENT OF THE CASE

1. This case presents two recurring questions of criminal procedure that can significantly affect the outcome of prosecutions and that have divided the courts of appeals.

The first asks what the government must prove when the jury instructions, to which it did not object, erroneously include additional or more stringent elements for a crime than does the statute and the indictment. Two circuits apply the law-of-the-case doc-

trine to hold the government to the heightened elements of the instructions when later testing the sufficiency of the evidence. Two other circuits, including the Fifth Circuit below, have created an exception to the law-of-the-case doctrine and test the evidence only against the statute and the indictment.

The second question asks whether a statute of limitations defense not raised at or before trial may be reviewed on appeal. Three circuits hold that the defense may be reviewed for plain error or otherwise. Seven circuits, including the Fifth Circuit below, hold that the defense is waived and unreviewable.

Both of these issues are squarely presented by the judgment below and this case is a clean and straightforward vehicle for resolving the splits.

2. The procedural questions presented by this case arise in the context of a prosecution for making unauthorized access to a protected computer. Such alleged access occurred in the course of business competition between two transportation brokerage companies.

Prior to 2004, Petitioner Musacchio was the president of Exel Transportation Services ("ETS"), a transportation brokerage company that arranges freight shipments for business clients. App. A1. Musacchio resigned from ETS in 2004 and in 2005 (after expiration of his non-compete agreement) founded a competing company. Two ETS employees – original co-defendants Roy Brown and Michael Kelly – later joined Petitioner at his new company. Several independent sales agents and other employees also eventually followed Petitioner from ETS to his new company.

As the two companies competed for sales agents, Petitioner's former company, ETS, became suspicious that Petitioner and his new company seemed to possess certain information regarding ETS. ETS eventually concluded that Petitioner and others must have obtained that information from ETS's computer servers.

3. In 2010, the United States indicted Petitioner, Brown, and Kelly for accessing and conspiring to access the protected computers of their former employer, ETS, in violation of 18 U.S.C. § 1030(a)(2)(C). The statute provides criminal penalties for anyone who "intentionally accesses a computer without authorization *or* exceeds authorized access, and thereby obtains— * * * information from any protected computer" (emphasis added). What is most relevant for present purposes is that the statute provides for two discrete means of committing the crime: either (1) accessing a computer "without authorization" or (2) "exceed[ing] authorized access" to a computer.

Initially the government indicted the three defendants for conspiring to engage in and engaging in *both* types of computer access. After defendants Brown and Kelly pled guilty, however, the government filed superseding indictments in 2012 and 2013, altering the charges against Petitioner by changing certain of the dates and events alleged in Count 2, limiting the charges to conspiring to access and accessing "without authorization," and dropping the charges of "exceed[ing] authorized access." App. A2-A3. The superseding indictments were filed more than five years after the underlying events. The final charges against Petitioner consisted of one count

of conspiracy to make unauthorized access (Count 1) and two substantive counts of making unauthorized access (Counts 2 and 3).

4. At trial the government sought to demonstrate that Petitioner and alleged co-conspirator Roy Brown had accessed ETS's computer servers without authorization by signing in with old administrative access codes. The government also sought to show that Petitioner's unindicted former assistant had given him internal company e-mails to which she had authorized access. App. A3.

5. At the close of the trial, the district court instructed the jury regarding the conspiracy count that:

> Title 18 U.S.C. § 1030(a)(2)(C) makes it a crime for a person to intentionally access a protected computer *without authorization* **and** *exceed authorized access*, and thereby obtain information * * *
>
> For you to find the defendant guilty of this crime, you must be convinced that the government has proved * * *
>
> First: That the defendant and at least one other person 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*.

Jury Instructions and Verdict Form (emphasis added) [Dkt. 166]; App. A3.

Having defined the two alternative methods for committing the underlying crime in the conjunctive, this instruction made *both* unauthorized access and

exceeding authorized access required elements of the crime and hence the conspiracy to commit that crime.

6. The government did not object to this definition and, in fact, argued in its closing that Petitioner had also "exceeded" authorized access—a crime for which he was not indicted. *See* Brief of Appellant at 11 & n. 48, 14 (May 1, 2014).

7. On March 1, 2013, the jury returned a general verdict of guilty on all counts. [Dkt. 166]

8. Following the verdict, Petitioner moved for a new trial or an acquittal, arguing, *inter alia*, that due to the jury charge the government was required to prove an agreement to engage in *both* unauthorized access and exceeding authorized access and that there was insufficient evidence to establish the latter. Motion for a New Trial, Mar. 15, 2013 [Dkt. 170]; Supplemental Motion for Judgment of Acquittal, Aug. 29, 2013 [Dkt. 199]; Second Supplement to Motion for Acquittal, Nov. 19, 2013 [Dkt. 221].

9. The district court orally rejected the motion for a new trial, App. D2, made no express ruling on the supplemental motion for acquittal, and, on November 19, 2013, entered judgment against Petitioner sentencing him to sixty months imprisonment on Counts 1 and 2 concurrently, and three consecutive months on Count 3. App. B1-B3.

10. Petitioner timely appealed to the Fifth Circuit, arguing, *inter alia*, that the conjunctive jury instruction for Count 1 was the law of the case and binding on the government, and that there was insufficient

evidence as a matter of law to establish the "exceeds authorized access" element of the crime. App. A5.[1]

Petitioner also argued that because Count 2 of the superseding indictment significantly altered the charges and allegations against him, it did not relate back to the original indictment against the three alleged conspirators, was filed more than five years after the alleged criminal acts, and hence prosecution was barred by the statute of limitations. App. A8-A9; Brief of Appellant at 48-50.

11. On November 10, 2014, the Fifth Circuit affirmed Petitioner's conviction and sentence. App. A1.

Regarding the law-of-the-case/sufficiency-of-the-evidence challenge to Count 1, the court of appeals reviewed the issue *de novo*. It acknowledged that the district court "incorrectly instructed the jury that it had to find that Musacchio had agreed to make unauthorized access *and* exceed authorized access" and that neither party objected to the instruction. App. A5 (emphasis in original). And while the court recognized the general rule that " '[a]n instruction that increases the government's burden and to which the government does not object becomes the law of the case, [citation omitted]' " it held that the "rule does not apply where (1) 'the jury instruction * * * is pa-

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[1] The sufficiency of the evidence for the "exceeds authorized access" element turns primarily on whether that term encompasses fully authorized *access* to computer information followed by misuse of that information, or whether it is limited to accessing information to which the otherwise-authorized user had no authority to access at all. There is a circuit split on that question and the evidence in this case would not satisfy the narrower construction of the statute. S*ee infra* at 8-9, 20-21 n. 5.

tently erroneous and (2) the issue is not misstated in the indictment,' " quoting *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), *cert. denied*, 546 U.S. 1115 (2006). App. A5-A6. Finding that the jury instruction was obviously in error, and that the indictment correctly charged only a conspiracy to make "unauthorized" access to a protected computer, the court held that the *Guevara* exception to the law-of-the-case doctrine applied. App. A6-A7. The court then found that the evidence was sufficient to establish an agreement to make unauthorized access. The majority opinion did not reach whether the evidence also was sufficient to demonstrate an agreement to exceed authorized access, and did not address a heavily briefed circuit split bearing upon that latter issue. *See infra* at 8-9, 20-21 n. 5.

