No. 23-638

In the Supreme Court of the United States

KENNETH WENDELL RAVENELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, who failed to present any evidence in support of a statute-of-limitations affirmative defense, was nonetheless entitled to a jury instruction that the government was required to prove that his non-overt act conspiracy continued during the limitations period.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Md.):

United States v. *Ravenell*, No. 19-cr-449 (June 22, 2022)

United States Court of Appeals (4th Cir.):

United States v. *Ravenell*, No. 22-4369 (Apr. 25, 2023)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 66 F.4th 472. The order of the district court (Pet. App. 80a-93a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2023. A petition for rehearing was denied on July 14, 2023 (Pet. App. 58a-71a). On September 7, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 13, 2023. On October 25, 2023, the Chief Justice further extended the time to and including December 11, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Judgment 1. He was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-57a.

1. Petitioner is a criminal defense attorney who conspired to use his position as a partner at his law firm to launder the illegal proceeds of Richard Byrd and Leonaldo Harris, who led drug-trafficking organizations. Pet. App. 4a.

a. Petitioner had known Byrd since the 1990s, when petitioner represented Byrd in connection with charges of firearms and narcotics offenses. Presentence Investigation Report (PSR) ¶ 9; Pet. App. 5a. From 2009 through 2014, Byrd sold thousands of pounds of marijuana, generating millions of dollars in cash. PSR ¶ 10; Pet. App. 4a-5a. Petitioner gave Byrd "valuable advice" on "how to evade law enforcement detection, how to launder drug proceeds through businesses and real estate investments, and how to then mix drug profits with the money generated from these other ventures to conceal their illicit source." Pet. App. 5a. For example, petitioner advised Byrd to launder proceeds through "cash-focused" business such as concert promotion companies. *Ibid.* Byrd paid petitioner "with stacks of cash * * * for his services in evading law enforcement." *Ibid.*

Around February 2011, Byrd was arrested and became a client of petitioner's (now former) law firm. Pet. App. 5a. Petitioner then began laundering Byrd's drug

proceeds "directly" using law firm accounts. *Ibid.* Byrd paid petitioner $1.8 million of drug proceeds and commingled those illegitimate funds with legitimate payments for legal fees. *Id.* at 6a. From the $1.8 million deposited, petitioner paid approximately $1.1 million to professional service providers and investment opportunities "to benefit Byrd." *Ibid.*

In early 2014, Byrd and Darnell Miller (another marijuana distributor) discussed "connecting their marijuana drug networks" with petitioner as an intermediary collecting the profits. Pet. App. 20a. Byrd was again arrested in April 2014, but gave Miller's number to petitioner "'so they could continue on the operation' without Byrd." *Ibid.* (citation omitted). In May 2014, petitioner offered to launder Miller's drug proceeds "in the same way that [petitioner] did [for] Byrd." *Ibid.* But after authorities raided petitioner's law firm in August 2014, Miller "decided not to move forward with this partnership." *Id.* at 21a.

As of August 28, 2014, petitioner's law firm's escrow account still contained $12,000 credited to Byrd. Pet. App. 20a. And earlier that month, petitioner made a payment to a tow-truck company on Byrd's behalf for storage of Byrd's vehicles that were seized following his 2011 arrest. *Id.* at 21a. Petitioner "remained Byrd's lawyer until October 10, 2014." *Id.* at 19a.

b. In June 2013, petitioner began representing Harris, who had been charged with federal narcotics offenses, and began laundering Harris's drug proceeds as well. PSR ¶ 32; Pet. App. 6a. Harris paid petitioner more than $350,000 in drug proceeds through Harris's associate, with petitioner's knowledge of "exactly where the money was coming from." Pet. App. 6a. Harris made his last payment to petitioner on April 25, 2014,

but petitioner thereafter "demanded more money from [Harris] to continue his representation and stated that he would continue with that representation should he receive the money." *Id.* at 22a. Harris's associate continued her "efforts to collect drug proceeds to pay [petitioner]." *Ibid.* After she received a target letter from the government in November 2014, she destroyed the records of her collection efforts and attempted to contact petitioner. *Ibid.* Petitioner withdrew as Harris's counsel in that same month. *Ibid.*

2. A grand jury in the District of Maryland charged petitioner with one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d); one count of conspiring to launder money, in violation of 18 U.S.C. 1956(h); one count of conspiring to distribute and possess with intent to distribute marijuana, in violation of 21 U.S.C. 846; one count of conspiring to commit offenses against the United States, in violation of 18 U.S.C. 371; one count of obstructing an official proceeding, in violation of 18 U.S.C. 1512(c)(2) and 2; and two counts of falsifying records, in violation of 18 U.S.C. 1519. Pet. App. 94a-158a.

