No. 23-638

In the Supreme Court of the United States

KENNETH WENDELL RAVENELL, PETITIONER

v.

UNITED STATES

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government's response underscores the need for this Court's review. The government acknowledges the "disagreement in the circuits" about whether the government must prove to a jury that a non-overt-act conspiracy existed during the limitations period. Opp. 15. The government doesn't dispute that the First, Fifth, and Ninth Circuits require it to prove an overt act in the limitations period—the rule the Fourth and Eleventh Circuits have rejected. And as to the Second, Third, and Sixth Circuits, the government ignores the rule that the government must offer evidence about the purpose and scope of the conspiracy to trigger a presumption allowing the jury to infer that the conspiracy continued into the limitations period. That rule conflicts with the Fourth and Eleventh Circuits' rule that the government need prove only the elements of the conspiracy offense to satisfy the statute of limitations.

Unable to deny the split, the government focuses on the merits. But the government's core argument—that it need not prove that a non-overt-act conspiracy existed during the limitations period—contravenes this Court's longstanding rule that "the Government must prove the time of the conspiracy offense if a statute-of-limitations defense is raised." *Smith v. United States*, 568 U.S. 106, 113 (2013) (citing *Grunewald v. United States*, 353 U.S. 391, 396 (1957)). It also contradicts the United States' representations in *Smith* and *Musacchio v. United States*, 577 U.S. 237 (2016), and before the Fourth Circuit here, that it *does* bear that burden. The government should turn square corners, even when it seeks denial of cert.

Given its problems with *Smith*, *Grunewald*, and the split, the government resorts to claiming that Mr. Ravenell didn't raise a statute-of-limitations defense or offer evidence that the conspiracy terminated before the limitations period. But Mr. Ravenell "introduce[d] the limitations defense" *six times* "at or before trial," giving the government ample opportunity "to reply or give evidence." *Musacchio*, 577 U.S. at 247-48. And as *Smith* and the decisions in the split make clear, the availability of a termination defense doesn't erase the government's burden to prove that the conspiracy existed during the limitations period in the first place.

Finally, the government insists there was evidence that the money-laundering conspiracy existed during the limitations period. But that just proves that the government had the opportunity to respond to Mr. Ravenell's limitations defense so that *the jury*, whose role it is to "[d]etermin[e] the weight and credibility" of the evidence, *United States v. Scheffer*, 523 U.S. 303, 313 (1998), could decide the timing of the charged conspiracy. A properly instructed jury could have acquitted Mr. Ravenell.

This Court's review is critical for vindicating the jury's role, enforcing 18 U.S.C. § 3282(a)'s statute-of-limitations requirement, resolving the circuit split, and ensuring compliance with this Court's precedent. The Court should grant review.

ARGUMENT

I. The Fourth and Eleventh Circuits' rule that the prosecution need not prove the existence of the conspiracy in the limitations period conflicts with the decisions of this Court and—as the government acknowledges—the decisions of other courts of appeals.

A. The government doesn't dispute the "disagreement in the circuits," and its efforts to minimize the 2–6 split fail.

1. The Fourth and Eleventh Circuits hold that the government has no burden to prove that a non-overt-act conspiracy existed during the limitations period. That approach conflicts with the rule in the First, Second, Third, Fifth, Sixth, and Ninth Circuits, which require the government to prove to a jury that a non-overt-act conspiracy existed during the limitations period. Pet. 22-30. Indeed, the government doesn't dispute the "disagreement in the circuits," Opp. 15, as to the First, Fifth, and Ninth Circuits, *see* Opp. 17-18, which require it to prove a conspiratorial *act* in the limitations period, Pet. 27-30. Had Mr. Ravenell been tried in any of those six other circuits, the government would have needed to prove to a jury that the conspiracy existed during the limitations period, and the jury could have acquitted him on that ground. Pet. 26, 30.

2. Forced to acknowledge the split, the government tries to downplay it. Those efforts fail.

a. As to the First, Fifth, and Ninth Circuits, which give effect to § 3282(a)'s statute-of-limitations by requiring proof of an overt act in the limitations period, *see* Opp. 17-18, the government's sole specific response is that those decisions predate *Smith*. But the government doesn't explain why *Smith* would

alter that rule. It can't. *Smith bolsters* those circuits' rule by reaffirming *Grunewald*'s longstanding holding that the government must prove that a conspiracy existed during the limitations period. As explained below (at 6-8), *Smith* puts the burden of proving timeliness on the government, not the defendant. The government's contrary argument misquotes *Smith* and contradicts the government's prior positions before this Court, and before the Fourth Circuit here, that *the government* bears that burden.

b. The government claims there's no split with the Second, Third, and Sixth Circuits because those courts "apply a presumption of continuity." Opp. 16. But as the government's own parentheticals (Opp. 16-17 n.2) show, that argument misconstrues those circuits' rule.