Regarding Musacchio's statute of limitations defense that Count 2 of the superseding indictment altered the indictment and came more than five years after the alleged events, the court held that because it was not raised in the district court it was waived. App. A8 (citing *United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (per curiam), *cert. denied*, 503 U.S. 908 (1992)). The court noted that Fifth Circuit precedent has applied the waiver rule "in precisely the situation here—where the issue can be resolved on the face of the indictment." App. A9 (citation omitted).

Judge Haynes concurred in the judgment, but declined to join the court's reasoning as to the law-of-the-case exception. She instead would have concluded that there was sufficient evidence for "both prongs ('exceeds authorized use' and 'unauthorized access')

and, therefore would not reach the issue." App. A16. In order to reach that conclusion, she relied upon *United States v. John*, 597 F.3d 263, 270-73 (5th Cir. 2010), which rejected an argument that "the statute does not prohibit unlawful *use* of material that [defendant] was authorized to access through authorized use of a computer," but rather "only prohibits using authorized access to obtain information that [defendant] is not entitled to obtain." *Id*. at 271. The Fifth Circuit in *John* candidly recognized that the panel's broader view of what constituted exceeding authorized access, while consistent with the First Circuit's approach, was in conflict with the Ninth Circuit's *en banc* interpretation of that language. *Id*. at 272-73.

12. On December 9, 2014, the Fifth Circuit denied Petitioner's petition for rehearing *en banc*. App. C1-C2.

13. Petitioner began serving his sentence on February 11, 2015.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari because the decision below erroneously resolves a recurring and important issue regarding the applicability of the law-of-the-case doctrine and conflicts with decisions of the Eighth and Tenth Circuits. The decision below also continues a broad split over whether a statute-of-limitations defense not raised at or before trial is waived and hence unreviewable on appeal, as seven circuits have held, or may be raised under a plain error standard or otherwise, as three circuits have held. Both issues arise regularly and lead to different outcomes for similarly situated de-

fendants based only on the circuit in which the prosecution was brought.

I. The Circuits Are Split Regarding the Scope of the Law-of-the-Case Doctrine as Applied to Extra-Statutory Elements Included in Jury Instructions.

In refusing to apply the law-of-the-case doctrine to match the prosecution's burden of proof to the conjunctive jury instruction to which the government did not object, the Fifth Circuit continued its participation in an established circuit split. The court of appeals recognized that "[i]n general, '[a]n instruction that increases the government's burden and to which the government does not object becomes the law of the case,' *United States v. Jokel*, 969 F.2d 132, 136 (5th Cir. 1992)," but held that the general "rule does not apply where (1) 'the jury instruction * * * is patently erroneous and (2) the issue is not misstated in the indictment,' " quoting *Guevara*, 408 F.3d at 258. App. A5-A6. The court concluded that the "*Guevara* exception applies here." App. A6.

In *Guevara*, the Fifth Circuit reviewed the sufficiency of the evidence for a conviction where the jury instruction required the government to show defendant's actions would have "substantially affected" interstate commerce. The statute and the indictment, however, only required that the actions would have "affected" interstate commerce, without requiring the effect to be substantial. 408 F.3d at 258. The Fifth Circuit held the government only to the lower statutory standard rather than the more stringent jury-instruction standard. *Id.* The court adopted a broad

exception to the general law-of-the-case doctrine, under which an erroneous jury instruction increasing the government's burden "may not become law of the case if both (1) it is patently erroneous and (2) the issue is not misstated in the indictment." *Id.*

Guevara took this rule from the analytically identical First Circuit case of *United States v. Zanghi*, 189 F.3d 71, 79-80 (1st Cir. 1999), *cert. denied*, 528 U.S. 1097 (2000). In *Zanghi*, the First Circuit recognized the general rule that a jury instruction raising the government's burden of proof, without objection, beyond that required by statute becomes law of the case when later evaluating the sufficiency of the evidence. But it adopted an exception to that rule in a case involving a heightened scienter requirement because the more stringent jury instruction was "patently incorrect" and the indictment had stated the correct standard. *Id.*

The rule in the Fifth and First Circuits, however, conflicts with the rule in the Eight and Tenth Circuits, which apply the law-of-the-case doctrine in the same circumstances to hold the government to any heightened burden imposed by jury instructions to which it did not object. Those circuits apply the doctrine regardless whether the indictment correctly charges fewer or less onerous elements, and regardless whether the jury instruction setting a higher burden was patently erroneous.

For example, in *United States v. Staples*, the Eighth Circuit held that an erroneous jury instruction stating alternative elements in the conjunctive rather than the disjunctive became law of the case. 435 F.3d 860, 866-67 (8th Cir.) (in prosecution for

bank fraud, "instruction advised the jury that it must find that the defendant's scheme was designed to obtain monies that were owned by *and* under the custody of the financial institution, rather than monies that were owned by *or* under the institution's custody") (emphasis in original), *cert. denied*, 549 U.S. 862 (2006). The error in the jury instruction—substituting "and" for "or"—was precisely as clear as in this case and the indictment made no such error. Indeed, from a structural perspective *Staples* and the current case are identical in that the jury was instructed in the conjunctive on two discreet and separate means of committing a crime. Applying the law-of-the-case doctrine, the court treated the two separate means as *both* being required elements of the government's burden of proof. Because there was insufficient evidence as to one of the means, the court reversed the conviction even though the evidence would have been sufficient to convict on the second means if a proper, disjunctive or single-means instruction had been given. *Id.*

Other Eighth Circuit cases similarly apply the law-of-the-case doctrine to indistinguishable circumstances. *See United States v. Torres-Villalobos*, 487 F.3d 607, 611 n. 1 (8th Cir. 2007) ("final jury instructions imposed a requirement that the government prove *both* that Torres-Villalobos entered *and* was found in the United States. * * * This heightened requirement thus became the law of the case") (emphasis in original) (citing *Staples*); *United States v. Ausler*, 395 F.3d 918, 920 (8th Cir.) (holding that an erroneous and more stringent jury instruction given without government objection became the law of the case for the

purpose of reviewing defendant's sufficiency challenge), *cert. denied*, 546 U.S. 861 (2005).

One Eighth Circuit panel, however, has mistakenly suggested that the circuit does not follow the law-of-the-case doctrine at all where the jury instructions increase the government's burden of proof. *United States v. Inman*, 558 F.3d 742, 748 (8th Cir.), *cert. denied*, 558 U.S. 916 (2009). The *Inman* panel unfortunately misread earlier precedent on a different issue – whether the law-of-the-case doctrine could *excuse* a *plaintiff* from having to prove all statutory elements required to impose liability where defendant failed to object to the omission of an element. *Id.* (discussing *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F.2d 859 (8th Cir. 1953)).