Petitioner proceeded to trial. Pet. App. 3a. After the government rested its case, petitioner moved for a judgment of acquittal, arguing that the government had not shown that the conspiracy existed past July 2, 2014—when the applicable period under the five-year statute of limitations began. *Id.* at 8a; see 18 U.S.C. 3282(a). The district court denied the motion, observing that the government had presented evidence of conduct in furtherance of the conspiracy occurring after that date. Pet. App. 8a.

Petitioner then presented evidence in his defense but "offered no affirmative evidence" that the conspiracy

terminated or that he withdrew before July 2, 2014. Pet. App. 17a. After resting his case, petitioner renewed his motion for a judgment of acquittal based on the statute of limitations. *Id.* at 8a. The district court again denied the motion because the evidence showed that the conspiracy continued past the statute of limitations, and there was no evidence that petitioner had withdrawn. *Ibid.*

Petitioner then requested a jury instruction stating that the government was required to prove beyond a reasonable doubt that an overt act occurred after July 2, 2014. Pet. App. 9a, 13a-14a. The district court declined to provide the instruction because "no overt act was required" for the conspiracy charge at issue. *Id.* at 9a; see *Whitfield* v. *United States*, 543 U.S. 209, 219 (2005).

The next day, petitioner submitted a revised jury instruction stating that the government was required to prove by a preponderance of the evidence that the conspiracy continued after the statute of limitations. Pet. App. 9a, 13a. The government objected, noting that petitioner had not cited any authority for the burden of proof, that the instruction lacked any explanation of the preponderance of the evidence standard, and that the instruction failed to instruct on withdrawal and risked confusing the jury by introducing additional concepts. C.A. App. 2879.

The district court declined to give the revised instruction, explaining that "the burden of proof and issues like withdrawal" had not been "properly framed for the jury and [the proposed instructions] would quite clearly confuse the jury." C.A. App. 2880. The court also stated that the statute-of-limitations issue could be "dealt with as a matter of law." *Ibid.*

The jury found petitioner guilty of money-laundering conspiracy but acquitted him on the other charges. Pet. App. 7a. The district court sentenced petitioner to 57 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-38a. The court found, *inter alia*, that the district court did not abuse its discretion when it declined to give petitioner's proposed jury instructions. *Id.* at 13a-15a.

The court of appeals first observed that if the district court had used either of petitioner's instructions, it would have committed legal error. Pet. App. 13a. The court explained that the first jury instruction incorrectly added an element by requiring the government to prove beyond a reasonable doubt that an overt act in furtherance of the conspiracy occurred. *Id.* at 13a-14a (citing *Whitfield*, 543 U.S. at 219). The court explained that the second instruction was likewise "legally incorrect on its own terms"—as petitioner himself had "admit[ted]" on appeal —because if "the statute of limitations is an element," as petitioner contended, then the instruction included the wrong standard of proof. *Id.* at 14a. And because "[j]udges are never obligated to give legally improper instructions," the court of appeals determined that "[t]he district court properly declined to give the erroneous instructions tendered here." *Id.* at 15a.

The court of appeals added that petitioner's argument for a statute-of-limitations instruction "misunderstands the difference between an overt act conspiracy and a non-overt act conspiracy." Pet. App. 15a. The court explained that while an overt-act conspiracy requires the government to show that a coconspirator took an act in furtherance of the conspiracy, a non-overt

act conspiracy (such as money laundering) requires the government to show only the act of agreement, after which the conspiracy is presumed to continue. *Id.* at 15a-16a (citing *United States* v. *Shabani*, 513 U.S. 10, 13-14 (1994)). The court stated that the "dispositive consideration for a statute of limitations defense" for a non-overt act conspiracy was therefore whether petitioner affirmatively withdrew from the conspiracy, or the conspiracy ended, before the limitations period commenced. *Id.* at 16a (citation and internal quotation marks omitted).

