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IN THE SUPREME COURT OF THE UNITED STATES

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CALVIN SMITH AND JOHN RAYNOR, :

Petitioners : No. 11-8976

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Tuesday, November 6, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

A.J. KRAMER, ESQ., Federal Public Defender, Washington, D.C.; on behalf of Petitioners.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-8976, Smith v. United States.

Mr. Kramer.

ORAL ARGUMENT OF A.J. KRAMER

ON BEHALF OF THE PETITIONERS

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

From the first Congress in 1790, Congress has made the decision that all Federal statutes which are, of course, creatures that are created by Congress in statutes, should be subject to a statute of limitations; in this particular case, five years. When it comes to conspiracy cases, as this Court said in Hyde, the statute of limitations is treated a little differently because conspiracy statutes are -- excuse me, conspiracy crimes are continuing offenses.

So the Court said the way we determine -- one way to determine whether a particular defendant's involvement in a conspiracy has ended -- in other words, his membership has ended -- is by the doctrine of withdrawal.

It's the statute of limitations that is the

1 defense in the case. It's the doctrine of withdrawal
2 that triggers -- that is the triggering event for the
3 statute of limitations, which sets the date for when the
4 statute of limitations starts to run. Withdrawal, in
5 and of itself, is not a defense. It's the statute of
6 limitations that's the defense.

7 JUSTICE SCALIA: Yes, but that -- is that an
8 element of the crime?

9 MR. KRAMER: No. This Court has called it a
10 defense in the Cook case, in the Oppenheimer case --

11 JUSTICE SCALIA: It has to be raised by the
12 defendant, right?

13 MR. KRAMER: It does have to be raised
14 initially -- I'm sorry.

15 JUSTICE SCALIA: Which means it's not an
16 element, so it doesn't have to be charged in the
17 indictment. Now, how can something that goes to the
18 existence or non-existence of an affirmative defense be
19 an element?

20 MR. KRAMER: Well, I don't -- it is -- it is
21 not an element, I agree with that; but it is -- I would
22 say that it's engrafted onto every Federal criminal
23 statute by statute. This is not the common law, but by
24 Congress' decision. I would also say that even though
25 it's not an element of defense -- of the offense, in

1 Winship, this Court referred to the fact that the
2 government must prove every fact necessary to prove a
3 crime beyond a reasonable doubt. It's a fact
4 necessary --

5 JUSTICE GINSBURG: But -- but you could
6 prove the crime without a reasonable -- beyond a
7 reasonable doubt, if you never raised the statute of
8 limitations. And statutes of limitations exist for
9 civil claims, as well as criminal claims.

10 And in -- on the civil side, the statute of
11 limitations is an affirmative defense. And it's up to
12 the plaintiff to plead and prove -- both plead and prove
13 it, both the burden of production and persuasion. Why
14 should it be different on the criminal side?

15 MR. KRAMER: I think several reasons. First
16 of all, obviously, the burden of proof is different in
17 criminal cases as the court said in Mullaney v. Wilbur.
18 It has been suggested that, because of the difficulties
19 in negating an argument that a homicide was committed in
20 the heat of passion, the burden of proof should rest on
21 the defendant.

22 And they said the same may be said of the
23 requirement of proof beyond a reasonable doubt of many
24 controverted facts, but this is the traditional burden
25 which our criminal justice system applies. I also think

1 that the Court has distinguished on some grounds and is
2 the civil statute of limitations from the criminal
3 statute.

4 In fact, in the number of cases, this Court
5 has talked about the criminal statute of limitations.
6 It has never referred to it as an affirmative defense.
7 It has said it's a defense, but it has never said that
8 the defendant is required to prove it.

9 In fact, the Quick case said it's part of
10 the merits of the case; although it doesn't have to be
11 pleaded in the indictment, and the -- that it has to
12 be -- the government has to present evidence of it and
13 proof of it.

14 JUSTICE GINSBURG: But you -- I think you --
15 you recognized that -- that the defendant has the burden
16 of production, not the government, the burden -- burden
17 of coming forward with this defense and producing some
18 evidence of the withdrawal.

19 MR. KRAMER: Yes, Justice Ginsburg, we do
20 accept that there is a burden of production, as with
21 several other things that are not affirmative defenses,
22 like entrapment or alibi, also have a burden of
23 production before the government has to prove the
24 elements of the crime beyond a reasonable doubt. So
25 it's not --

1 CHIEF JUSTICE ROBERTS: Mr. -- I'm sorry.
2 I'm sorry. Finish your answer.

3 MR. KRAMER: It's -- it's not dissimilar to
4 those in that respect, and it does go to negate an
5 element of the crime. In -- in the conspiracy statute,
6 the membership in the conspiracy is an element of the
7 crime. Withdrawal negates that element of the crime.

8 JUSTICE GINSBURG: Not -- only for the later
9 period. It doesn't negate that this person was once a
10 member of the conspiracy. The government has the burden
11 to show membership, and it did. So it's not -- it
12 doesn't reach back to negate that there was membership
13 at some time. It just says, after withdrawal, we no
14 longer prosecute.

15 MR. KRAMER: That's true. What it does is
16 extinguish liability for that offense past that time if
17 the statute of limitations has -- if withdrawal occurs
18 before the statute of limitations, someone can no
19 longer, as the statute says, "be prosecuted, tried, or
20 punished."

21 JUSTICE SOTOMAYOR: Isn't that like an
22 amnesty? Isn't that how you described it in your brief?

23 MR. KRAMER: There are some cases that call
24 it an amnesty. Some cases call it an extinguishment of
25 liability.

1 JUSTICE SOTOMAYOR: What is the difference
2 between the two, in your mind, that makes it an element
3 of the crime or a negation of some element of the crime?

4 MR. KRAMER: In a conspiracy, there is the
5 conspiracy that -- the government has to prove,
6 obviously, the conspiracy itself, which is an agreement
7 between -- it can be anyone. And then they have to
8 prove the defendant's membership in that conspiracy.

9 JUSTICE SOTOMAYOR: So you are a member, you
10 are liable for all the foreseeable acts of your
11 co-conspirators, whether or not you knew they were going
12 to happen, so long as they were foreseeable?

13 MR. KRAMER: Yes. Under Pinkerton, yes.

14 JUSTICE SOTOMAYOR: And you can be liable
15 for as long as you stay, until you prove you withdrew?

16 MR. KRAMER: Until --

17 JUSTICE SOTOMAYOR: And that extinguishes
18 your liability for the continuing conspiracy?

19 MR. KRAMER: I would say until you produce
20 evidence that you withdrew, yes. And then the
21 government has to prove that you were still a member of
22 the conspiracy within the statutory limitations period.

23 JUSTICE SOTOMAYOR: Why?

24 MR. KRAMER: This Court has never said in
25 Hyde --

1 JUSTICE SOTOMAYOR: The why is, once you've
2 joined, you are trying to extinguish liability. Why
3 would the government have to prove that you're entitled
4 to amnesty or not entitled to amnesty?

5 MR. KRAMER: It -- I think, Justice
6 Sotomayor, that it's really no different than if the
7 government has to prove you guilty of a crime in the
8 first place. They have to prove that you committed the
9 offense. The statute of limitations, which is, as I
10 said, engrafted on every Federal criminal statute --
11 almost every statute --

12 CHIEF JUSTICE ROBERTS: Well, your argument
13 basically reduces to the fact that, when it comes to the
14 statute of limitations, you treat the conspirators as
15 individuals, rather than as members of the conspiracy.

16 MR. KRAMER: Yes.

17 CHIEF JUSTICE ROBERTS: Well, that's not
18 true with respect to other aspects of the conspiracy.
19 If members of the conspiracy commit a murder, and it was
20 anticipated and all that, the person that has nothing to
21 do with that, other than being a part of the conspiracy,
22 is liable -- criminally liable for that as well. Why is
23 there a special rule for statutes of limitations? Why
24 is he treated as an individual, rather than a member of
25 the conspiracy in that respect?

1 MR. KRAMER: Well, he would be treated
2 for -- for the withdrawal purpose. If he withdrew, he
3 would also not be liable under Pinkerton. There is a
4 membership element component of Pinkerton as well, for
5 Pinkerton liability.

6 CHIEF JUSTICE ROBERTS: No, my point is
7 that, once you prove the conspiracy, a member who
8 doesn't -- that doesn't actually participate in the
9 activities of the conspiracy, is still responsible for
10 them. So it makes sense to say you can prove the
11 statute of limitations with respect to the conspiracy,
12 not with respect to each individual.