Hubbard was a civil case holding that a *defendant* held liable under a statute is not bound by law of the case when raising a sufficiency of the evidence challenge involving an unproven statutory element for liability, regardless whether he failed to object to a jury instruction neglecting such element. 203 F.2d at 861-62. *Inman* noted that *Hubbard* disapproved of a criminal case stating that a criminal defendant was bound, for sufficiency of the evidence purposes, by jury instructions to which he did not object that failed to included a required statutory element. 558 F.3d at 748 (noting *Hubbard*'s disapproval of *Pevely Dairy Co. v. United States*, 178 F.2d 363, 367 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950)). But cases finding that civil or criminal *defendants* cannot be subject to liability or punishment based on *less* proof than is required by statute involve a very different question than whether a non-objecting plaintiff or

prosecutor can bind themselves to having to prove *more* than the statutory minimum, as *Staples* and similar cases have held. There thus was never any conflict between *Hubbard* and subsequent cases such as *Staples* and *Ausler*, which held only that the law-of-the-case doctrine could *increase* the government's burden, not that it could excuse a statutory element of a crime.[2]

A subsequent Eighth Circuit case applying *Inman* illustrates the contradictory aspects of the opinion and effectively limits its reach. In *United States v. Johnson*, 652 F.3d 918, 922 (8th Cir. 2011), the court held that the first step of the *Inman* analysis was to apply the law of the case and see whether the evidence was sufficient for a rational jury to find each element of the offense " 'as charged in the jury instructions' " to which the government made no objection. (Quoting *Inman*); *see also id.* n. 2 (citing *Ausler* and *United States v. Williams*, 376 F.3d 1048, 1051

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[2] *Inman* is problematic for the further reason that it completely contradicts itself and *Hubbard* in its very next paragraph when it says that because a criminal defendant may not challenge a jury instruction to which it did not object, a sufficiency-of-the-evidence challenge can be measured against the (incomplete) jury instructions alone, and "there is no need to conduct a separate analysis of whether the evidence was sufficient to establish statutory elements on which the appellant did not seek an instruction." 558 F.3d at 748. That is precisely the opposite of what *Hubbard* held, and the exact same as what the disapproved *Pevely* held. More strange still, *Inman* cites *Ausler* with approval in the midst of this paragraph. *Ausler*, of course, applies the precise same law-of-the-case rule as *Staples*. *Supra* at 12.

(10th Cir. 2004), for the proposition that law of the case binds the government to more stringent jury instructions to which it did not object). If the evidence is insufficient to establish the elements set forth in the jury instructions, *Johnson* reads *Inman* to provide the government a limited way out of its bind, allowing a conviction to be affirmed under a "rigorous standard of review" if the court can conclude that " 'the evidence is so overwhelming or incontrovertible that there is no reasonable doubt that any rational jury would have found that the government proved the statutory element.' " *Johnson*, 652 F.3d at 922-23 (quoting *Inman*). *Johnson* held that the government had failed this rigorous standard of review and expressly rejected "the relatively government-friendly standard applied in" *Guevara* and *Zanghi*. *Id*.[3]

Regardless whether *Inman*'s flawed and contradictory reasoning render it a complete aberration or it survives as a limited alternative path for the government as in *Johnson*, all potential versions of Eighth Circuit law reject the standard in the First and Fifth Circuits, apply the law-of-the-case doctrine

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[3] Another Eighth Circuit case has recognized the potential confusion created by *Inman* but found it unnecessary to resolve it. *United States v. Littlewind*, 595 F.3d 876, 884 n. 2 (8th Cir. 2010) (observing that *Inman* viewed prior law-of-the-case precedent as *dicta*, but noting that the "issue of whether the intent element became the law of the case is not squarely presented by the parties, and we refuse to address the issue in this novel context"). And yet another post-*Inman* case simply cited *Staples* but found the evidence satisfied the jury instructions. *United States v. Bell*, 761 F.3d 900, 908-09 (8th Cir.), *cert. denied*, -- U.S. --, 135 S. Ct. 503 (2014) (noting defendant's reliance on *Staples* for law-of-the-case doctrine but finding that government satisfied elements set forth in jury instructions).

either as an initial step or as the complete measure of the government's burden, and hence the split raised in this case remains, though now potentially with three, rather than two, alternative approaches.

The other circuit fully participating in the split is the Tenth Circuit, which squarely applies the law-of-the-case doctrine in circumstances such as in this case. *See United States v. Romero*, 136 F.3d 1268, 1272-73 (10th Cir. 1998) (where jury instructions erroneously placed the burden on the government to prove the non-Indian status of the victims in an assault case occurring on an Indian reservation, court reversed conviction based on government's failure to introduce evidence regarding that added element). The *Romero* court acknowledged the government's position that "the non-Indian status of the victim in § 1152 cases is an exception to the statute which must be raised and established by the defendant, but nonetheless held that '[b]ecause the unopposed jury instructions making the non-Indian status of the victims an element of the Government's case formed the law of this case," it would reverse the conviction for insufficient evidence. *See also Williams*, 376 F.3d at 1051 (10th Cir) (recognizing that "the government [has] the burden of proving each element of a crime as set out in a jury instruction to which it failed to object, even if the unchallenged jury instruction goes beyond the criminal statute's requirements," though finding that the government did object to the instruction).[4]

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[4] The First Circuit sought to distinguish *Romero* as involving a jury instruction that "may have been legally correct," and hence would not have triggered the exception for patently erro-

The Eleventh Circuit has brushed up against the split, but chose to distinguish *Guevara* rather than reject it outright. *See United States v. Raphael*, 487 Fed. Appx. 490, 506 n. 9 (11th Cir. 2012) (unpub.) (applying law of the case where additional element of crime was added to jury charge and distinguishing Fifth Circuit *Guevara* exception because government stipulated to the erroneous element at pretrial conference and hence "we cannot say that the District Court erred in its jury instructions when it" included that additional element), *cert. denied sub nom. Baptiste v. United States*, -- U.S. --, 133 S. Ct. 1293 (2013). That the government agreed to an erroneous instruction in *Raphael*, however, hardly makes it less erroneous, and hence it is unlikely that the First and Fifth Circuits would find that distinction relevant to whether the instruction was "patently erroneous." In any event, whether literally part of the "split" or not, *Raphael* further illustrates that the issue arises regu-

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neous instructions. *Zanghi*, 189 F.3d at 80 n. 10. But that attempted distinction ignores what the Tenth Circuit actually held. After noting that the district court "determined that notwithstanding the instruction, the non-Indian status was a matter of defense to be proved by the defendant," *i.e.*, that its own instruction was erroneous, the court of appeals noted that the issue of who should have had the burden of proof, while interesting, was irrelevant. "[T]his circuit's law of the case doctrine now prevents us from reaching these intriguing questions. Instead, we are compelled to find that Romero's conviction must be overturned because of the Government's failure to prove an element of the crime as charged to the jury." *Romero*, 136 F.3d at 1271. Such a holding preventing the Tenth Circuit from even addressing whether the instruction was erroneous (patently or otherwise) is unavoidably in conflict with the First and Fifth Circuit exception for patently erroneous jury instructions.

larly and is being resolved in conflicting manners on indistinguishable fact patterns.