The court of appeals observed that petitioner had "offered no affirmative evidence showing that the conspiracy was terminated or that he affirmatively withdrew from the conspiracy" prior to the limitations date and therefore held that petitioner was not entitled to a jury instruction on the statute of limitations. Pet. App. 17a. The court stated that requiring the government prove an overt act showing the conspiracy continued past the statute of limitations would "eviscerate the line between non-overt act and overt act conspiracies" and would "contradict[] the text Congress enacted." *Ibid.* And the court moreover found that, even though it had not been required to do so, the government had in fact presented evidence of conduct in furtherance of the conspiracy during the limitations period. *Id.* at 19a-22a.

Then-Chief Judge Gregory dissented. Pet. App. 43a-57a. In Judge Gregory's view, the district court should have fashioned a legally correct jury instruction about the statute of limitations. *Id.* at 44a-47a. Judge Gregory agreed that once the government established the existence of a non-overt act conspiracy, it is "presumed to continue unless or until the defendant shows that it was terminated or [the defendant] withdrew from it."

Id. at 49a (citation omitted). But he parted ways with the majority on whether a limitations instruction had been required in the circumstances of this particular case. *Id.* at 51a-53a.

4. The court of appeals denied en banc review. Pet. App. 59a.

Judge Wilkinson concurred in the denial of rehearing en banc, observing that the "one point of difference between the majority and dissent is heavily factual." Pet. App. 60a; see *id.* at 60a-63a. Judge Wilkinson emphasized that district courts have "discretion on whether to include particular jury instructions because instructions proceed from the evidence." *Id.* at 60a. And he explained that in this case, the "panel majority found no abuse of discretion" in the district court's ruling that there was "no issue of triable fact that would justify the [statute-of-limitations] instruction" that petitioner requested. *Ibid.*

Judge Gregory, joined by Judges King, Wynn, and Thacker, dissented from the denial of en banc rehearing. Pet. App. 64a-71a. They agreed that because petitioner "was convicted of a non-overt act conspiracy * * * the government was not required to prove that an overt act occurred within the limitations period," *id.* at 68a, and that petitioner "must demonstrate that he withdrew from the conspiracy, or the conspiracy terminated, before" the statute of limitations, *id.* at 69a. They disagreed with the majority, however, because in their view there were "numerous facts in the record" showing that "the conspiracy terminated outside of the limitations period." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 15-35) that the district court should have instructed the jury that the government was

required to prove beyond a reasonable doubt that his conspiracy to launder money continued during the limitation period, even though he presented no affirmative evidence in support of a statute-of-limitations defense. The court of appeals correctly rejected that contention. Its decision does not conflict with any decision of this Court, and petitioner overstates the extent of any disagreement in the courts of appeals, relying on decisions that do not directly address the question of when a jury instruction is necessary and do not account for recent and relevant precedent from this Court. At bottom, the dispute in this case is a factbound disagreement as to whether petitioner adequately raised the statute-of-limitations defense in the district court. That question does not warrant further review.

1. The court of appeals found that the district court did not abuse its discretion in declining to include jury instructions regarding the statute of limitations based on its determination that petitioner did not raise an "issue of triable fact" as to whether he affirmatively withdrew from the conspiracy or the conspiracy terminated before the limitations period began. Pet. App. 60a. The court correctly applied this Court's precedents and the plain text of the statute.

a. The money-laundering conspiracy provision, 18 U.S.C. 1956(h), penalizes entering into an agreement to launder money. Because the statute's text "does not expressly make the commission of an overt act an element of the conspiracy offense, the Government need not prove an overt act to obtain a conviction." *Whitfield* v. *United States*, 543 U.S. 209, 214 (2005).

"Since conspiracy is a continuing offense," a defendant who joins a conspiracy "continues to violate the law through every moment of the conspiracy's existence."

Smith v. *United States*, 568 U.S. 106, 111 (2013) (citation, internal quotation marks, and brackets omitted). In a conspiracy that has a continuing purpose rather than a "distinct period of accomplishment," a conspirator is offending until "full fruition" of the conspiracy's purposes is "secured" or until the conspirator withdraws by engaging in "some act to disavow or defeat the purpose." *Hyde* v. *United States*, 225 U.S. 347, 369 (1912). And for a non-overt act conspiracy like a conspiracy to launder money, a defendant's "responsibility * * * endures even if [the defendant] is entirely *inactive* after joining it." *Smith*, 568 U.S. at 114.