13 MR. KRAMER: Well, I think, actually, it's
14 just the opposite. If -- under -- under Grunewald, the
15 government -- if the defense -- if the claim of
16 termination is raised, the government has to prove that
17 the conspiracy continued into the limitations period and
18 that there was an overt act -- that was an overt act.

19 JUSTICE KENNEDY: But what the Chief Justice
20 indicates, it seems to me, is that if we accept your
21 view, then there is going to be a different statute of
22 limitations for each member of the conspiracy. And so
23 you have four or five different statute of limitations.
24 I find that -- I find that puzzling.

25 MR. KRAMER: Well, actually, in this case,

1 there was different statutes of -- I believe there were
2 three different statute of limitations that the district
3 court instructed the jury about because there were
4 superseding indictments and people were indicted at
5 different times.

6 So there were already, in this case,
7 different statute of limitations. But if one of the
8 reasons for withdrawal is to encourage people to get out
9 of the agreement, Justice Kennedy, then -- and try to --
10 try to thwart the agreement, then people may have -- may
11 come in and leave at different times during a
12 conspiracy.

13 JUSTICE BREYER: What is -- is there any --
14 I'm trying to find an analogous instance without the
15 statute of limitations. And what occurred to me, just
16 as an example, that you might have in your practice
17 found a different one, the Thomas Crown Affair. He robs
18 the bank or the art museum, but he has an intent to
19 return it, and he produces evidence that he had an
20 intent to return.

21 Now, in such a case, once he produces the
22 evidence, does the government have to prove beyond a
23 reasonable doubt that he didn't have the intent to
24 return? Or does he -- is there any instance in which
25 the burden of persuasion shifts? Do you see what I'm

1 driving at?

2 MR. KRAMER: I do, and I think that there --
3 that an argument can be made if the intent -- if one of
4 the elements of that offense is to deprive the owner
5 permanently of the property and he did not have that
6 intent, the government would have to prove what it would
7 have to prove originally, which is that he intended to
8 deprive the -- the owner --

9 JUSTICE BREYER: So you have never found a
10 case -- I will ask the government this -- in the
11 substantive criminal law, no matter what, who is -- even
12 if the defendant is the only one ever likely to know
13 anything about it, you've never found a case where, once
14 the burden is produced, the -- the burden of persuasion
15 remains on the defendant?

16 MR. KRAMER: That the burden of persuasion
17 remains on the defendant?

18 JUSTICE BREYER: Yes, because you agree the
19 defendant has the burden of production here.

20 MR. KRAMER: Yes.

21 JUSTICE BREYER: And so I was trying to
22 think of some instance -- as I said, I would be
23 repeating myself -- I am looking for any instance in
24 which, leaving the statute of limitations out, the
25 burden of persuasion shifts to the defendant. So I'm

1 saying, did you ever find one? The Thomas Crown Affair
2 or some other instance, and your answer is, no, you
3 never have heard of it.

4 MR. KRAMER: Well, I guess --

5 JUSTICE BREYER: Have you heard of it? So
6 what?

7 MR. KRAMER: Self defense and duress, as the
8 Court said in Dixon, dealing with duress, because it did
9 not negate the elements of the offense, it was an
10 affirmative defense that excused --

11 JUSTICE BREYER: Well, this is not -- this
12 does not negate the elements of the defense -- this does
13 not negate the elements of the crime.

14 MR. KRAMER: If it doesn't negate the
15 elements of the crime, I would say then this Court has
16 classified it as an affirmative defense.

17 JUSTICE BREYER: All right. Well, then if
18 that's so, if it's an affirmative defense and if
19 sometimes where it doesn't negate the elements of the
20 crime the burden of persuasion remains on the defendant,
21 then why shouldn't it here? Because he's the one most
22 likely to know.

23 MR. KRAMER: Well, I don't think, first of
24 all --

25 JUSTICE BREYER: And how do you prove it?

1 MR. KRAMER: -- that the government has
2 shown -- well, first of all, they -- they have to prove
3 nothing more than what they would have to prove
4 originally, that the defendant was joined -- knowingly
5 and willfully joined the conspiracy.

6 JUSTICE GINSBURG: But you -- you would have
7 the government prove that twice. They prove his
8 membership in the conspiracy. And then you say, once he
9 alleges that he withdrew, they have to prove it again.

10 MR. KRAMER: No, they would not have to
11 prove that twice. They could just rest on what they had
12 done originally. The -- the burden of production on the
13 withdrawal, the government could just say to the jury
14 that that's nonsense, there is no reasonable doubt here.
15 We've proved that he was a member. There is a
16 permissive inference that he is still a member within
17 the limitations period. They would not have to prove it
18 twice. They could rest on what they had done
19 originally.

20 It's very simple for them, however, to rebut
21 this evidence.

22 JUSTICE GINSBURG: What would you -- what
23 would you have to produce to get over your threshold of
24 satisfying the burden of production?

25 MR. KRAMER: Well, it's -- it's actually, I

1 think, quite a high burden of production. You would --
2 the defendant -- in most cases, I would think the
3 defendant himself would have to testify, which, of
4 course, subjects him to extensive cross-examination on
5 everything.

6 He can -- of course, cannot call his
7 co-conspirators as witnesses. He might be able to
8 present third-party evidence which, again, would be
9 subject to cross-examination. But he has to show that
10 he took some -- produce evidence that he took some
11 affirmative act to disavow --

12 CHIEF JUSTICE ROBERTS: Well, that's why
13 it's very difficult to put the burden on the government,
14 because the people -- he says, well, I told so-and-so
15 I'm out of this business, I'm not going to do it any
16 more. And so the government, if they had the burden of
17 proof, would say, well, I don't think that's true, I
18 want to call the person you -- you talked to.

19 And the person says, well, I'm not going to
20 testify because I take my rights under the Fifth
21 Amendment. There is no way the government -- in many
22 cases, there would be no way the government can carry
23 this burden of proof.

24 MR. KRAMER: No, I disagree with that. I
25 think, in every case, it would actually be fairly simple

1 for them. If the defendant can't call that person to
2 support his defense, the government could just say,
3 well, you didn't hear any testimony from that person
4 supporting the defense. That's enough right there to
5 meet our burden.

6 The government, as in this case, had
7 extensive cooperating witnesses, had wiretaps, had
8 documentary evidence --

9 JUSTICE BREYER: They often do. I just want
10 to go back, get the complete -- insofar as you can help
11 with this.

12 All right. Let's take duress or
13 self-defense. The government shows all the elements of
14 murder. Then the defendant comes in and says, I have
15 evidence here that it was under duress or evidence that
16 it was self-defense. Then to prevail, what's the
17 standard of persuasion? How does it work?

18 Is it then that -- is it that the defendant
19 must show more likely than not? Or is it the defend --
20 that I was defending myself? Or is it that the
21 government -- how does it work? What's the rule?

22 MR. KRAMER: The defendant -- as I
23 understand it, the defendant has to -- and, of course,
24 it could vary by state.

25 JUSTICE BREYER: Yes, of course. Of course.

1 MR. KRAMER: The states may put different
2 burdens. In the Federal system --

3 JUSTICE BREYER: Yes, yes.

4 MR. KRAMER: -- the defendant has the
5 burden, by a preponderance, to prove the duress defense
6 or the self-defense defense.

7 JUSTICE BREYER: All right. Well, that's --
8 well, then their point is, well, this is awfully
9 similar.

10 MR. KRAMER: It's not, though, in the sense
11 that the only thing that connects an individual
12 defendant to a conspiracy is that defendant's
13 membership, knowing and willful participation in the
14 conspiracy.

15 JUSTICE BREYER: The fact that there is a
16 statute of limitations makes your case weaker, not
17 stronger, because -- because the statute of limitations
18 is less directly connected to the elements of the -- the
19 offense than is self-defense or duress.

20 MR. KRAMER: I actually think it makes it
21 stronger, in the sense that Congress has made this
22 choice to require that every crime be proved to have
23 been committed within the statute of limitations.

24 JUSTICE SCALIA: Well, you say that you --
25 you have to prove that the defendant was knowing and

1 willfully a member of the conspiracy, right?