Other federal and state courts also have applied the law-of-the-case doctrine in comparable circumstances. *See, e.g., United States v. Winckelmann*, 2010 CCA LEXIS 390 (U.S. Army Ct. Crim. App. Nov. 30, 2010) (unpub.), at *15-*16 (military judge's instruction "went beyond what has been required by the majority of circuits," government did not object, and hence more stringent instruction "constitutes the law of the case and binds the parties"), *rev'd on other grounds*, 70 M.J. 403, 407 n. 7 (CAAF 2011) (noting error in instruction but finding it irrelevant to issue on further appeal); *Winckelmann*, 2010 CCA LEXIS 390 at *75-76 (Ham, J., concurring in part and dissenting in part and in the result) (agreeing with plurality that law of the case applies regardless of error in definition of element, citing *Staples* and *Romero*); *Brewster v. McNeil*, 720 F. Supp.2d 1369, 1374-75 (S.D. Fla. 2009) (holding, in a 28 U.S.C. § 2254 habeas proceeding, that when jury was charged partly in the conjunctive, "the state assumed the burden of proving more than the statute required," citing *Staples*); *State v. Azure*, 186 P.3d 1269, 1275 (Mont. 2008) ("where the State has the opportunity to object to a proposed jury instruction before it is given to the jury but fails to do so, that instruction, whether or not it includes an unnecessary element, becomes the law of the case once delivered, and the jury is accordingly bound by it"); *State v. Crawford,* 48 P.3d 706, 711 (Mont. 2002) ("when the State fails to properly object to a jury instruction, the instruction, whether it includes an unnecessary element or not, becomes

the law of the case once delivered, and the jury is accordingly bound by it"); *State v. Hickman,* 954 P.2d 900, 902 (Wash. 1998) ("In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction").

This case is important and worthy of this Court's attention because the issue arises regularly and can be outcome determinative in many cases. Additionally, applying the law of the case is a better rule because it simply holds the government to such burdens as it has assumed when seeking to exercise the weighty power of criminal prosecution. *Williams*, 376 F.3d at 1051 (purpose of law of the case "is to prevent the government from arguing on appeal a position which it abandoned below"). While our Constitution recognizes and seeks to check the tremendous danger involved in the government's power to prosecute and incarcerate its citizens, there are now numerous means by which defendants can forfeit potentially valid claims through procedural default at multiple stages in criminal proceedings. Holding the government to this limited instance of having to comply with additional burdens from jury instructions to which it failed to object not only tends to maintain a proper balance in the procedural rules, it best comports with the Constitution's repeated concern with checking the government's power to take away a person's liberty. If defendants may be required to avoid and survive a host of procedural hurdles in defending their liberty, surely the government should be required to meet such burdens as it has assumed or ac-

quiesced in when not objecting to a jury instruction setting a higher bar than the statute or indictment. *Cf. United States v. Jimenez Recio*, 537 U.S. 270, 279 (2003) (Stevens, J., concurring in part and dissenting in part) ("The prosecutor, like the defendant, should be required to turn square corners.").

This case also is a good vehicle for addressing this split given that the court of appeals recognized that the conjunctive jury instruction was erroneous, recognized the general law-of-the-case rule, and thus the case squarely presents the question regarding the scope of the law-of-the-case doctrine. The fact that the case is unpublished is of no moment given that the rule it is applying was from the published *Guevara* decision and hence is already established precedent in the Fifth Circuit. Indeed, that the court of appeals thought it unnecessary to publish simply confirms that the issue is considered straight-forward and well-established in the circuit.[5]

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[5] This Court also might have the opportunity in this case to provide some guidance on or resolve yet a third circuit split concerning the scope of the "exceeds authorized access" element of the crime alleged in this case. *See supra* at 6-7 n. 1, 8-9. If this Court agrees that the law-of-the-case doctrine applies, it would need to vacate and remand with instructions to consider the sufficiency of the evidence for the "exceeds" element. Indeed, Judge Haynes's concurring view that there was sufficient evidence of exceeding authorized access was expressly based on her taking sides in a circuit split regarding whether an insider can "exceed[] authorized access" by misusing or misappropriating information that the insider was perfectly authorized to access. App. A16 (citing *John*, 597 F.3d 263); *contra United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (*en banc*) (narrow view of "exceeds authorized access" language excluding subsequent misuse of materials *accessed* within authority; noting disagree-

II. The Circuits Are Split Regarding the Reviewability of a Statute-of-Limitations Defense Not Raised at or Before Trial.

On appeal, Petitioner sought to raise a statute-of-limitations defense to Count 2, arguing that the superseding indictments changed the charges, were more than seven years after the events alleged, and hence were barred by the applicable five-year limitations period. *See* Brief of Appellant at 48-50; 18 U.S.C. § 3282. Because the limitations defense was not raised in the district court, Petitioner argued on appeal that it was reviewable under the plain-error standard and that such standard was easily met simply by reviewing the face of the indictments.

The Fifth Circuit declined to reach the merits, holding that "a limitations defense is waived if, as here, it was not raised at trial." App. A8 (citing *Arky*, 938 F.2d at 582).

Whether a limitations defense not raised at or before trial is waived and hence lost forever, or simply forfeited but reviewable for plain error or otherwise,

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ment with Fifth, Seventh, and Eleventh Circuits on this issue); *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199, 203 (4th Cir. 2012) (agreeing with Ninth Circuit and rejecting Seventh Circuit view), *cert. denied*, -- U.S. --, 133 S. Ct. 831 (2013).

Because the government argued on appeal that there was sufficient evidence for both versions of the crime (notwithstanding its admission that it had not indicted Petitioner on the "exceed[ing]" crime), this issue was fully briefed below and would become the primary issue on remand. This Court's guidance on the legal question would add value and be an efficient use of this Court's time and resources.

is the subject of a well-developed circuit split. As the First Circuit recognized in *United States v. Franco-Santiago*, 681 F.3d 1, 12 (1st Cir. 2012), there is an extended split on this issue. One circuit simply permits the issue to be raised for the first time on appeal absent an "explicit waiver." *United States v. Crossley*, 224 F.3d 847, 858 (6th Cir. 2000) ("absent an explicit waiver, the statute of limitations presents a bar to prosecution that may be raised for the first time on appeal"); *United States v. Titterington*, 374 F.3d 453, 455 (6th Cir. 2004) (same, citing *Crossley*), *cert. denied*, 543 U.S. 1153 (2005).

Two circuits, the First and Seventh, allow review for plain-error. *Franco-Santiago*, 681 F.3d at 12 (1st Cir.); *United States v. Baldwin*, 414 F.3d 791, 795 & n.2 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007).