Prosecution of such a conspiracy is only untimely if it is commenced more than five years after the defendant withdrew from the conspiracy or the conspiracy terminated entirely. *Smith*, 568 U.S. at 111, 113. And "[c]ommission of the crime within the statute-of-limitations period is not an element of [a] conspiracy offense." *Id.* at 112 (emphasis omitted). Accordingly, the government is not required to show "active participation in the conspiracy during the limitations period." *Id.* at 114; see *id.* at 112-113 ("Passive nonparticipation" is "not enough to sever the meeting of the minds that constitutes the conspiracy.").

Instead, the statute of limitations is a "defense that becomes part of a case only if the defendant presses it in the district court." *Musacchio* v. *United States*, 577 U.S. 237, 247 (2016). As this Court has long held, the defense "must be pleaded or given in evidence by the accused" in order to be adequately raised. *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 181 (1872); see *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917) ("The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal

cases."); see also *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) (describing common-law rule).

b. Together, those principles show the proper procedure for handling the statute of limitations in a non-overt act conspiracy prosecution like the money-laundering conspiracy at issue here.

The government must, of course, prove the elements of the conspiracy to launder money beyond a reasonable doubt. *Whitfield*, 543 U.S. 219. Once the government meets its burden to show the existence of a conspiracy to launder money, the conspiracy is presumed to continue. See *United States* v. *Seher*, 562 F.3d 1344, 1364 (11th Cir. 2009); *United States* v. *Eppolito*, 543 F.3d 25, 48 (2d Cir. 2008), cert. denied, 555 U.S. 1148 (2009); *United States* v. *Hamilton*, 689 F.2d 1262, 1268 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983); cf. *Hyde*, 225 U.S. at 369. But because the statute of limitations is not an element of the offense, the government is not required to prove it beyond a reasonable doubt in the course of the case. *Smith*, 568 U.S. at 110. Nevertheless, the government may (and often does) present evidence showing that an overt act occurred within the statute-of-limitations period. *United States* v. *Green*, 599 F.3d 360, 372 (4th Cir.), cert. denied, 562 U.S. 913 (2010).

To raise the statute of limitations as a defense, the defendant must meet a burden of production by identifying evidence that the conspiracy terminated or the defendant affirmatively withdrew. See *Cook*, 84 U.S. (17 Wall.) at 181; *Smith*, 568 U.S. at 113; *Hyde*, 225 U.S. at 369. When the defendant does so, "the Government then has 'the right to reply or give evidence' on the limitations claim." *Musacchio*, 577 U.S. at 247 (quoting *Cook*, 84 U.S. (17 Wall.) at 179). And if the defendant meets the burden of production such that the issue is

properly joined, the defendant is entitled to jury instructions on the statute of limitations that reflect the burdens of proof. See generally *United States* v. *Harriston*, 329 F.3d 779, 783 (11th Cir. 2003) (per curiam) (summarizing burdens for non-overt act conspiracies).

If the defendant does not adequately raise the affirmative defense, however, the court need not provide the jury with any such instruction. See *Mathews* v. *United States*, 485 U.S. 58, 63 (1988) ("[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in [the defendant's] favor."); see also *Smith*, 568 U.S. at 107, 113 (noting that the statute-of-limitations analysis applies "when the defendant produces some evidence supporting [a statute-of-limitations] defense").

2. In this case, the court of appeals appropriately applied those particular principles in finding that the district court did not abuse its discretion in declining to instruct the jury on an affirmative limitations defense.

a. As the court of appeals explained, "[t]he dispositive consideration for a statute-of-limitations defense in a non-overt act conspiracy is whether [the defendant] withdrew from the conspiracy or the conspiracy ended outside the five-year limitations period." Pet. App. 16a (citation and internal quotation marks omitted); see *id.* at 49a (Gregory, C.J., dissenting) (agreeing with legal test). And the court found evidence of termination or withdrawal to be absent from the record here. See *id.* at 17a-22a.

The court of appeals correctly observed that petitioner "offered no affirmative evidence" showing either withdrawal or termination prior to the statute of limitations, Pet. App. 17a-18a, and the petition for a writ of

certiorari does not claim otherwise. Nor could petitioner point to evidence in the government's case-in-chief that might itself allow the jury to infer that the conspiracy terminated before the limitations period began. As the court of appeals observed, the government in fact presented evidence that the conspiracy continued into that period. See *id.* at 19a-22a.