2 MR. KRAMER: That was the --

3 JUSTICE SCALIA: That's what you said?

4 MR. KRAMER: That was the jury instructions
5 in this case.

6 JUSTICE SCALIA: Well, and you agree that
7 that's the rule of law, right?

8 MR. KRAMER: Yes.

9 JUSTICE SCALIA: Doesn't duress eliminate
10 willfully?

11 MR. KRAMER: The Court said, in Dixon -- it
12 might, to my thinking, but the Court said, in Dixon,
13 that it did not negate any of the elements of the
14 offense, that the -- that she had to do the acts
15 knowingly and willfully in Dixon and that it did not
16 negate those elements.

17 JUSTICE SCALIA: So why is that different
18 from this? If that's not an element, for Pete's sake,
19 even though the definition of the crime is knowingly and
20 willfully, and yet, nonetheless, that's -- that's an
21 affirmative defense, why -- why is that any different
22 here?

23 MR. KRAMER: Because the only way a
24 defendant can prove -- the way a defendant shows that he
25 withdrew is to produce evidence of withdrawal. That is

1 inconsistent with the fact that he is a member --
2 necessarily negates the element of membership in the
3 conspiracy. If he withdrew, he cannot, at the same
4 time, be a member of the conspiracy.

5 JUSTICE ALITO: Well, I'm having trouble
6 understanding how your argument would work. Let's say
7 that the -- the defense calls a witness other than the
8 defendant to testify to a conversation in which the
9 defendant allegedly withdrew from the conspiracy and, by
10 doing that, satisfies its burden of production.

11 Now, you say the government has the burden
12 to prove beyond a reasonable doubt, not only that this
13 conversation didn't occur, but also, that the defendant
14 never withdrew at any other time during the limitations
15 period. Isn't that where your argument would lead?

16 MR. KRAMER: No, I don't think they have to
17 disprove the conversation. All they have to prove is
18 what they had to prove originally, which is that the
19 defendant was a member of the conspiracy within the
20 limitations period, by any kind of evidence.

21 JUSTICE ALITO: But how can they prove that
22 he did not withdraw at any other time during this
23 conspiracy?

24 MR. KRAMER: Well, as in this case, they had
25 a number --

1 JUSTICE SCALIA: Between the statute of
2 limitations.

3 MR. KRAMER: As in this case, they had a
4 number of cooperating witnesses who testified about
5 Mr. Smith's actions. They could ask them, did the
6 conspiracy -- did Mr. Smith continue to participate, was
7 he involved, did he withdraw, any --

8 JUSTICE ALITO: Aren't you transforming
9 the -- the nature of withdrawal? You are seeming to
10 argue that the government has to prove, beyond a
11 reasonable doubt, active participation in the conspiracy
12 during the statute of limitations period, rather than
13 the -- the affirmative withdrawal from the conspiracy.

14 MR. KRAMER: No. I don't mean to imply
15 active participation, if that means an overt act. It
16 can just be -- the government could simply rest upon the
17 inference from Hyde that the defendant had been a member
18 outside the limitations period and their continued
19 participation is inferred. That is overcome when the
20 defendant produces evidence of withdrawal. So --

21 JUSTICE GINSBURG: What -- what evidence of
22 withdrawal did you produce in this case?

23 MR. KRAMER: In this particular case, it was
24 the -- well, it was the jury that actually called the
25 issue to the attention of everybody in the first place,

1 by sending out a note saying that, if we -- the
2 conspiracy continued, but we think a defendant left,
3 must we find him not guilty?

4 There was a number of pieces of evidence,
5 primarily that he was incarcerated for over six years
6 before the indictment --

7 JUSTICE SCALIA: That doesn't prove that he
8 withdrew.

9 JUSTICE GINSBURG: But you -- you agree --
10 you agree that that would not have necessarily meant
11 withdrawal?

12 MR. KRAMER: No, there are some circuit
13 cases that say that alone may be enough, but there was
14 more in this case. In this particular case, one witness
15 said he recalled -- he did not recall any contacts
16 between Kevin Gray, who was the ringleader, after the
17 arrest.

18 Another said that Mr. Smith was mad at
19 Mr. Gray for not sending any money. They weren't
20 communicating with him. Another witness -- there was
21 testimony from another witness that Mr. Smith refused to
22 comply with an order that Mr. Gray sent to him.
23 So there were --

24 JUSTICE SCALIA: Which -- which of those are
25 affirmative actions? I mean, the law is that he has to

1 take an affirmative action withdrawing from the
2 conspiracy. I don't think being in jail is -- is an
3 affirmative action. I don't think being mad at the
4 ringleader is an affirmative action. I don't think any
5 of the things you've said amount to an affirmative
6 withdrawal from the conspiracy.

7 MR. KRAMER: Whatever that may be, it's not
8 an issue in this case, in the sense that the government
9 is actually the one who requested that the district
10 court give the withdrawal instruction after the jury's
11 note.

12 JUSTICE SCALIA: Maybe not, but it -- it may
13 mean that we are wasting our time.

14 MR. KRAMER: I think that whether this
15 qualified as affirmative acts or not is, in a sense,
16 irrelevant to the question before the Court because,
17 after the jury's note came out, the government itself
18 requested the withdrawal instruction. And the
19 government not only requested the withdrawal
20 instructions, but said, we have no objection to placing
21 the burden on us beyond a reasonable doubt, if that's
22 what the defense wants.

23 JUSTICE KAGAN: Mr. Kramer --

24 CHIEF JUSTICE ROBERTS: I'm -- I'm having
25 trouble understanding how this works. You said a while

1 ago that the government has -- doesn't have to do
2 anything? In other words, he puts on -- he says, I
3 withdrew. And I told this -- the head of the conspiracy
4 that I wanted no more part of it. And the head of the
5 conspiracy says, well, I'm not going to testify.

6 And then the government doesn't have to do
7 anything?

8 MR. KRAMER: The government can just say --
9 they can rest on the fact that the proof outside the
10 membership period and rest on the inference from Hyde
11 that his membership continued.

12 CHIEF JUSTICE ROBERTS: Well, how is that --
13 how is that carrying the burden that you say is on it to
14 prove the absence of withdrawal beyond a reasonable
15 doubt? It seems to me that, if the government just sits
16 there and doesn't say anything, they will never be able
17 to carry their burden.

18 MR. KRAMER: I think -- I think they can by
19 just saying to -- well, I don't think they have a burden
20 to prove the absence of withdrawal. They have the
21 burden to prove membership within the limitations
22 period.

23 CHIEF JUSTICE ROBERTS: Yes, but they have
24 already done that. That's --

25 MR. KRAMER: Within the limitations -- his

1 membership within the period. So they can just say to
2 the jury, look, this evidence of withdrawal is nonsense,
3 you've heard the testimony, we have cross-examined him,
4 It makes no sense.

5 CHIEF JUSTICE ROBERTS: No, no, no. My
6 hypothetical is, because we are talking about the
7 criminal conspiracy, and the idea is did he tell those
8 people he was out, they're probably going to say, I'm
9 not going to testify.

10 And so -- and you say, well, the government
11 still doesn't have to do anything. It seems to me that
12 you can't say that they've carried their burden of
13 beyond a reasonable doubt, if they have nothing to say
14 about an issue as to which you say they have the burden
15 of proof.

16 MR. KRAMER: Well, I think it's up to the
17 jury whether to believe that evidence or not. And I
18 don't think the government has to prove --

19 CHIEF JUSTICE ROBERTS: Believe what
20 evidence?

21 MR. KRAMER: The -- the evidence that was
22 produced by the defendant that he actually told somebody
23 he --

24 CHIEF JUSTICE ROBERTS: But there can't be
25 any evidence because nobody is willing to testify

1 under -- because they invoked their Fifth Amendment
2 rights.

3 MR. KRAMER: Oh, I'm sorry. I thought the
4 defendant had testified to that effect, that he -- if
5 there is no evidence, there is nothing for the jury.
6 There is no -- if there's -- the defendant has not
7 produced any evidence of withdrawal, then there
8 is nothing --

9 CHIEF JUSTICE ROBERTS: Okay. Well, if the
10 defendant does testify, and he says, I told the
11 ringleader I want out, is an attack on his credibility
12 sufficient to prove the absence of withdrawal beyond a
13 reasonable doubt?

14 MR. KRAMER: Absolutely. And it happens all
15 the time in trials, that the government relies upon the
16 fact of a witness' unreliability and what happened on
17 cross to say that they proved their case beyond a
18 reasonable doubt. They don't have to prove anything
19 they didn't have to prove originally in this case. In
20 fact, it may be easier because it's within the
21 limitations period.