Seven circuits, by contrast, hold that simple failure to raise a limitations defense waives it and makes the defense unreviewable on appeal. *United States v. Walsh*, 700 F.2d 846, 855-56 (2d Cir. 1983); *United States v. Castello*, 308 Fed. Appx. 523, 524 (2d Cir. 2009) (unpub.) (applying *Walsh*); *United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); *United States v. Botsvynyuk*, 552 Fed. Appx. 178, 182 (3d Cir.) (unpub.) (applying *Karlin*), *cert. denied*, -- U.S. --, 135 S. Ct. 187 (2014); *United States v. Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); *United States v. Boccone*, 556 Fed. Appx. 215, 238 n. 6 (4th Cir.) (unpub.) (applying *Williams*), *cert. denied*, -- U.S. --, 135 S. Ct. 169 (2014); *United States v. Arky*, 938 F.2d at 582 (5th Cir); *United States v. LeMaux*,

994 F.2d 684, 689-90 (9th Cir. 1993); *United States v. Wilbur*, 674 F.3d 1160, 1177 (9th Cir. 2012) (citing *LeMaux*); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987); *United States v. Brody*, 705 F.3d 1277, 1284 (10th Cir. 2013) (applying *Gallup*); *United States v. Siegelman*, 561 F.3d 1215, 1232 (11th Cir. 2009), *vacated on other grounds*, 561 U.S. 1040 (2010).

Many of these cases openly acknowledge the split and hence the division among the circuits is well-entrenched and unlikely to be resolved absent this Court's involvement. *E.g., Franco-Santiago*, 681 F.3d at 12; *Baldwin*, 414 F.3d 791, 795 & n. 2; *Arky*, 938 F.2d at 582.

The question presented is worthy of this Court's attention in this case because the split is straightforward, arises regularly, is well-entrenched, and can be outcome determinative. Furthermore, allowing review is the better rule in that prosecutions brought outside the limitations period injure not only the defendant, but the public as well by rendering uncertain a check imposed by Congress on the government's exercise of its power to threaten and take citizens' liberty. The prospect that the limitations period may be waived simply encourages the government to file claims outside the limitations period in the hopes that the argument will be waived by overworked defense counsel or that the mere threat of conviction might induce a plea before a potential limitations defense is fully explored. It is the public good that is injured by such incentives for aggressive government prosecution beyond the checks Congress has imposed.

As with the law-of-the-case split, this case is a good vehicle for addressing this issue given that the ruling below squarely relies on well-established circuit precedent, and lacks any confounding issues on the merits of the limitations question. The court of appeals simply never reached the merits.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

JOE KENDALL
JODY RUDMAN
THE KENDALL LAW GROUP
3232 McKinney Avenue
Dallas, TX 75204
(214) 744-3000

Counsel for Petitioner

Dated: March 9, 2015

APPENDICES

APPENDIX A

2014 U.S. App. LEXIS 21358

United States v. Musacchio

United States Court of Appeals for the Fifth Circuit

November 10, 2014, Filed

No. 13-11294

Before SMITH, BARKSDALE, and HAYNES, concurs, Circuit Judges.

PER CURIAM:*

Michael Musacchio appeals his conviction and sentence for conspiracy and substantive violations of the Computer Fraud and Abuse Act. We affirm.

I.

Musacchio was the president of Exel Transportation Services ("ETS") until he resigned in 2004. ETS is a transportation brokerage company that arranges freight shipments for business clients; it relies on independent agents to sell its services. In 2005, Musacchio founded a competing company, Total Transportation Services ("TTS"), and two ETS employees, Roy Brown and Michael Kelly, **[*2]** followed

* Pursuant to ***5th Cir. R. 47.5***, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in ***5th Cir. R. 47.5.4***.

him. Beginning in 2006, several agents moved from ETS to TTS.

At about the same time, the new ETS president, Jim Damman, under-took to sign new contracts with agents. He noticed, however, that some agents seemed aware of the new terms before they had been disclosed. One agent revealed Brown had shown him an undisclosed ETS contract addendum; Damman became suspicious and hired a forensic firm to investigate the leak. The firm discovered Musacchio and Brown had been accessing ETS's servers. ETS sued TTS, Musacchio, Brown, and others, and the parties settled for $10 million.

In 2010, the government indicted Musacchio, Brown, and Kelly. Count 1 charged all three with conspiracy to make unauthorized access and exceed authorized access to a protected computer. *See* 18 U.S.C. §§ 371, *1030(a)(2)(C)*, *(c)(2)(B)(i)*, *(iii)*. Counts 23 and 24 charged Musacchio with unauthorized access to a protected computer, with Count 23 indicating he accessed the "Exel Server" "[o]n or about" November 24, 2005. *See id. § 1030(a)(2)(C)*, *(c)(2)(B)(i)*, *(iii)*. After Brown and Kelly had pleaded guilty, the government filed a superseding indictment against Musacchio in 2012. Count 1 no longer contained the "exceed authorized access" language in the section summarizing the offense, although **[*3]** it did mention exceeding authorized access in the "Object of the Conspiracy" and "Manner and Means" sections. Count 2 was similar to Count 23 of the original indictment but amended the allegations by specifying Musacchio accessed the "Exel email accounts of Exel President and Exel legal counsel" "[o]n or about" No-

vember 23-25, 2005. Count 3 was the same as Count 24 of the original indictment. In 2013, the government filed a second superseding indictment that made no relevant changes.

At trial, the government introduced evidence that, after Musacchio left ETS but before Brown did, Musacchio asked Brown to access other employees' email to collect information. Brown had previously worked in ETS's information-technology department and had the ability, though not the authority, to access other employees' email. Brown complied with Musacchio's requests. After resigning from ETS, Brown used another administrator account to access ETS's servers remotely, and when that stopped working, Kelly provided Musacchio and Brown with other administrator accounts. In addition, the government presented evidence that Kim Shipp, an ETS employee who had been Musacchio's assistant, shared the email of Steve Bowers, **[*4]** an ETS executive, with Musacchio at his request. As Bowers's assistant, Shipp had the authority to access Bowers's email but not to share it with Musacchio.

The government's proposed jury instructions for Count 1 stated the jury had to find Musacchio agreed to "intentionally access[ ] a protected computer(s) without authorization." It did not mention exceeding authorized access. The court revised the instructions, defining the underlying offense as "to intentionally access a protected computer without authorization and exceed authorized access." Neither the government nor Musacchio objected to the conjunctive instructions. The court instructed the jury that its "verdict must be unanimous on each count of the in-

dictment." The jury found Musacchio guilty on all three counts.