The Second, Third, and Sixth Circuits apply a presumption of continuity not as a matter of law, but *only if* the government shows with evidence that the purpose and scope of the charged conspiracy would allow the jury to infer "that the particular agreement into which a defendant entered continued into" the limitations period. *United States v. United States Gypsum Co.*, 600 F.2d 414, 417-18 (3d Cir. 1979); Pet. 22-27. Indeed, the government's own quote (Opp. 17 n.2) from *United States v. Mayes*, 512 F.2d 637, 642-43 (6th Cir. 1975), refers to "a conspiracy [that] contemplates a continuity of purpose and a continued performance of acts." Or take *United States v. Hayter Oil Co. of Greeneville, Tennessee*, 51 F.3d 1265, 1266, 1270-71 (6th Cir. 1995) (Opp. 17 n.2), where the government likewise needed to offer evidence of "[t]he scope and duration of the conspiracy" to show that it *was* the kind of conspiracy that the jury could infer would continue.

Thus, a defendant may argue, as the Sixth Circuit's pattern instructions explain, that the government didn't show that the conspiracy "include[d] an understanding that the conspiracy will continue over time." 6th Cir. Pattern Jury Instruction § 3.12 (2023), https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/Chapter%203.pdf. To be sure, if the government proves the conspiracy is a continuing one—by proving "an understanding that the conspiracy will continue over time"—then the defendant may point to evidence that the conspiracy "ended" before the limitations period. *Id.* But the key point—which the government doesn't confront—is that these circuits require the government to prove facts about the conspiratorial agreement *to trigger* the presumption of continuity.

c. The government tries to minimize the split by claiming (Opp. 16) that other circuits' decisions don't address whether a defendant is entitled to a jury instruction. That's wrong. All six circuits that require the government to prove that the conspiracy existed during the limitations period necessarily require instructions so the jury can determine whether "the action in question is … time barred." *Griffin v. United States*, 502 U.S. 46, 59 (1991); Pet. 19-20. Without instructions, the jury cannot decide whether the government met its burden, nullifying the statute-of-limitations defense. *Cf. Musacchio*, 577 U.S. at 244.

In response, the government observes that the decisions in the split dealt with sufficiency-of-the-evidence questions. But that observation only highlights the conflict: the jury must be instructed if it is to make a finding for which the court can evaluate the sufficiency of the evidence. Indeed, contrary to the government's argument, district courts in these

circuits continue providing statute-of-limitations instructions in non-overt-act conspiracy cases—even after *Smith* (*contra* Opp. 17-18). *See, e.g.*, *United States v. Churuk*, 797 F. App'x 680, 688-89 (3d Cir. 2020); Doc. 558, at 78-81, *United States v. Botsvynyuk*, No. 2:10-cr-159 (E.D. Pa. May 6, 2015); Doc. 386, at 18, *United States v. Florida*, No. 4:14-cr-582 (N.D. Cal. Dec. 15, 2016).

d. The government also tries to deemphasize the split by observing that none of the decisions "sets aside a conviction." Opp. 18. But that's not surprising given the challenging standard that applied to the sufficiency-of-the-evidence questions in those cases. As relevant here, however, those sufficiency analyses rest on and reaffirm the requirement to instruct the jury.

What's more, the government ignores the asymmetry in criminal appeals. A jury that receives a statute of limitations instruction—including after *Smith*—may decide to acquit. *See, e.g.*, Doc. 447, at 22-23, *United States v. Farmer*, No. 3:13-cr-162 (D.P.R. May 10, 2015); Doc. 1251, at 14, *United States v. Bai*, No. 3:09-110-5 (N.D. Cal. Oct. 9, 2013). Those cases don't show up on appeal not because they don't exist or aren't important, but because the government cannot appeal from jury acquittals.