22 JUSTICE SCALIA: They didn't have to prove
23 within the limitations period. They didn't have to
24 prove that. You acknowledged that that the -- look,
25 what's at issue here is not a defense of withdrawal.

1 It's the defense of the statute of limitations, right?

2 MR. KRAMER: Yes.

3 JUSTICE SCALIA: You acknowledge that that
4 is an affirmative defense. And you are arguing that
5 what establishes that affirmative defense in this case,
6 namely, withdrawal, is an element. How -- how can
7 something that is -- that does nothing more than
8 establish an affirmative defense be an element?

9 MR. KRAMER: I --

10 JUSTICE SCALIA: I can't understand that.
11 Can you give me any other example in the criminal law
12 where -- where --

13 MR. KRAMER: I mean, an alibi -- alibi or
14 entrapment negate elements are not affirmative defenses.
15 If an alibi -- the defense is what -- and what could
16 happen in any case --

17 JUSTICE SCALIA: But that's not an
18 affirmative -- I want an example of something which is
19 an affirmative defense and where the proof of that
20 affirmative defense becomes an element.

21 MR. KRAMER: I may have given the wrong
22 impression. I don't classify the statute of limitations
23 as -- as an affirmative defense, nor has this Court ever
24 done it.

25 JUSTICE SCALIA: Why does it have to be

1 contained in the indictment, if it's an element?

2 MR. KRAMER: It's not -- well, it's not an
3 element. But in Grunewald, this Court said --

4 JUSTICE SCALIA: Why is it up to the
5 defendant to raise it, if it's an element?

6 MR. KRAMER: I think, in Ledbetter, this
7 Court said that, although there doesn't have to be a
8 date in the indictment, the government -- it's
9 sufficient if the government proves a date before the
10 indictment within the limitations period, this Court
11 specifically referred to in Ledbetter, which is at page
12 21 of our brief.

13 So I don't -- I may have given a wrong
14 impression. This is not an affirmative defense. An
15 affirmative defense does not --

16 JUSTICE SCALIA: Okay. That at least is
17 logical. I'm not sure it's right. But it's logical.

18 MR. KRAMER: Well, I'm halfway there.

19 (Laughter.)

20 JUSTICE SOTOMAYOR: I actually thought your
21 stronger argument in your brief was in trying to explain
22 why it negated an element. I think what you said in
23 your brief -- and you haven't made it here yet, as
24 clearly -- was that, if he wasn't willingly
25 participating during the statute of limitations, then he

1 hadn't committed the actual crime.

2 MR. KRAMER: That is -- that is the heart of
3 our argument, that it negates the element of membership
4 within the statutory period, which is what the
5 government has to prove. And I'm sorry if I did not
6 make that clear.

7 But the element that's at issue, that the
8 statute of limitations negates, is membership within the
9 statute -- membership in the conspiracy, knowing and
10 willful participation --

11 JUSTICE SCALIA: But the government doesn't
12 have to prove within the statutory period. It's up to
13 the defendant to raise that defense, and if he doesn't
14 raise it, it's waived.

15 MR. KRAMER: Well, I think it is up to the
16 government to prove it. It may be that if -- this Court
17 has never said a defendant waives it by not raising it.
18 But I -- I think the government has to prove it in every
19 case. It may be waived.

20 Some circuits have said it's waived. This
21 Court has not said so.

22 I would like to reserve the remainder of my
23 time for rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Harrington?

1 ORAL ARGUMENT OF SARAH E. HARRINGTON
2 ON BEHALF OF THE RESPONDENT

3 MS. HARRINGTON: Thank you,
4 Mr. Chief Justice, and may it please the Court:

5 The Due Process Clause does not require the
6 government to disprove withdrawal outside the
7 limitations period because lack of withdrawal is not an
8 element of the crime of conspiracy. This Court has been
9 clear that the Winship burden attaches only to things
10 that are elements in the constitutional sense. And when
11 something is an element in the constitutional sense,
12 then at least four consequences follow.

13 As the Court has suggested, first, the
14 government has to allege in the indictment in every
15 case. Second, the -- the government has to prove it in
16 every case. Third, the jury has to be instructed on it
17 in every case. And fourth, a defendant can't waive the
18 requirement that it be proved in his case by failing to
19 raise it.

20 But none of those things apply as to a
21 statute of limitations --

22 JUSTICE KAGAN: Ms. Harrington --

23 JUSTICE BREYER: This is true, but his
24 point -- basic point -- and he has responded to the
25 points I've made, is that, of course, if there is a

1 five-year statute on robbery, it doesn't help the
2 government that he create -- he committed a robbery
3 before.

4 MS. HARRINGTON: Correct.

5 JUSTICE BREYER: All right. So he's saying
6 what you charged in the indictment is that he was a
7 member of a conspiracy that existed between 1995 and
8 2005. Now, that's the crime that concerns us, roughly.
9 And he is saying, to prove your case, you have to show,
10 as an element, that he was a member.

11 Now, you did present some evidence that he
12 was a member. And he wants to present some evidence,
13 and has, that he wasn't a member. And he wasn't a
14 member if he withdrew. And therefore, once he presents
15 enough to get -- make that an issue, you have to prove
16 beyond a reasonable doubt that he was a member. So you
17 have to show he didn't withdraw.

18 Now, this has nothing to do with the statute
19 of limitations. By coincidence, it does. But a statute
20 of limitations issue would be that you all agreed that
21 he withdrew, but the question is did it happen in 1993
22 or 1997? That's a statute of limitations issue, but
23 this isn't.

24 This is a question of whether he was a
25 member of the conspiracy during the time period that you

1 charged in the indictment. That's his point. So what
2 is the response?

3 MS. HARRINGTON: So I guess I have two
4 responses. The first is that it is a statute of
5 limitations question, in the sense that the government
6 proved -- and there is no dispute about this -- that the
7 conspiracy that was charged did exist within the
8 limitations period. And so the question is just did
9 this particular member of the conspiracy --

10 JUSTICE BREYER: Well, in other words, you
11 can charge me or anybody in the audience or anybody here
12 with what? Not charging them? You are saying there was
13 a conspiracy? Doesn't he have to be shown to be a
14 member of the conspiracy in order for you to get a
15 conviction?

16 MS. HARRINGTON: He does, and there's no --

17 JUSTICE BREYER: And that's an element of
18 the crime?

19 MS. HARRINGTON: And an -- but when
20 Petitioner talks about the membership or participation
21 element, what he is really talking about is the
22 agreement element.

23 JUSTICE BREYER: All right.

24 MS. HARRINGTON: The government has to prove
25 that each defendant who is charged with a conspiracy

1 intentionally agreed to join the conspiracy. And there
2 is no dispute that the government proved that with
3 respect to Petitioner in this case --

4 JUSTICE BREYER: There is no more relevance,
5 is there, to the fact that there happened to be a
6 pre-1995 conspiracy, except as a matter of proof -- I
7 shouldn't say relevance -- that he happened to rob a
8 bank before 1995? I mean, in each instance, there was
9 criminal activity before 1995.

10 Now, you can use that in order to prove that
11 he was a member during '95 to 2000. That, I see. But
12 he, similar, can use the matter of withdrawal to prove
13 he wasn't a member during 1995 to 2000. And, therefore,
14 it goes to show whether you or the government have
15 proved an element of the offense, namely, that he was a
16 member between '95 and 2000.

17 MS. HARRINGTON: But, again, the element is
18 agreement, right? So we prove that he agreed to join
19 the conspiracy, and we proved that each defendant agreed
20 to join the conspiracy. We don't have to prove that
21 that agreement happened in the limitations period, as
22 long as we prove that the conspiracy continues to --

23 JUSTICE KAGAN: So how do we tell that,
24 Ms. Harrington? Because it seems to me that the crux of
25 the difference between you and your friend is that you

1 say the element is membership in the conspiracy at some
2 point, it doesn't matter whether it's within the
3 limitations period. And he says the element is
4 membership in a conspiracy in the limitations period.
5 And if he's right, a set of things follow from that; and
6 if you are right, another set of things follow.

7 So how do we determine that the -- you know,
8 that the statute of limitations -- that the timing
9 question is not baked into the elements question, that
10 it's just membership sometime, as opposed to membership
11 at a particular time?

12 MS. HARRINGTON: Well, we know it's not an
13 element for the reasons I explained because it doesn't
14 have to be charged in the indictment, it doesn't have to
15 be proved in every case, the defendant can waive it. So
16 it's not an element in the constitutional sense, for all
17 of those reasons.

