

EXPERT ANALYSIS

Supreme Court Rejects Erroneous Jury Instruction Appeal in Federal Computer Crime Case

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On Jan. 25, the U.S. Supreme Court rejected a shipping executive's arguments in a unanimous decision about two criminal procedure questions, affirming the 5th U.S. Circuit Court of Appeals opinion in the case. *Musacchio v. United States*, 136 S. Ct. 709 (2016).

The case arose under the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030, and specifically Section 1030(a)(2)(c), which addresses unauthorized access and exceeding authorized access to a protected computer.

Michael Musacchio began serving his 5-year sentence Feb. 11, 2015, before the high court accepted his case for review. With the Supreme Court's ruling, his sentence for hacking into his former employer's computer server and wrongfully accessing employee emails will stand.

ALLEGED CONSPIRACY

According to the 5th Circuit opinion, Musacchio was the president of Exel Transportation Services, a shipping logistics company. He resigned from Exel in September 2004.

In November 2005, Musacchio founded a competing company. Two Exel employees, Roy Brown and Michael Kelly, later joined Musacchio at his new company, the 5th Circuit opinion said.

As the two companies competed for sales agents, Exel became suspicious about information Musacchio and his new company seemed to possess, the opinion said.

Exel's new president, Jim Damman, hired a forensic firm to investigate. The firm determined that Musacchio and Brown, Exel's former information technology manager, had secretly agreed to access Exel's computer system to gain certain business advantages, the opinion said.

This continued until March 2006, when Exel discovered the computer breach. Exel sued Musacchio and others, ultimately reaching a \$10 million civil settlement, the opinion said.

In November 2010, the U.S. government indicted Musacchio, Brown and Kelly for accessing and conspiring to access Exel's protected computers in violation of 18 U.S.C.A. § 1030(a)(2)(c).

That statute makes it a crime to "intentionally access a computer without authorization or exceed authorized access."

MUSACCHIO CONVICTED

After defendants Brown and Kelly pleaded guilty, the government filed a superseding indictment directed at Musacchio. Among other things, the new indictment charged Musacchio only with conspiring to violate the statutory provision relating to gaining "unauthorized access" and removed references to "exceeding authorized access."



With the U.S. Supreme Court's ruling, Michael Musacchio's 5-year sentence for hacking into his former employer's computer server and wrongfully accessing employee emails will stand.

At trial, the government proposed instructions that would require the jury to find him guilty of "unauthorized access" consistent with the superseding indictment. Musacchio did not propose any counter-instruction on this point. However, the final instruction read to the jury required a finding of a conspiracy to "intentionally access a computer without authorization and exceed authorized access."

By the time the U.S. Supreme Court took the case, this was conceded to be an error because the law only requires unauthorized access or exceeding access to convict.

The jury convicted Musacchio, and the trial court denied his motion for new trial.

APPEAL TO 5TH CIRCUIT

On appeal, Musacchio argued for the first time that even if the evidence had been sufficient to support the allegations of unauthorized access, it was insufficient to prove that he had conspired to exceed authorized access. Based on the instructions, the jury needed to find both, he said.

Musacchio also argued for the first time on appeal that the government filed its superseding indictment outside the five-year statute-of-limitations period.

Particularly, he argued the superseding indictment could not relate back to the 2010 indictment — which the government had filed within the limitations period — because the superseding indictment broadened the charges.

The 5th Circuit rejected both arguments, ruling that the erroneous instruction did not govern the sufficiency question because:

- The jury instruction was not patently erroneous.
- The indictment properly stated the law.

The 5th Circuit ruled that Musacchio waived the statute-of-limitations argument when he failed to raise it at trial.

HIGH COURT ACCEPTS CRIMINAL LAW QUESTIONS

In June 2015 the U.S. Supreme Court granted certiorari on two issues the case presented. The first was how an appeals court must analyze a sufficiency-of-the-evidence challenge to a criminal conviction against an unopposed jury instruction that added an unnecessary element to the charged offense that the government had to prove at trial.