The presentence investigation report ("PSR") calculated Musacchio's criminal history category as I and the offense level as 36. A significant component of the latter calculation was an estimate that the loss was $10 million, which increased the offense level by twenty compared to a loss of $5,000 or less. *See* U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 2B1.1(b)(1). Musacchio and the government objected to the loss calculation. Musacchio **[*5]** claimed the forensic firm's fees, $322,000, were a reasonable estimate of the total loss. The government suggested $160 million, which it said was the loss in business value and profits. Two of Musacchio's experts alleged the conspiracy had a negligible impact on agent departures and estimated the loss to be, at most, less than $200,000. Jim Shields, TTS's attorney during the settlement negotiations in the civil case, testified that approximately $135,000 of the $10 million settlement represented ETS's lost profit from agents' departures attributable to the conspiracy. He explained that about $1 million of the settlement represented ETS's total economic loss attributable to the conspiracy and that most of the settlement was driven by TTS's fear of punitive damages. The court found the settlement to be the best of the methodologies presented and calculated the loss as "a million dollars or less, as testified by Mr. Shields."

Musacchio also objected to the PSR's application of a two-level enhancement for sophisticated means. *See id.* § 2B1.1(b)(10)(C). The court rejected his contention, finding that the conspirators' efforts to conceal

their access to ETS's servers constituted sophisticated means.

Based **[*6]** on these rulings, the court calculated Musacchio's total offense level as 26, resulting in a guideline range of 63 to 78 months. The court imposed concurrent 60-month sentences on Counts 1 and 2 and a consecutive three-month sentence on Count 3.

II.

Musacchio challenges the sufficiency of the evidence on Count 1. The court incorrectly instructed the jury that it had to find that Musacchio had agreed to make unauthorized access *and* exceed authorized access. The statute requires only that he agreed to make unauthorized access *or* exceed authorized access. Musacchio urges that the erroneous instruction became the law of the case, obligating the government to prove he agreed to both elements. He believes the evidence was insufficient to prove he agreed to exceed authorized access. We review *de novo* a properly preserved challenge to the sufficiency of the evidence, *United States v. Brown*, 727 F.3d 329, 335 (5th Cir. 2013), and we "review[] the record to determine whether, considering the evidence and all reasonable inferences 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," *United States v. Vargas-Ocampo*, 747 F.3d 299, 303 (5th Cir. 2014) (en banc).

In general, "[a]n instruction that increases the government's **[*7]** burden and to which the government does not object becomes the law of the case," *United States v. Jokel*, 969 F.2d 132, 136 (5th Cir.

1992), but that rule does not apply where (1) "the jury instruction . . . is patently erroneous and (2) the issue is not misstated in the indictment," *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005). The *Guevara* exception applies here.

The court instructed the jury that "18 U.S.C. § 1030(a)(2)(C) makes it a crime for a person to intentionally access a protected computer without authorization and exceed authorized access . . . ." The statute, by contrast, applies to anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer." 18 U.S.C. § 1030(a)(2)(C). The replacement of "or" with "and" was an obvious clerical error, not a possible alternative description of the offense.

Nor was the issue misstated in the indictment.[1] The second superseding indictment summarized the offense in Count 1 as "Conspiracy To Make Unauthorized Access to Protected Computer," which correctly described the offense. Although portions of the "Object of the Conspiracy" and "Manner and Means" sections alleged Musacchio agreed to make unauthorized access and exceed authorized access, the government was entitled to make those accusations. It **[*8]** had to prove Musacchio agreed to make unauthorized access or exceed authorized access; these

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[1] Musacchio tacitly concedes this, noting he "was indicted in Count 1 of the second superseding indictment for conspiracy to make unauthorized access to a protected computer" and referring to the "two superseding indictments . . . which abandoned the 'exceeding authorized access' crime."

statements merely indicated it believed it *could* prove both.

Therefore, *Guevara* controls, and the government was required to prove only that Musacchio agreed to make unauthorized access. Musacchio does not dispute the sufficiency of the evidence on that element, so he cannot prevail on his challenge to the sufficiency of the evidence on Count 1.

III.

Musacchio attacks the jury instructions on Count 1 as plainly erroneous. In his view, the court should have told the jury it had to be unanimous as to one of the two possible elements—making unauthorized access or exceeding authorized access.[2] His concern is that the jury could have been split, with some jurors finding he agreed to make unauthorized access and others finding he agreed to exceed authorized access, but with no unanimous finding on either element.

Where the claim is properly preserved, we review a failure to provide a requested jury instruction for abuse of discretion. *United States v. Grant*, 683 F.3d 639, 650 (5th Cir. 2012). Musacchio did not object to the instruction, so the standard of review is plain error. *See United States v. Valdez*, 726 F.3d 684, 691-92 (5th Cir. 2013). "A plain error is a forfeited error that is clear or obvious and affects the defendant's sub-

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[2] Apparently **[*9]** Musacchio is taking inconsistent positions on appeal and claiming the jury had to find only one of the two elements. No specific unanimity instruction would have been necessary had the government been required to prove both elements.

stantial rights." *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (per curiam).

"[A] general unanimity instruction is ordinarily sufficient," *United States v. Mason*, 736 F.3d 682, 684 (5th Cir. 2013) (per curiam), but a specific unanimity instruction is sometimes necessary "where there exists a 'genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts,'" *United States v. Holley*, 942 F.2d 916, 926 (5th Cir. 1991) (quoting *United States v. Duncan*, 850 F.2d 1104, 1114 (6th Cir. 1988)). Typically, no specific unanimity instruction is necessary for a conspiracy charge because "the crux of a conspiracy charge . . . [is] [t]he defendant's voluntary *agreement* with another or others to commit an offense." *United States v. Dillman*, 15 F.3d 384, 391 (5th Cir. 1994). A unanimous finding that the defendant agreed to participate in the conspiracy **[*10]** is sufficient. *See id.* at 392.

Dillman forecloses Musacchio's challenge to the jury instructions on Count 1. No specific unanimity instruction was necessary, and the court properly declined to provide one. Further, there was no risk of jury confusion, because the jury found Musacchio guilty of two substantive counts of making unauthorized access. There was no plain error.

IV.

Musacchio claims his prosecution on Count 2 was barred by the statute of limitations. But a limitations defense is waived if, as here, it was not raised at trial. *United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (per curiam). Musacchio urges that *Arky* does

not apply, because the issue can be resolved based on the face of the indictment. That approach is inconsistent with *Arky* and finds no support in our caselaw.

Musacchio points to *United States v. Shipley*, 546 F. App'x 450 (5th Cir. 2013) (per curiam), *cert. denied*, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014), an unpublished opinion, as a case that evaluated a statute-of-limitations defense on the merits even though it was not raised at trial. That is a misreading: *Shipley* explicitly noted the defendant "did not raise [a limitations] argument in the district court," *id.* at 458, and it quoted *Arky*'s rule that "the defendant must affirmatively assert a limitations defense at trial to preserve it for appeal," *id.* (alteration omitted) **[*11]** (quoting *Arky*, 938 F.2d at 582). It then found, "[i]f there was error, it was not plain." *Id.* Although the wording of that conclusion is unusual, *Shipley* did not discuss the merits at all, so the only basis on which it could have rejected the defendant's claim was waiver.