18 We can also tell that, in the specific
19 conspiracy context, it's not an element because of this
20 Court's decision in Hyde from 1912. In that case, the
21 defendant, Mr. Schneider, who had raised the statute of
22 limitations defense, had not done anything to
23 participate in the charged conspiracy within what was
24 then a three-year statute of limitations period.

25 The jury was charged, he didn't do anything,

1 the court said he didn't do anything. The court said,
2 it's fine, he's still a member of the conspiracy because
3 he has not taken an affirmative act to withdraw from the
4 conspiracy.

5 So that's now we know that some sort of
6 active membership isn't an element of the crime, as long
7 as the government has proved, beyond a reasonable doubt,
8 that -- that the defendant joined the crime at some
9 point and that the -- joined the conspiracy -- excuse
10 me -- at some point, and that the conspiracy continued
11 to exist in the --

12 JUSTICE SCALIA: Didn't the government
13 charge in the indictment that the conspiracy existed
14 during this five-year period?

15 MS. HARRINGTON: Yes.

16 JUSTICE SCALIA: During the particular
17 five-year period.

18 MS. HARRINGTON: Yes.

19 JUSTICE SCALIA: Did it have to do that?

20 MS. HARRINGTON: It did not have to do that,
21 but there's no dispute --

22 JUSTICE SCALIA: And if it did not have to,
23 it would have been up to the defendant to say, the
24 statute of limitations runs on my participation, right?

25 MS. HARRINGTON: Right. And, to be clear,

1 I'm not sure it specifically used that phrase, but it
2 charged -- it charged overt acts that were part of the
3 conspiracy that happened within the five-year period.

4 JUSTICE SCALIA: But it -- it didn't say the
5 conspiracy only existed within that five-year period?

6 MS. HARRINGTON: I'm not sure what -- I'm
7 not sure exactly the language that is used in the
8 indictment, but it --

9 JUSTICE SCALIA: Well, let's assume it did.
10 Would -- would -- let's say, in a burglary indictment --
11 let's say the burglary occurred seven years ago, and
12 there is a five-year statute of limitations. If the
13 indictment just -- just accuses the individual of
14 conducting a burglary seven years ago, is that -- is
15 that indictment invalid?

16 MS. HARRINGTON: This Court -- this Court
17 has held since the Cook case that the -- the government
18 does not have to charge that -- the satisfaction of the
19 limitations period in the indictment.

20 JUSTICE SCALIA: So it's -- it's up to the
21 defendant to say, no --

22 MS. HARRINGTON: It's up to the defendant --

23 JUSTICE SCALIA: -- seven years is too long.

24 MS. HARRINGTON: -- to raise it, right.

25 JUSTICE SCALIA: So I guess the issue here

1 is whether the government's statement that the
2 conspiracy existed within this five-year period causes
3 that to be an element of the crime?

4 MS. HARRINGTON: But I think this part has
5 been clear, that it doesn't cause it to be an element of
6 the crime. I mean, back as far as the Cook case, the
7 Court said that it doesn't have to be -- timing is not
8 an element -- is not of the essence of these crimes.
9 And so it doesn't have to be charged in the indictment.

10 And, again --

11 CHIEF JUSTICE ROBERTS: But what if it is?

12 MS. HARRINGTON: But what if it is? Of --

13 CHIEF JUSTICE ROBERTS: If it is charged in
14 the indictment?

15 MS. HARRINGTON: Then that doesn't -- that
16 doesn't cause it to be an element of the crime. I
17 think, again, there is no dispute in this case that the
18 government proved that the conspiracy did exist within
19 the limitations period. I don't think Petitioner is
20 contesting that. What he is saying is that he wasn't a
21 part of that conspiracy within the limitations period.

22 CHIEF JUSTICE ROBERTS: What he's saying is
23 that it wasn't proven to be within the limitations
24 period with respect to him.

25 MS. HARRINGTON: That's true, but

1 once the -- it's true that that's his argument. But
2 once the government has proved that he willingly joined
3 the conspiracy, which it did in this case, then the law
4 presumes that every person who has willingly joined the
5 conspiracy remains a member of an ongoing conspiracy,
6 unless or until he takes some affirmative action to
7 withdraw from the conspiracy.

8 JUSTICE BREYER: I mean, I am looking at it
9 as a puzzle here because I think you could look at it
10 either way. I mean, if a person commits a burglary and
11 the indictment charges that, and he says, yes, I did, I
12 did, there is no doubt about all the elements being
13 satisfied, but it happened outside the limitation
14 period. That's in the statute of limitations area.

15 But where you charge the conspiracy taking
16 place within a period of time, as I would think you
17 usually would -- I would think the -- those words on the
18 paper almost always have a date in them -- then you
19 could look at it as a question of membership in that
20 conspiracy, the one that's charged, in which case, it's
21 a question of the elements.

22 And then, if you're in doubt as to whether
23 or not the time that he withdrew was inside or outside
24 the period, that becomes a limitations question.

25 MS. HARRINGTON: But it can't --

1 JUSTICE BREYER: And then I'm -- I'm sort
2 of -- I'm torn here. I actually can see it either way.

3 MS. HARRINGTON: I mean, I think it can't be
4 an element of the crime because, if the defendant
5 doesn't raise it, the government doesn't have to prove
6 it or disprove it, depending on how you look at it.
7 So --

8 JUSTICE BREYER: No, that isn't true. You
9 have to prove membership.

10 MS. HARRINGTON: Well, you have to prove
11 membership --

12 JUSTICE BREYER: And it happens, in this
13 instance, that you bring in a prima facie case. I'd be
14 repeating myself. And that he says withdrawal, and
15 withdrawal is designed to negate membership.

16 MS. HARRINGTON: But withdrawal does not
17 negate membership because, again, membership is really
18 just the agreement. And, in fact, a withdrawal defense
19 tends to confirm that a particular defendant agreed to
20 join a conspiracy because there is nothing to withdraw
21 from if he didn't join --

22 JUSTICE BREYER: But then the withdrawal
23 prior to the time charged negates membership in the
24 conspiracy that you have charged because there was no
25 membership during that time.

1 MS. HARRINGTON: It's true, but the
2 government has to prove that the defendant joined the
3 conspiracy and the conspiracy continued to exist. And
4 to bring you back to the Hyde --

5 JUSTICE SOTOMAYOR: Counsel, in a normal
6 case, where it's a robbery or burglary, whatever, you
7 charge the crime happened in X date, and the defendant
8 raises an affirmative defense that it's not within the
9 statute of limitations. Who bears the burden of proving
10 it does, in that situation?

11 MS. HARRINGTON: This Court stated, in
12 Grunewald, that the government bears the burden.

13 JUSTICE SOTOMAYOR: All right. So, if you
14 bear the burden in the normal statute of limitations
15 case, the issue, I think, in my mind, becomes do you
16 continue to bear that burden in a conspiracy crime?

17 MS. HARRINGTON: Yes.

18 JUSTICE SOTOMAYOR: Because -- and you still
19 have to prove -- you're saying that the elements of the
20 statute of limitation there are that there was an
21 agreement to commit a crime, this person joined it at
22 any time during the conspiracy, and the conspiracy
23 continues.

24 MS. HARRINGTON: Right.

25 JUSTICE SOTOMAYOR: You don't have to prove

1 that the defendant was part of that conspiracy or joined
2 that conspiracy during the statute of limitations;
3 that's your point.

4 MS. HARRINGTON: We don't have to prove that
5 he -- that the agreement happened in the limitations
6 period or that any particular defendant did something to
7 sort of re-agree within the limitations period. And
8 that, again, is clear from this Court's decision in
9 Hyde, where, in that case, the defendant raising the
10 limitations defense had not done anything related to the
11 conspiracy within the limitations period.

12 JUSTICE SOTOMAYOR: I think his intuitive
13 argument is, I can't be responsible for a crime I wasn't
14 a part of during the limitations period. That really is
15 the essence of his argument. And if it's your job to
16 prove that he committed the -- a robbery during the
17 limitations period, that it's your job to prove that he
18 committed the conspiracy during -- that he was part --
19 that the conspiracy -- that he was part of the
20 conspiracy during the limitations period --

21 MS. HARRINGTON: Well, what the statute --

22 JUSTICE SOTOMAYOR: I think that -- that's
23 the simplicity of his argument.

24 MS. HARRINGTON: It -- that is the
25 simplified version of his argument. I think, if you

1 look at --

2 JUSTICE SOTOMAYOR: So simplify your
3 response to me.

4 (Laughter.)