Thus, recognizing the "substantial discretion" afforded to "district judges in fashioning jury instructions," Pet. App. 19a, and the district court's "superior position . . . to evaluate evidence and formulate the jury instructions," *id.* at 13a (citation omitted), the court of appeals correctly found that petitioner's request for a limitations instruction was insufficient to compel the district court to give one, see *id.* at 22a. The limitations issue had not been part of the case, and the district court was not required to insert it at that late stage.

b. Petitioner's contrary arguments lack merit. Petitioner contends that, despite his failure to show a triable issue about the timeliness of the prosecution, he was nonetheless entitled to a jury instruction because the government "had to prove to the jury beyond a reasonable doubt that the money-laundering conspiracy * * * continued into the [statute of] limitations period." Pet. 21; see Representatives Glenn F. Ivey and Hank Johnson Amicus Br. 4. That approach is unsound.

Adopting that approach would contravene this Court's precedent by converting an affirmative defense into an element that the government must prove in every case. See *Musacchio*, 577 U.S. at 247; *Smith*, 568 U.S. at 114; *Cook*, 84 U.S. (17 Wall.) at 181. As petitioner would have it, all that a defendant would need to do to obtain to a statute-of-limitations instruction would

be to request one. He would thereby reduce the affirmative defense and its accompanying burden of production simply to a penalty on defendants whose lawyers forget to ask (and are not later deemed ineffective for that lapse).

To the extent that petitioner takes the slightly narrower view that a defendant is entitled to a statute-of-limitations instruction in cases where the government's case-in-chief lacks affirmative evidence of conduct within the limitations period, he would "eviscerate the line between non-overt act and overt act conspiracies"—"contradicting the text Congress enacted" by converting a non-overt act conspiracy into an overt act conspiracy. Pet. App. 17a. And in any event, in this case, the government did introduce proof that the conspiracy continued into the limitations period. See *id.* at 19a-21a.

c. Petitioner's assertion (*e.g.*, Pet. 13) that he adequately put the statute of limitations at issue is fact-bound and incorrect. As the district court explained, petitioner had not "properly framed" the statute-of-limitations issue for the jury. C.A. App. 2880. Aside from the request for a jury instruction, petitioner invoked the statute of limitations only in motions practice. See *id.* at 49-50 (motion for a bill of particulars); *id.* at 3341, 3344-3345, 3347-3349 (discovery requests); Pet. App. 8a (motion for judgment of acquittal). Those materials were not evidence before the jury and fell well short of the burden of production petitioner must meet to support a jury instruction.

3. Petitioner contends (Pet. 18-30) that the Fourth and Eleventh Circuit's treatment of the statute-of-limitations defense conflicts with this Court's precedent and that the lower courts are divided as to whether and

how the government must "prove to a jury that a non-overt-act conspiracy existed in the limitations period." Pet. 16. There is no conflict with this Court's precedent, and any disagreement in the circuits does not warrant further review.

a. As explained above, the court of appeals' decision follows this Court's decisions, up to and including its decision in *Smith* v. *United States*, which squarely holds that the burden of showing withdrawal from a conspiracy lies with the defendant. 568 U.S. at 114. And contrary to petitioner's contention (Pet. 18-19), neither the decision below nor those in the Eleventh Circuit, see, *e.g.*, *Seher*, 562 F.3d at 1364, conflict with *Grunewald* v. *United States*, 353 U.S. 391 (1957).

As the Court explained in *Smith*, *Grunewald* holds that "the Government must prove the time of the conspiracy offense if a statute-of-limitations defense is raised." *Smith*, 568 U.S. at 113. Nothing in *Grunewald* or *Smith*, however, opined on what a defendant must do to adequately raise the defense and therefore trigger the government's burden.[1]

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[1] Nor is petitioner correct in suggesting (Pet. 19) that the government's brief in *Smith* concedes any material aspect of his argument here. The government's brief in *Smith*, like the Court's decision, see 568 U.S. at 107, addressed only the question of the procedure "when a defendant adduces evidence that he withdrew from a criminal conspiracy outside the applicable statute-of-limitations period." U.S. Br. at I, *Smith*, *supra* (No. 11-8976). And, among other things, that brief took the position, later adopted by the Court in *Musacchio* v. *United States*, that "[a]s a general matter, if a criminal defendant fails to raise the statute of limitations as a defense, it is waived." *Id.* at 24; see *id.* at 38-40; see also *Musacchio*, 577 U.S. at 247. The government further expanded on that position in its brief in *Musacchio*. See, *e.g.*, U.S. Br. at 34-36, *Musacchio*, *supra* (No. 14-1095).