The other case Musacchio cites, *Putman v. United States*, 162 F.2d 903, 903 (5th Cir. 1947) (per curiam), was pre-*Arky* and therefore is not relevant. Moreover, we have previously found waiver based on *Arky* in precisely the situation here—where the issue can be resolved on the face of the indictment. *See United States v. Barakett*, 994 F.2d 1107, 1108-10 (5th Cir. 1993). Accordingly, Musacchio waived his limitations defense by failing to raise it at trial.

V.

Musacchio contends the errors in his trial combined to render it unconstitutionally unfair. Under

the cumulative-error doctrine, "an aggregation of non-reversible errors . . . can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998). Reversal is appropriate only in rare cases where "constitutional errors so 'fatally infect the trial' that they violated the trial's 'fundamental fairness.'" *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004) (quoting *Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir. 1992) (en banc)). The only error was instructing the jury that it had to find that Musacchio agreed to make unauthorized access and exceed authorized access. If that error affected the **[*12]** trial at all, it benefited Musacchio and does not justify reversal.

VI.

Musacchio urges that the court miscalculated the loss under the sentencing guidelines. First, he claims the court should have considered only the costs of investigating and remediating the computer intrusion, not business losses. Second, he alleges the court miscalculated the loss even under the government's interpretation of the guidelines.

We review *de novo* interpretations of the guidelines and the method of calculating the loss. *United States v. Nelson,* 732 F.3d 504, 520 (5th Cir. 2013), cert. denied, 134 S. Ct. 2682, 189 L. Ed. 2d 224 (2014). We review factual findings, including the actual calculation of the loss, for clear error. *See id.* "A factual finding is not clearly erroneous as long as it is plausible in light of the record read as a whole." *United States v. Krenning*, 93 F.3d 1257, 1269 (5th Cir. 1996).

The guidelines provide for an offense-level increase based on the loss, defined as "the greater of actual loss or intended loss." U.S.S.G. § 2B1.1 *cmt.* n.3(A). Actual loss is "the reasonably foreseeable pecuniary harm that resulted from the offense," *id. cmt.* n.3(A)(i), while intended loss is "the pecuniary harm that was intended to result from the offense," *id. cmt.* n.3(A)(ii). The guidelines include an additional provision for cases involving computer crimes:

> (v) Rules of Construction in **[*13]** Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:
>
> . . . .
>
> (III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: 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 damages incurred because of interruption of service.

Id. cmt. n.3(A)(v)(III) (emphasis omitted).

Musacchio's first contention, that only the costs described in the latter provision should have been included, is incorrect. To begin with, his approach is contrary to the guideline language. The use of the

word "includes" in Note 3(A)(v)(III) indicates the loss described in that provision should be considered in addition to actual loss, as defined in Note 3(A)(i).[3] Nothing in Note 3(A)(v)(III) suggests it replaces or limits the general process for calculating loss discussed in Note 3(A)(i)-(ii). **[*14]** The Sentencing Commission's report is consistent with this interpretation. According to the report, Note 3(A)(v)(III) was "designed to *more fully* account for specific factors relevant to computer offenses."[4] The addition of Note 3(A)(v)(III) was necessary because the costs described in that provision otherwise would not have been included in the loss unless they were reasonably foreseeable.

Moreover, the caselaw is contrary to Musacchio's position. The out-of-circuit cases he cites concerning the guidelines, as distinguished from the Act's similarly worded civil provisions, provide little support. **[*15]** Musacchio concedes that *United States v. Batti*, 631 F.3d 371 (6th Cir. 2011), did not directly

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[3] *See United States v. Baker*, 742 F.3d 618, 622 (5th Cir. 2014) ("[U]se of the word 'including' . . . signals that the cited acts of distribution are illustrative rather than exhaustive." (omission in original) (quoting *United States v. Reingold*, 731 F.3d 204, 228-29 (2d Cir. 2013))); *United States v. Ramos*, 695 F.3d 1035, 1040 (10th Cir. 2012) ("The intent-related examples that the commentary sets forth . . . are preceded by the word, 'including,' suggesting that the list of outlawed conduct is non-exhaustive." (citations omitted)), *cert. denied*, 133 S. Ct. 912, 184 L. Ed. 2d 701 (2013); Black's Law Dictionary 880 (10th ed. 2014) ("The participle *including* typically indicates a partial list.").

[4] U.S. Sentencing Comm'n, Report to the Congress: Increased Penalties for Cyber Security Offenses 1 (2003) (emphasis added).

address how the loss should be calculated, greatly limiting its persuasive value. The decision in *United States v. Schuster*, 467 F.3d 614 (7th Cir. 2006), actually favors the government's position. Musacchio notes that *Schuster* found costs associated with assisting the government should not be considered under Note 3(A)(v)(III) because the Note does not explicitly list them. *See id.* at 619-20. That case did, however, analyze whether those costs should be considered as actual losses, *see id.* at 619, indicating Note 3(A)(v)(III) does not replace or limit the general process for calculating loss set out in Note 3(A)(i)-(ii). *Schuster* characterized the relationship between the two Notes as follows:

> "Actual loss" under the sentencing guidelines, "means the reasonably foreseeable pecuniary harm that resulted from the offense." . . . *Additionally*, in cases involving fraud and related activity in connection with computers, the sentencing guidelines *include* in the calculation of actual loss [the costs described in Note 3(A)(v)(III)], regardless of whether such pecuniary harm was reasonably foreseeable . . . .

Id. at 619 (emphasis added) (quoting U.S.S.G. § 2B1.1 *cmt.* n.3(A)). Under *Shuster*, then, the loss includes both foreseeable harm and the costs listed in **[*16]** Note 3(A)(v)(III). Other cases have interpreted the guidelines similarly.[5] In light of this caselaw and

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[5] *See, e.g., United States v. Willis*, 476 F.3d 1121, 1128-29 (10th Cir. 2007) (including value of information provided to co-conspirator in loss); *United States v. Nosal*, No. CR-08-0237 EMC, 2014 U.S. Dist. LEXIS 4021, 2014 WL 121519, at *8 (N.D.

the guideline language, the court properly considered business losses.

Musacchio's second claim, that the court miscalculated the loss even under the government's interpretation of the guidelines, is equally unavailing. Shields' testimony provided a basis for the finding that the loss was $1 million or less, showing it "is plausible in light of the record read as a whole." *Krenning*, 93 F.3d at 1269. Musacchio criticizes Shields' testimony as "pure speculation," but Shields had knowledge of the loss from the settlement negotiations, and the court was entitled to find his testimony credible and to reject other testimony.[6] Contrary to Musacchio's suggestion, the court was not required to state a precise loss amount but instead needed only to make a reasonable estimate, which it did.[7] As a result, there was no clear error.

Cal. Jan. 13, 2014) (including cost of developing stolen trade secrets in loss).