5 MS. HARRINGTON: Okay. Well, if you look at
6 Section -- if you look at Section 3282, which is the
7 statute of limitations, it says that the crime --

8 JUSTICE SOTOMAYOR: That's not a simple
9 response.

10 (Laughter.)

11 JUSTICE SOTOMAYOR: You are already way too
12 fast.

13 MS. HARRINGTON: What we have to prove is
14 that the crime was committed within the limitations
15 period. We proved that the crime was committed within
16 the limitations period because the conspiracy existed in
17 the limitations period. By operation of law, anyone who
18 has willingly joined the conspiracy at some point
19 remains a member of the conspiracy, unless or until he
20 takes an affirmative step to withdraw.

21 JUSTICE KENNEDY: Isn't it essential to your
22 argument that the very definition of a conspiracy is a
23 crime that continues over time?

24 MS. HARRINGTON: Absolutely. The way the
25 statute of limitations defense operates within the

1 conspiracy context is it asks the question whether and
2 when a conspiracy was complete. But -- but the
3 affirmative defense of withdrawal is actually an
4 affirmative defense, even within that affirmative
5 defense, because it asks the question whether a
6 conspiracy was complete as to a particular defendant.

7 And to take advantage of that affirmative --
8 affirmative defense within an affirmative defense, the
9 defendant has to take some affirmative act. And it
10 makes sense to require him to prove that he took those
11 acts.

12 JUSTICE SCALIA: I wish I had -- we had the
13 supervening indictment. Of course, it's -- it's not in
14 the Joint Appendix.

15 MS. HARRINGTON: It's very long.

16 JUSTICE SCALIA: But it -- it's described in
17 the court of appeals opinion as follows: "According to
18 the indictment in the district court and the evidence of
19 the United States at trial, during the late 1980s and
20 1990s, appellants Rodney Moore, Kevin Gray, John Raynor,
21 Calvin Smith, Timothy Handy, and Lionel Nunn, along with
22 others, some of whom were also indicted, but tried
23 separately, conspired to conduct and did conduct an
24 ongoing drug distribution business in Washington."

25 So apparently, according to that

1 description, it -- it was not charged as a conspiracy
2 during those five years. It was just charged as a
3 conspiracy.

4 MS. HARRINGTON: It was charged as an
5 ongoing conspiracy. It started before the beginning of
6 the limitations period.

7 JUSTICE SCALIA: That's right. So it would
8 have been up to the defendant to prove that the statute
9 of limitations barred -- barred his conviction.

10 MS. HARRINGTON: That's right. That's
11 why --

12 JUSTICE BREYER: Well, I suspect I agree.
13 If -- it's awfully tough to turn this on the presence or
14 absence of particular dates in the indictment, but
15 the -- the thing that motivates me -- I mean, I can see
16 it's like a rabbit-duck. You know, is it a rabbit, or
17 is it a duck? And -- and the -- the -- the thing that
18 is so rare in the law --

19 JUSTICE SCALIA: It's a jackalope, maybe. I
20 never heard of a rabbit-duck.

21 (Laughter.)

22 MS. HARRINGTON: That's really a rabbit.

23 JUSTICE BREYER: Yet it's so rare, that the
24 government doesn't have the burden of proving beyond a
25 reasonable doubt, that it suggests, when in doubt, say

1 reasonable doubt.

2 But -- so what do you want? I mean, we've
3 thought of duress. We've thought of self-defense.

4 MS. HARRINGTON: Insanity is another.

5 JUSTICE SCALIA: Insanity.

6 JUSTICE BREYER: Insanity.

7 MS. HARRINGTON: Yes.

8 JUSTICE BREYER: Anything else?

9 MS. HARRINGTON: Extreme emotional
10 disturbance. Just a constitutional matter, this Court
11 held in Patterson that the government didn't need to
12 disprove that.

13 JUSTICE ALITO: Ms. Harrington, would you
14 agree that, as this argument is developing, what is
15 really at issue has less to do with the statute of
16 limitations than the nature of conspiracy? And one view
17 is Petitioners', and it's embodied in some of the
18 questions that has been -- that have been asked, and
19 it's this: that the crime is continuing to participate
20 as a member of a conspiracy.

21 And the other view is that a conspiracy is a
22 dangerous thing. It's like rounding up a -- a pack of
23 lions or wolves or setting loose some thing that
24 continues to be a danger; and if you do that thing, by
25 joining it, you are liable, criminally, for everything

1 that happens after that, even if, at a certain point,
2 you walk away, and you do nothing.

3 Now, if -- if he's right, that it is active
4 membership, then there may be a problem for you here.
5 But if the other view is correct, that you are liable
6 for setting this thing in motion, whether or not you
7 continue to do anything active in support of it during
8 the limitations period, then you are correct.

9 Now, which is the -- which is the
10 established view of the crime of conspiracy?

11 MS. HARRINGTON: The view established by
12 this Court is that the crime of conspiracy continues,
13 and once a person joins the conspiracy, he or she is
14 liable for all the acts of his co-conspirators that were
15 reasonably foreseeable in furtherance of the conspiracy.
16 And that is true, even if that person, once he joins the
17 conspiracy, doesn't ever do anything else --

18 JUSTICE GINSBURG: Yes, but you recognize --
19 you recognize, as I think Justice Alito's question
20 doesn't, that there is -- there is a withdrawal defense
21 and the question is how do you allocate the proof
22 burden?

23 So your case accepts that there is a
24 withdrawal defense. Indeed, the judge gave a charge to
25 the jury on -- so the contest, as I understand it, the

1 difference between the two of you is you say, defendant
2 can say, I withdrew. If he does that, he has to prove
3 it. And the defendant is saying, I have to produce
4 enough, so that a jury could find I withdrew, but you
5 have the ultimate burden of persuasion.

6 MS. HARRINGTON: That's right. And the
7 Petitioners' view is grounded in due process concerns.
8 Our view is that it is not a matter of due process
9 because lack of withdrawal is not an element of the
10 crime of conspiracy.

11 So once you take due process out of the
12 equation, then you have to ask what -- where would
13 Congress have understood the burden -- the allocation of
14 burdens to be, when it enacted these conspiracy statutes
15 in 1970?

16 And as a matter of logic, as a matter of
17 history, as a matter of policy, there is no reason to
18 think Congress would have thought the burden of
19 persuasion to be anywhere other than on the defendant.

20 JUSTICE KENNEDY: And I suppose a conspiracy
21 is defined by relation to its criminal objects, not to
22 its membership. If there's five people that conspired
23 to rob a bank and one of the conspirators has said, I'm
24 out of here, I withdraw from the conspiracy,
25 metaphysically, you might argue, well, it's a new

1 conspiracy because it's a new group.

2 But there is no support of the law for that,
3 I take it.

4 MS. HARRINGTON: No, this Court has said the
5 opposite. It has said that -- you know, people can come
6 and go in a conspiracy and --

7 JUSTICE KENNEDY: Because it's the criminal
8 objects that define the conspiracy?

9 MS. HARRINGTON: That's right. And, again,
10 there's no dispute in this case that the conspiracy was
11 ongoing.

12 CHIEF JUSTICE ROBERTS: But
13 you've indicted -- you haven't indicted a conspiracy.
14 You've indicted an individual, and it's not clear to me
15 why you don't have to show that that was -- that that
16 individual's conduct was within the statute of
17 limitations period.

18 MS. HARRINGTON: Because once --

19 CHIEF JUSTICE ROBERTS: At least, when he
20 comes forward with -- under the burden of production,
21 with evidence suggesting the opposite.

22 MS. HARRINGTON: Well, again, if we can take
23 the due process part off the table -- because we think
24 it's not an element of lack of withdrawal, then you ask
25 sort of, you know, what -- how would Congress have

1 understood the state of the law to be when it enacted
2 these crimes, that's how the Court approached this
3 question as to duress in Dixon.

4 I think, as a matter of logic, because the
5 government can prove that someone is liable for a
6 conspiracy by proving that he joined a conspiracy at
7 some point and that the conspiracy existed in the
8 limitations period, it wouldn't make sense to require
9 the government to disprove withdrawal, once it's
10 asserted --

11 CHIEF JUSTICE ROBERTS: Well, but Mr. Kramer
12 says it's not that big a deal, I mean, you don't have to
13 do -- he says you don't have to do anything at all.