Indeed, the question presented in *Smith* was limited to "whether, when the defendant produces some evidence supporting such a defense, the Government must prove beyond a reasonable doubt that he did not withdraw outside the statute-of-limitations period." 568 U.S. at 107. And *Grunewald* involved a statute that required the government to prove an overt act, which therefore required an act within the statute-of-limitations period. 353 U.S. at 396.

b. Petitioner claims (Pet. 22-30) that the lower courts are in conflict as to whether and how the government must prove the crime occurred within the statute of limitations. But petitioner overstates any disagreement in the circuits, and any such disagreement does not implicate the relevant (and antecedent) factbound question of whether petitioner adequately raised a statute-of-limitations defense in this case.

Petitioner errs in asserting (Pet. 22) that the Second, Third, and Sixth Circuits require the government to "prove to a jury that a non-overt-act conspiracy existed in the limitations period." All of those circuits apply a presumption of continuity that a defendant may overcome by presenting evidence of withdrawal or termination.[2] Contrary to petitioner's suggestion (Pet. 22-27),

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[2] See *Eppolito*, 543 F.3d at 48 (explaining that where the government introduces "sufficient evidence to show that such a [non-overt act] conspiracy existed, the conspiracy *is presumed to exist* until there has been an affirmative showing that it has been terminated") (citation and internal quotation marks omitted); *United States* v. *Spero*, 331 F.3d 57, 60 (2d Cir.) (collecting cases), cert. denied, 540 U.S. 819 (2003); *United States* v. *Allen*, 492 Fed. Appx. 273, 277 (3d Cir. 2012) ("A conspiracy is deemed to have continued as long as the purposes of the conspiracy have neither been abandoned nor accomplished and the defendant has not made an affirmative showing that

the decisions that he cites from those circuit do not show that the jury must be instructed on the statute of limitations even when the defendant has not identified evidence of withdrawal or termination.[3]

Petitioner also asserts that the First, Fifth, and Ninth Circuits not only "require the government to prove to the jury that a non-overt-act conspiracy continued into the limitations period," Pet. 27, but require actual proof of "an overt act within the limitations

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the conspiracy has terminated"); *United States* v. *Mayes*, 512 F.2d 637, 642 (6th Cir.) ("[W]here a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated."), cert. denied, 422 U.S. 1008 (1975); *United States* v. *Hayter Oil Co.*, 51 F.3d 1265, 1266, 1270-1271 (6th Cir. 1995) ("[O]nce a conspiracy has been established, it is presumed to continue until there is an affirmative showing that it has been abandoned" and "the government did not need to show that defendants performed overt acts in furtherance of the conspiracy after" the statute of limitations).

[3] In *Spero* v. *United States*, the Second Circuit expressly "[a]ssum[ed] without deciding that [the defendant's] statute of limitations claim was properly raised in District Court," before concluding that the defendant had failed to rebut the presumption of a continuing conspiracy. 331 F.3d at 60. In some of the cases petitioner cites, the defendants raised a defense of withdrawal or abandonment, thereby entitling them to an accompanying instruction. See *Eppolito*, 543 F.3d at 41; *United States* v. *United States Gypsum Co.*, 600 F.2d 414, 418 (3d Cir.), cert. denied, 444 U.S. 884 (1979). In others, the courts assessed the sufficiency of the evidence without discussing the necessity or adequacy of jury instructions at all. See, *e.g.*, *Hayter Oil*, 51 F.3d at 1270-1271; *United States* v. *Brown*, 332 F.3d 363, 373-374 (6th Cir. 2003). And although the Third Circuit's unpublished decision in *United States* v. *Churuk*, 797 Fed. Appx. 680, 689-691 (2020), did discuss the adequacy of the jury instruction, that discussion was limited to the issue of the appropriate burden of proof.

period," Pet. 22. But petitioner cites only one case decided after *Smith*. Pet. 29 (citing *United States* v. *Pursley*, 22 F.4th 586, 587 (5th Cir. 2022)). And there, the conspiracy offense alleged was a violation of 18 U.S.C. 371, which is an overt-act conspiracy—and thus distinct from a non-overt act conspiracy like the one here. See Indictment at 12-26, *Pursley*, *supra* (No. 18-cr-575) (charging Pursley with violating 18 U.S.C. 371); see also *United States* v. *Jake*, 281 F.3d 123, 127 n.3 (3d Cir. 2002) (overt-act conspiracy to obstruct justice).