B. The Fourth and Eleventh Circuits' rule conflicts with this Court's precedent.

1. The Fourth and Eleventh Circuits' rule conflicts not only with the rule in six other circuits, but also with this Court's precedent. This Court has long held 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; *Musacchio*, 577 U.S. at 248; *Grunewald*, 353 U.S. at 396. That rule applies

equally in cases involving non-overt-act conspiracies, like *Smith*, and cases involving overt-act conspiracies, like *Grunewald*. Pet. 18-19. The government thus had to prove to Mr. Ravenell's jury that the money-laundering conspiracy existed during the limitations period. But rather than require the jury instruction necessary to enforce that requirement—and allow the jury to acquit Mr. Ravenell—the Fourth Circuit, siding with the Eleventh, contravened *Smith* and *Grunewald* by holding that the *defendant* must prove that a non-overt-act conspiracy prosecution is untimely. App. 16a; *see United States v. Harriston*, 329 F.3d 779, 783 (11th Cir. 2003) (per curiam).

2. The government argues that (a) *the defendant* must prove that a non-overt-act conspiracy is untimely, and (b) Mr. Ravenell failed to even *raise* a statute-of-limitations defense. Opp. 11-13. Both arguments conflict with this Court's precedent and the government's prior positions before this Court and the court of appeals below.

a. The government says it "is not required to prove" compliance with the statute of limitations, because it need only prove the elements of the offense, and the defendant must prove withdrawal or termination. Opp. 11. The government is wrong.

First, this Court's precedent reiterates that the government "bears the burden of establishing compliance with the statute of limitations by presenting evidence that the crime was committed within the limitations period." *Musacchio*, 577 U.S. at 248; *Smith*, 568 U.S. at 113; *Grunewald*, 353 U.S. at 396. The government doesn't confront that language. The government also fails to explain how proving only the elements of a conspiracy answers "the crucial

question" about whether "the scope of the conspiratorial agreement" contemplated a continuing purpose or conduct. *Grunewald*, 353 U.S. at 397. It doesn't.

Second, the government says that *Smith* states that the defendant must "produce[] some evidence supporting [a statute-of-limitations] defense." Opp. 12 (second alteration by the government; otherwise quoting *Smith*, 568 U.S. at 107); *see* Opp. 16. But the government alters the quote to make *Smith* say something it doesn't. *Smith* addressed the *withdrawal* defense and its "intersection" with "a statute-of-limitations defense." 568 U.S. at 109; *see id.* at 107-12. The Court held that the defendant must prove *withdrawal*—the subject of the government's altered quote, *id.* at 107—while *the government* "must prove the time of the conspiracy" in the first place, *id.* at 113. That made sense, the Court explained, because "[t]he defendant knows what steps, if any, he took to dissociate from his confederates." *Id.* But as the government *itself* acknowledged in *Smith*—and contrary to its representations here—requiring the government to prove the conspiracy existed in the limitations period makes sense. The government "already has to prove … that the crime actually happened"—meaning typically proving *when* it happened. Argument Tr. 51-52, *Smith*, 568 U.S. 106 (No. 11-8976).

In *Smith* and *Musacchio*, and before the Fourth Circuit here, the government agreed that it bears the burden of proving that a conspiracy exists during the limitations period. C.A. Oral Argument 38:23-39:42; U.S. Br. 15, 23-24, 30-31, *Smith*, 568 U.S. 106 (No. 11-8976); U.S. Br. 34, *Musacchio*, 577 U.S. 237 (No. 14-1095). The government's startling and unexplained about-face is yet another reason to grant review.

b. The government asserts an "antecedent" issue, that Mr. Ravenell didn't "raise" a statute-of-limitations defense. Opp. 16. That's incorrect. Mr. Ravenell raised the limitations issue *six times*, both before and at trial, giving the government ample notice. Indeed, the parties' pre-indictment tolling agreement reflected the government's awareness that most of its evidence predated the limitations period.

A defendant raises a limitations defense by "introduc[ing] [it] into the case" "at or before trial" in a way that allows the government "to reply or give evidence" to address "the limitations claim." *Musacchio*, 577 U.S. at 247-48. Mr. Ravenell did just that. The government and Mr. Ravenell entered into a pre-indictment tolling agreement setting July 2, 2014, as the beginning of the limitations period. App. 12a. And as the government recognizes (Opp. 14), Mr. Ravenell addressed the limitations issue in a motion for bill of particulars (C.A. JA49-50), discovery requests (C.A. JA3341, 3344-45, 3347-49), and motions for acquittal after both the government's and the defense's cases (App. 8a). He also repeatedly requested a statute-of-limitations instruction. App. 8a-9a; C.A. JA2879-80; App. 45a & n.2 (Gregory, J., dissenting). The government thus had ample opportunity "to reply or give evidence" showing the prosecution was timely. *United States v. Cook*, 84 U.S. (17 Wall.) 168, 179-80 (1872).