14 MS. HARRINGTON: I think that's kind of a
15 remarkable assertion. If what he's saying is we have to
16 be disprove withdrawal, once the defendant asserts that
17 beyond a reasonable doubt, it's hard to imagine why the
18 government would ever -- once a defendant makes a prima
19 facie case of withdrawal, when the government would ever
20 just say, oh, well, we'll sort of rest on our laurels
21 and rest on the -- the evidence we have proving that he
22 joined the conspiracy outside the limitations period.

23 JUSTICE SCALIA: Suppose this thing doesn't
24 come up in the -- in the statute of limitations context.
25 Suppose it comes up in the context of whether this

1 defendant is liable for an act committed by the
2 co-conspirators after he withdrew. So it's the same
3 issue of whether -- whether he withdrew or not, before
4 the murder of somebody, okay?

5 He said -- you know, before that occurred, I
6 was out of the conspiracy. What do our cases say
7 about -- about proving it in that context? Is the
8 burden on the defendant? Or is the burden on the
9 prosecution?

10 MS. HARRINGTON: Your cases don't say
11 anything about that. Our view is that the burden would
12 be --

13 JUSTICE KENNEDY: And I didn't hear you.

14 MS. HARRINGTON: Your cases don't say
15 anything about that question, so our view would be that
16 the -- the burden stays on the defendant to prove that
17 he withdrew from a conspiracy in that context. The
18 Pinkerton liability isn't at issue here, so you don't
19 need to -- to wrap that up into this case, but our --
20 our view would be the same.

21 JUSTICE BREYER: Nothing to do with statute
22 of limitations.

23 CHIEF JUSTICE ROBERTS: Justice Kennedy?

24 JUSTICE KENNEDY: I was just -- I was
25 curious. In 1997, the Petitioner did report the

1 identity of another cooperating witness to Gray. You
2 don't -- you don't rely on that as showing that he was,
3 indeed, part of the conspiracy? That's just irrelevant
4 to your case?

5 MS. HARRINGTON: No, we -- we do rely on
6 that. That's mentioned in our brief -- at the back end
7 of the brief where we talk --

8 JUSTICE KENNEDY: Well, that was -- it was
9 kind of a throwaway line. But why isn't that
10 dispositive for you?

11 MS. HARRINGTON: No, I think it is
12 dispositive. And that was the reason we gave for the
13 Court to deny the petition for Writ of Certiorari
14 because there is plenty of evidence in this case that
15 this defendant was in fact a member of the conspiracy.
16 There's evidence that the leaders of the conspiracy gave
17 him drugs and money.

18 First of all, there's evidence that the
19 reason he went to prison was to help out the leader of
20 the conspiracy. There was evidence he was paid back
21 because they gave him drugs and money while he was in
22 prison.

23 CHIEF JUSTICE ROBERTS: All of this is
24 questions for the jury under -- under the Petitioners'
25 view, right?

1 MS. HARRINGTON: Yes, certainly. I mean,
2 under -- under both views -- you know, it all -- all the
3 evidence goes to whether -- you know, he had joined the
4 conspiracy and whether he proved withdrawal.

5 JUSTICE KAGAN: Could I make sure I
6 understand one part of your argument, Ms. Harrington?
7 The conclusion that timing -- the timing is not an
8 element. Now, take Justice Sotomayor's example of
9 something which is not a conspiracy at all, let's say
10 somebody commits a robbery, and you have to show that
11 the person has committed a robbery and that the person
12 brings up the question of timing.

13 You also have the burden of persuasion on
14 that. But would the timing be an element in that case
15 or not?

16 MS. HARRINGTON: Not.

17 JUSTICE KAGAN: And so you are essentially
18 saying that this case should be treated just as every
19 other case. You happen to have the burden of persuasion
20 if somebody says the statute of limitations has been
21 violated, but the question of when conduct occurred is
22 never an element.

23 MS. HARRINGTON: It's never an element. It
24 is true that the government -- if a defendant raises a
25 statute of limitations defense, the government has the

1 burden of proving that the crime was committed within
2 the limitations period. This Court said that in
3 Grunewald. It did not offer any explanation for that,
4 but we have accepted that as our burden.

5 JUSTICE KAGAN: Why is it then -- I mean,
6 why would Grunewald be right, that you do have the
7 burden if, in fact, this isn't an element?

8 MS. HARRINGTON: I think, just because it
9 is an -- it is a burden that is placed on the government
10 by Congress in Section 3282. I think -- I think a
11 reason one could think that it makes sense is that the
12 government already has to prove all the things that it
13 needs to prove, to prove that the crime actually
14 happened.

15 And generally, in proving that a crime
16 actually happened beyond a reasonable doubt, you also
17 prove when the crime actually happened. And so it
18 doesn't really add very much to what the government's
19 burden already is in proving the crime.

20 But that sort of leads me into sort of the
21 policy reasons for not allocating a burden of persuasion
22 to the government as to the issue of withdrawal. And
23 there are sort of four big reasons why Congress wouldn't
24 have understood the burden to be -- for policy
25 reasons -- wouldn't have understood the burden to be on

1 a defendant as to the issue of withdrawal.

2 The first is that the defendant will almost
3 always be in a better position to have the information
4 about whether he withdrew, except in cases where he
5 withdraws by making a clean rest with the government, in
6 which case, it's hard to imagine he's going to be
7 indicted for -- for the indictment past that period,
8 except in those cases, he will know what he said in
9 secret to his co-conspirators.

10 Second, the government will also be
11 prevented from bringing up evidence to rebut an
12 assertion of withdrawal because it can't make a
13 defendant testify, and it often won't be able to make
14 his co-conspirators testify.

15 Third, a defendant doesn't have to give any
16 advanced notice of his intention to rely on a withdrawal
17 defense, and so often, he can scuttle the defendant's --
18 the government's ability to procure any other evidence
19 it may be able to procure relevant to the issue of -- of
20 withdrawal.

21 And, fourth, Petitioner's role would
22 encourage spurious assertions of withdrawal because it
23 has -- it could have the effect of essentially making
24 the government prove something extra. It already has to
25 prove that he joined the conspiracy willingly, that the

1 conspiracy existed in the limitations period.

2 But under the government's -- under the
3 Petitioner's role -- excuse me -- the government would
4 also have to prove that the defendant essentially took
5 some other act to show his membership or somehow
6 re-agreed to the conspiracy --

7 CHIEF JUSTICE ROBERTS: Well, but that last
8 point seems to me spurious itself because, to prove
9 withdrawal, he's got to accept the fact that he was in
10 the conspiracy in the first place. So if he doesn't
11 have a good withdrawal defense, it's unlikely that he
12 would raise it because it would cost him any argument he
13 has against participation in a conspiracy in the first
14 place.

15 MS. HARRINGTON: But in cases where -- such
16 as this, where a defendant goes through a period of
17 inaction with respect to the conspiracy, which this
18 Court said in Hyde is not enough to withdraw, then there
19 would be an incentive to raise a spurious assertion of
20 withdrawal because it would require the government to
21 sort of -- to rebut that by proving that the defendant
22 had done something within that period, which it doesn't
23 have to prove in order to establish liability.

24 JUSTICE SCALIA: I suppose he could present
25 his defense in the alternative, I didn't belong to the

1 conspiracy, and anyway, I withdrew. I mean, he can make
2 both of those points, can't he?

3 MS. HARRINGTON: He certainly can. I think
4 there's a good deal of risk in that for a defendant.

5 CHIEF JUSTICE ROBERTS: Well, but, I mean,
6 that works in a civil case. But, I mean, in a criminal
7 case, it's kind of a big thing to say -- begin my -- my
8 first argument is that, I withdrew from this horrendous
9 conspiracy that's been going on.

10 MS. HARRINGTON: That --

11 CHIEF JUSTICE ROBERTS: Or then I wasn't a
12 part of it after that.

13 That's a little different in a criminal
14 context.

15 MS. HARRINGTON: It's true. And the theory
16 of defense in this case was, in fact, that there were
17 many separate conspiracies, not that any particular
18 person had withdrawn, and it only came up, as my friend
19 pointed out, because the jury asked a question about it.

20 If I can just sort of wrap up on a -- on a
21 broader note? A defendant does not become liable for a
22 criminal conspiracy casually. As the jury was charged
23 in this case, the government has to prove that every
24 defendant was aware of the existence of the conspiracy,
25 that every defendant understood that it had an illegal

1 objective, and that every defendant willingly agreed to
2 participate in the conspiracy with the aim -- aim of
3 advancing that illegal objective.