To the extent that the remaining decisions contain language that might favor petitioner's position, they lacked the benefit of *Smith*. See Pet. 27-30 (citing *United States* v. *Upton*, 559 F.3d 3 (1st Cir.), cert. denied, 558 U.S. 949 (2009); *United States* v. *Therm-All, Inc.*, 373 F.3d 625 (5th Cir.), cert. denied, 543 U.S. 1064 (2004); *United States* v. *Brown*, 936 F.2d 1042 (9th Cir. 1991)). Nor do those decisions even provide significant support for petitioner. See, *e.g.*, *Upton*, 559 F.3d at 9 (finding that "[t]he trial court did not commit plain error in declining to instruct the jury on the statute of limitations"); *Therm-All*, 373 F.3d at 631 (focusing "hold[ing]" on the requirements for "a price-fixing conspiracy" under antitrust law); *Brown*, 936 F.2d at 1048 (cursorily approving, on plain-error review, jury instruction requiring proof of overt act in limitations period and finding sufficient evidence on limitations issue). Indeed, far from compelling a different result on the facts of this particular case—where the government did, in fact, adduce "ample evidence" that the conspiracy continued into the limitations period, Pet. App. 22a—none of them even sets aside a conviction. See *Upton*, 559 F.3d at 16; *Therm-All*, 373 F.3d at 628; *Brown*, 936 F.2d at 1050.

4. In any event, this case would be an unsuitable vehicle to consider the statute-of-limitations question for two reasons.

First, because the government introduced "ample evidence" that the conspiracy continued beyond July 2, 2014, Pet. App. 22a, while petitioner offered "no affirmative evidence" to support his statute-of-limitations defense, *id.* at 17a, petitioner is unlikely to prevail even under the rule that he espouses. The money laundering conspiracy was "part and parcel" of petitioner's representation of Bryd and, in August 2014, petitioner held funds from Byrd in his law firm account and made a payment on Byrd's behalf. *Id.* at 20a. Similarly, sometime after August 2014, Miller declined petitioner's offer to launder Miller's drug proceeds. *Id.* at 20a-21a. And petitioner also requested additional funds to continue representing Harris, all while Harris's associate continued her efforts to "collect drug proceeds to pay" petitioner, and petitioner did not withdraw as Harris's counsel until November 2014. *Id.* at 21a-22a. In light of that evidence, any error in failing to instruct the jury on the statute of limitations would have been harmless.

Second, and relatedly, any properly preserved claim is, at bottom, factbound and does not warrant this Court's review. See Sup. Ct. R. 10. Both the majority and the dissent in the court of appeals characterized their disagreement as about whether the evidence warranted a limitations instruction—not any legal rule. See Pet. App. 60a (Wilkinson, J., concurring in the denial of reh'g en banc) (describing the disagreement as "heavily factual"); see also *id.* at 69a (Gregory, C.J., dissenting from the denial of reh'g en banc) (agreeing with the legal principles the majority articulated but disagreeing about the sufficiency of the facts in the record). And

petitioner's briefing below contested the facts, not the legal correctness of the majority's and dissent's uniform approach to the proper procedure for proving a non-overt act conspiracy. See Pet. C.A. Br. 16-27.[4]

The Court should therefore follow its longstanding policy of "not grant[ing] a [writ of] certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Indeed, "under what [the Court] ha[s] called the 'two-court rule,' th[at] policy has been applied with particular rigor when," as here, "[the] district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting); see, *e.g.*, *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

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[4] Similarly, to the extent petitioner now introduces a Sixth Amendment challenge (Pet. 5, 13-16, 20; National Association of Criminal Defense Lawyers and Maryland Criminal Defense Attorneys Amicus Br. 6-18), this Court should decline to consider it. Petitioner did not cite the Sixth Amendment in his opening brief or otherwise raise a constitutional challenge before the court of appeals. Thus, any such challenge was not "raised or resolved in the lower courts," *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (brackets and citation omitted), and is not an appropriate subject for this Court's consideration. This Court is one "of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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