The government doesn't claim otherwise. In fact, it *admits* that it had that very opportunity when it argues (Opp. 13, 19) that it offered evidence that the conspiracy continued into the limitations period. Instead, the government claims that the defendant must offer evidence of withdrawal or termination to raise a limitations defense. Opp. 11. That's wrong under *Smith* and *Grunewald*, for the reasons just explained

(at 6-8), and it's not the rule in the circuits on the other side of the split, either, *see supra* pp. 3-6. No wonder the government didn't take that position in its brief in *Musacchio*. U.S. Br. 35-36, 577 U.S. 237 (No. 14-1095).

At bottom, the government seems to suggest that because the statute of limitations is an "affirmative defense," the defendant must "show a triable issue about the timeliness of the prosecution" and shoulder the burden of proof. Opp. 13. But this Court's decisions, and the circuits on the other side of the split, say just the opposite. The government bears the burden of proof, and the defendant need not satisfy the standard the government appears to have borrowed—just to oppose cert—from the civil-summary-judgment context.

C. The Fourth Circuit's decision is wrong.

1. The Fourth Circuit's holding that the government need not prove to the jury that the conspiracy existed during the limitations period is wrong. Pet. 31-33; *supra* pp. 6-10. The court's primary rationale—that requiring proof of an overt act in the limitations period would collapse the distinction between overt-act and non-overt-act conspiracies—is meritless. Requiring proof of an overt act in the limitations period—the First, Fifth, and Ninth Circuits' rule—gives effect to § 3282(a) where the non-overt-act conspiracy was formed *before* the limitations period. Pet. 32-33. When the government doesn't delay—like it did here—it will never have to prove an overt act to satisfy the limitations requirement for a non-overt-act conspiracy. What's more, in the Second, Third, and Sixth Circuits, the government can alternatively prove that the particular conspiratorial agreement

included an understanding that the conspiracy would continue. Pet. 31-32.

2. The government's counterarguments fail.

a. The government claims (Opp. 12, 15-16) the Fourth Circuit followed *Smith* and *Grunewald*. That's wrong: it contravened them. *Supra* pp. 6-10.

b. The government contends that the Fourth Circuit correctly concluded that Mr. Ravenell's proposed jury instructions were "insufficient to compel the district court to give one." Opp. 13. Not so.

First, the government was required to prove the conspiracy continued into the limitations period, so the jury needed an instruction to determine whether the government carried its burden. *Supra* pp. 6-10. Mr. Ravenell's proposed instructions correctly placed the burden on the government. Pet. 10.

Second, the Fourth Circuit didn't think its view of the proposed instructions was dispositive. Instead, it recognized that it still needed to answer the question presented here—whether the government had to prove that the conspiracy continued into the limitations period. *See* App. 15a-18a.

3. The government complains (Opp. 13-14) that a defendant shouldn't be able to get a limitations instruction just by requesting one. But the rule is that the defendant must raise a limitations defense "at or before trial" so the government has an opportunity to meet its burden. *Musacchio*, 577 U.S. at 247-48. Mr. Ravenell did so several times. The government's true complaint is that it's required to bring (and prove it is bringing) timely prosecutions.

II. The question presented is important, and this case is the ideal vehicle to address it.

The statute of limitations is a critical safeguard against unfair prosecutions, but it requires clear rules for courts, prosecutors, and defendants alike. Pet. 33-34. This case is an ideal vehicle for providing that important guidance. The jury could have acquitted Mr. Ravenell—just as it did on every other charge—had it been properly instructed.

The government claims (Opp. 19-20) this case is factbound and not certworthy. That's wrong. The fact-intensiveness isn't in the question presented, but in whether the factfinder could determine, from the evidence, that the government failed to prove the conspiracy existed during the limitations period. That factfinder is *the jury*, not the court. And the government's suggestion that any error in failing to provide a statute-of-limitations instruction was harmless is unsupported and meritless, *see* Pet. 13-14, 34-35—and a remand question at most, *McFadden v. United States*, 576 U.S. 186, 197 (2015).

CONCLUSION

The Court should grant review.

Respectfully submitted.

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