4 CHIEF JUSTICE ROBERTS: You have -- you have
5 to prove that every defendant did?

6 MS. HARRINGTON: That every defendant
7 willingly joined the conspiracy, yes, with the
8 understanding that they were advancing some illegal
9 objective, the objective of the conspiracy. Now, that's
10 a high evidentiary --

11 CHIEF JUSTICE ROBERTS: Let me -- so you
12 charge ten people as participating in this conspiracy,
13 and the jury determines that one wasn't, then
14 everybody's off the hook?

15 MS. HARRINGTON: No, no, no. No. I'm
16 sorry.

17 CHIEF JUSTICE ROBERTS: So you don't have to
18 prove --

19 MS. HARRINGTON: To prove liability for each
20 person, you have to prove that that person --

21 CHIEF JUSTICE ROBERTS: Yes.

22 MS. HARRINGTON: -- satisfied all these
23 things. I'm sorry --

24 CHIEF JUSTICE ROBERTS: You have to treat
25 them as individuals.

1 MS. HARRINGTON: That's what I meant, yes,
2 yes.

3 CHIEF JUSTICE ROBERTS: Which is what your
4 friend is trying to argue for in this case?

5 MS. HARRINGTON: Right. But that is -- this
6 is high evidentiary burden that the government has to
7 bear to prove that each defendant took some affirmative
8 action to get into the conspiracy. And once the -- once
9 the government proves that a defendant was a member of
10 the conspiracy, then it's on the defendant to prove --
11 to take some affirmative action to get himself out of
12 the conspiracy.

13 And it only makes sense to require him to
14 prove that he took that act, instead of requiring the
15 government to prove negative that he didn't take that
16 act in every case.

17 If there are no further questions?

18 JUSTICE GINSBURG: Is this -- the burden
19 allocation, is this a more hypothetical academic
20 question? I mean, you pointed out that you had ample
21 evidence to show that he remained a member of the
22 conspiracy.

23 So does the allocation of burden of
24 persuasion to the defendant versus proof of production
25 to the defendant, persuasion to the government, does it

1 really make much difference? Does it have much
2 practical consequence?

3 MS. HARRINGTON: I mean, it would not have
4 made a difference in this case, for the reasons you
5 suggest, we had good evidence that he had active
6 participation within the limitations period. It can
7 make a difference in some other cases -- you know, I
8 think, as a practical matter, most criminal conspiracies
9 that are charged in the Federal system involve activity
10 that was more recent than some of the activity that was
11 involved in this case.

12 But it certainly can come up, and -- you
13 know, if we didn't have the type of evidence that we did
14 about this particular defendant's behavior in prison,
15 then it would have been hard to rebut his assertion of
16 withdrawal caused by his incarceration. So it
17 definitely can come up.

18 CHIEF JUSTICE ROBERTS: Well, when you say
19 it wouldn't have made a difference in this case, you're
20 basically saying you had some good evidence. But a jury
21 could have always decided against you, right?

22 MS. HARRINGTON: Oh, it certainly could
23 have, right. It could have decided against us on the
24 whole thing, but --

25 CHIEF JUSTICE ROBERTS: Well, but I think

1 it's a little much to say it wouldn't make a difference
2 because the jury would definitely have ruled in your
3 favor.

4 MS. HARRINGTON: Okay. I -- yeah. I didn't
5 mean to be brazen about it. We think we had good
6 evidence that the Petitioner continued in the conspiracy
7 in this case.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Ms. Harrington.

10 Mr. Kramer, you have four minutes remaining.

11 REBUTTAL ARGUMENT OF A.J. KRAMER

12 ON BEHALF OF THE PETITIONERS

13 MR. KRAMER: Thank you.

14 I would just like to start with one quick
15 point. My friend said that the government would never
16 rest on its laurels, but that's precisely what they did
17 in this case. It was 12 days into jury deliberation
18 when they said, go ahead and instruct the jury on
19 withdrawal, so they rested on the evidence that had been
20 presented in the trial. So that's precisely what they
21 did.

22 JUSTICE KAGAN: Well, that's because they
23 thought that you had the burden. And it -- it does
24 strike me that, if you are right that this is an
25 element -- membership in the conspiracy at a particular

1 time -- and the government has the burden, this idea
2 that the government could -- you know, just sort of just
3 say, well, we don't have any evidence, but we think you
4 should presume that we're right, I mean, that's -- the
5 government couldn't do that if you are right.

6 MR. KRAMER: The -- the government could
7 just rest on whatever they had presented originally and
8 tell the jury that's plenty to prove beyond -- to meet
9 our burden of proof.

10 JUSTICE KAGAN: Well, if you make an
11 assertion, and they don't really respond to the
12 assertion and -- you win.

13 MR. KRAMER: It -- I mean, it happens all
14 the time. The defendants say, I didn't do it, and the
15 government presents their evidence and say, that defense
16 is nonsense, we presented overwhelming evidence.

17 In fact, in this case, also they did -- they
18 didn't ask for the instruction because they thought it
19 was our burden. They agreed, in the end, that the jury
20 should be instructed --

21 JUSTICE ALITO: I think the crux of your
22 argument is that the government is going to have to
23 prove, beyond a reasonable doubt, active participation
24 in the conspiracy during the statute of limitations
25 period because it is impossible for the prosecution to

1 prove beyond a reasonable doubt that on no day, during a
2 five-year period, did the defendant withdraw from the
3 conspiracy.

4 It simply can't be done. This person was
5 under 24-hour video surveillance for the whole five-year
6 period.

7 MR. KRAMER: All they have to prove,
8 Justice Alito, is that the person was a member of the
9 conspiracy within the limitations period. That could be
10 done by the inference that they were a member outside
11 the limitations period and say that there was just
12 insufficient -- that the --

13 JUSTICE ALITO: And say what? That there
14 was insufficient evidence to prove --

15 MR. KRAMER: No.

16 JUSTICE ALITO: -- the opposite of what they
17 have to prove?

18 MR. KRAMER: No, that they -- insufficient
19 evidence doesn't create a reasonable doubt in what they
20 are required to prove, which is membership within the
21 limitations period.

22 JUSTICE ALITO: I thought you argue that
23 every day, that there is -- that something has to be
24 proved beyond a reasonable doubt because the prosecution
25 hasn't provided sufficient evidence?

1 MR. KRAMER: It is. And the prosecution
2 stands up and says, we presented plenty of evidence
3 that -- that there is no reasonable doubt here at all.
4 And that happens every day, needless to say, that people
5 are convicted by that argument when --

6 JUSTICE KAGAN: Well, Mr. Kramer, if they
7 really have to prove beyond a reasonable doubt that
8 there is membership in the conspiracy during the
9 limitations period, they couldn't just come in and say,
10 well, there's membership in the conspiracy before the
11 limitations period, and, you know, you should assume
12 that it continued.

13 I mean that's not a
14 beyond-a-reasonable-doubt kind of proof, is it?

15 MR. KRAMER: They get a permissive
16 inference. And there are many cases when I think that
17 would be proof beyond a reasonable doubt for a jury,
18 absent some conflicting evidence presented by the
19 defendant, more than just a proffer.

20 JUSTICE ALITO: Couldn't you argue they have
21 the burden of proving that the defendant did not
22 withdraw during this five-year period? They have the
23 burden of proving that. And did you hear any evidence
24 from them that -- did you hear evidence disproving
25 that -- that he didn't withdraw during that period?

1 There is no evidence on that.

2 MR. KRAMER: Of course --

3 JUSTICE ALITO: You can make that argument?

4 MR. KRAMER: Yes. Or did we prove -- did
5 you hear any evidence -- that there was no evidence that
6 Mr. Smith was a member during the --

7 JUSTICE BREYER: Your -- I'm sorry. The
8 Thomas Crown Affair again, all the evidence shows he
9 took \$10,000 from the bank. He testifies and says, oh,
10 I was going to give it back, okay? The prosecution puts
11 on nothing. The jury says, are you kidding?

12 MR. KRAMER: Right.

13 JUSTICE BREYER: Yes.

14 MR. KRAMER: I mean, and that happens every
15 day, I think, in cases where the prosecution just stands
16 up and says, you heard that evidence, nobody would think
17 that is a reasonable doubt, that someone was not a
18 member.

19 Thank you very much.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 11:01 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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