[6] *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) ("[W]hen a trial judge's finding is based on his decision to credit **[*17]** the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error."); *United States v. Klein*, 543 F.3d 206, 214 (5th Cir. 2008) ("[T]he finding as to the amount of loss is a factual finding, and we cannot reassess the evidence but owe the finding deference.").

[7] *See United States v. Kennedy*, 726 F.3d 968, 974-75 (7th Cir. 2013) (finding no error in determination that loss exceeded $1 million based on defendant's admission that he purchased counterfeit art for $500,000 and marked it up).

VII.

Musacchio criticizes the application of the sophisticated-means enhancement, claiming his conduct fell short of the sophistication required to trigger it. We review for clear error a determination that a defendant used sophisticated means. *United States v. Roush*, 466 F.3d 380, 387 (5th Cir. 2006). The guidelines provide for a two-level increase where "the offense . . . involved sophisticated means," U.S.S.G. § 2B1.1(b)(10)(C), which "means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense," *id.* § 2B1.1 *cmt.* n.9(B).

Musacchio's efforts to conceal his activities meet this standard. He and his coconspirators used administrator accounts to read ETS employees' email, which concealed **[*18]** their identities. They forwarded the text of the email using webmail accounts in an attempt to avoid leaving records. Though many individuals familiar with computers likely could have developed a similar process, we previously have applied the enhancement "in cases involving some method that made it more difficult for the offense to be detected, even if that method was not by itself particularly sophisticated." *Valdez*, 726 F.3d at 695 (collecting cases). Musacchio's efforts to conceal his activities are similar in complexity to the activities at issue in some earlier cases.[8] Thus, the court did not clearly err by applying the enhancement.

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[8] *See, e.g., United States v. Wright*, 496 F.3d 371, 377-79 (5th Cir. 2007) (in which defendant purchased cashier's checks in borrowers' names to defraud mortgage companies into thinking borrowers had provided funds); *United States v. Clements*, 73

AFFIRMED.

HAYNES, Circuit Judge, concurring:

I concur fully in the judgment of the court. I do not join in the reasoning of Section II of the opinion, however, because I would conclude that the Government sufficiently proved both prongs ("exceeds authorized use" and "unauthorized access") and, therefore would **[*19]** not reach the issue discussed in Section II. *United States v. John*, 597 F.3d 263, 270-73 (5th Cir. 2010).

F.3d 1330, 1340 (5th Cir. 1996) (in which defendant deposited cashier's checks into wife's account to conceal link between money and himself).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA § JUDGMENT IN A CRIMINAL CASE
§
v. §
§ Case Number: 3:10-CR-00308-P(1)
MICHAEL MUSACCHIO § USM Number: 42493-177
§ **Jay Ethington**
§ Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	One, Two and Three of the Second Superseding Indictment filed on January 8, 2013.

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18:371; 1030(a)(2)(c);(c)(2)(b)(i) And (Iii) Conspiracy To Make Unauthorized Access To Protected Computer	03/01/2006	1ss
18: 1 030(a)(2)(c); (c)(2)(b)(i) And (Iii) Unauthorized Access To Protected Computers	11/25/2005	2ss
18:1030(a)(2)(c); (c)(2)(b)(i) And (Iii) Unauthorized Access To Protected Computers	1/21/2006	3ss

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)
☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

B3

September 5, 2013
Date of Imposition of Judgment

s/ Jorge A. Solis
Signature of Judge

Jorge A. Solis, United States District Judge
Name and Title of Judge

Nov.19, 2013
Date

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Sixty (60) months as to count l of the Second Superseding Indictment and Sixty (60) months as to count 2 of the Second Superseding Indictment to run concurrent with each other; and Three (3) months as to count 3 of the Second Superseding Indictment, to run consecutive to Counts 1 and 2 for a total sentence of Sixty-three months.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:
☐ at ☐ a.m. ☐ p.m. on
☐ as notified by the United States Marshal.
☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL
By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.)* as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that

may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall maintain not more than one business and/or one personal checking account, and shall not open, maintain, be a signatory on, or otherwise use any other financial institution account without the prior approval of the probation officer.

The defendant shall notify the probation officer within 72 hours of acquiring or changing any type of communication device, including pagers, cellular telephones, personal telephones, business telephones, electronic mail addresses, or web addresses.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a value of $500 or more without the approval of the probation officer.

The defendant shall provide to the probation officer any requested financial information.

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

CRIMINAL MONETARY PENALTIES

The defendant must a the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	**Fine**	**Restitution**
TOTALS	$300	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (A0245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fif-

teenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109 A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ ____ over a period of _____ *(e.g., months or years),* to commence ____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of$ over a period of _____ *(e.g., months or years),* to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $300.00 for Counts 1, 2 and 3 of the Second Superseding Indictment which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number),* Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

No. 13-11294

_____

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

MICHAEL MUSACCHIO,
Defendant-Appellant

_____

On Appeal from the United States District Court
for the Northern District of Texas, Dallas

_____

ON PETITION FOR REHEARING EN BANC

(Opinion 11/10/14, 5 Cir. ____, ____, F.3d ____)

Before SMITH, BARKSDALE, and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P.

and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT
s/ Jerry Smith
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Sentencing Transcript (Excerpt)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	) CAUSE NO. 3:10-CR-308-P (1)
	(
vs.	)
	(JULY 3, 2013
	) DALLAS, TEXAS
MICHAEL MUSACCHIO	(1:30 P.M.

SENTENCING
(PART 1)
BEFORE THE HONORABLE JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

FOR THE GOVERNMENT: UNITED STATES ATTORNEY'S OFFICE
1100 COMMERCE, 3RD FLOOR
DALLAS, TEXAS 75242
(214) 659-8600
BY: MS. LINDA GROVES

UNITED STATES ATTORNEY'S OFFICE
1301 NEW YORK, NW, SUITE 600
WASHINGTON, D.C. 20005
BY: MR. RICHARD GREEN

FOR THE DEFENDANT: LAW OFFICES OF JAY ETHINGTON
3131 McKINNEY AVE., SUITE 800
DALLAS, TEXAS 75204
(214)740-9955
BY: MR. JAY ETHINGTON

LAW OFFICE OF REID MANNING
P.O. BOX 192665
DALLAS, TEXAS 75219
(214) 740-9955
BY: MR. REID MANNING

MS. CAMILLE M. KNIGHT
2828 ROUTH STREET
SUITE 850 LB 10
DALLAS, TEXAS 75202
(214) 871-2741

OFFICIAL COURT REPORTER: SHAWN M. McROBERTS, RMR, CRR
1100 COMMERCE STREET, RM. 1654
DALLAS, TEXAS 75242
(214) 753-2349

* * *

[Page 4, line 20 through Page 5 line 1]

MS. GROVES: Your Honor, there is a housekeeping matter. The Defense motion for Rule 29 ruling and for a new trial have not been decided yet.

THE COURT: Correct. Remind me of that. And I will get an order out on that, but the motions are denied. I have read your motions and your brief, and those will be denied. I [Page 5] will get a written order out.

* * *

[END EXCERPT]