Second, the high court decided whether a criminal defendant may successfully raise a statute-of-limitations defense for the first time on direct appeal.

The 5th Circuit ruled that Musacchio waived the issue entirely when he failed to raise it, but Musacchio decided to raise it again in his certiorari petition anyway.

Musacchio's first argument was that the evidence against him was insufficient for a rational jury to find he conspired to exceed authorization to Exel's computers. The jury instruction, which required the jury to make that finding, became the law of the case, he said.

Specifically, Musacchio argued that the government should have had to meet the standard outlined in the jury instructions, which erroneously stated that his conviction hinged on whether he gained unauthorized access to Excel's computers *and* whether he exceeded authorized access, when the statute only requires the government to prove either of those prongs.

As such, the appellate court was required to analyze the sufficiency question against this standard, Musacchio argued.

The government responded that a sufficiency review simply requires the court to assess whether there was enough proof introduced at trial to establish the statutory elements of a crime. It

further argued that a jury instruction adding an additional element to government's burden of proof could only help a defendant at trial. However, on appeal, the court must apply the proper standard from the statute or the indictment.

On the second issue, Musacchio argued an indictment falling outside the applicable limitations period is a jurisdictional defect, which he could raise at any time. He further argued that even if the failure to raise a limitations bar could be waived, an express and knowing waiver is required. At minimum, he said, the appeals court should review a forfeited statute-of-limitations argument like his for plain error.

The government responded that the Supreme Court has consistently held for more than 140 years that the statute of limitations is a non-jurisdictional affirmative defense that becomes part of a case if — and only if — the defendant raises it at trial.

During oral argument, it seemed clear Musacchio had no support from the bench.

The late Justice Antonin Scalia made it clear that there was no way to get around the fact that Musacchio was guilty of unauthorized access to the Exel computer. Other justices repeated the point.

Justice Samuel A. Alito Jr. went so far as to say there may be no real difference between the statutory elements of "exceeding access" and accessing "without authorization."

From the comments and questions at oral argument, the justices seemed even less inclined to rule for Musacchio on the limitations argument.

As predicted, in a unanimous decision, the Supreme Court rejected Musacchio's claim that prosecutors had to abide by the incorrect instructions.

The high court held that when a jury instruction adds an element to the charged crime and the government fails to object, a challenge to the sufficiency of the evidence should be assessed against the elements of the charged crime rather than the elements set forth in the erroneous jury instruction. It further held that a defendant cannot successfully raise a statute-of-limitations bar for the first time on appeal.

In its opinion, the Supreme Court stated that "[t]he government's failure to introduce evidence of an additional element does not implicate these principles, and its failure to object to a heightened jury instruction does not affect sufficiency review."

The Supreme Court further held that the 5th Circuit correctly rejected the sufficiency challenge because Musacchio did not dispute that he was properly charged with conspiracy to obtain unauthorized access or that the evidence was sufficient to convict him of that charge.

In regard to the statute-of-limitations argument, the opinion stated that "[w]hen a defendant fails to press a limitations defense, the defense does not become part of the case and the government does not otherwise have the burden of proving that it filed a timely indictment."

The high court affirmed that if a defendant does not raise the statute-of-limitations defense, "there is no error for an appellate court to correct."

While the opinion was straightforward, the Supreme Court expressly noted in a footnote that it was leaving three issues open:

- First, what happens if the *indictment* also incorrectly adds an "element" not required by the statute?
- Second, whether it is necessarily adding an "element" when "different means of committing a crime" are alleged "in the conjunctive."
- Third whether an erroneous jury instruction can ever result in reversible error when there is sufficient evidence.

Section 1030(a)(2)(c) of the Computer Fraud & Abuse Act makes it a crime to "intentionally access a computer without authorization or exceed authorized access."

In the end, the opinion provides a clear standard for federal courts to follow. The sufficiency of the evidence should be assessed against the elements of the charged crime, not those set forth in an erroneous jury instruction. Also, a defendant cannot successfully raise a statute-of-limitations bar for the first time on appeal. **WJ**



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