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

1 that respect?

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

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

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

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

1 MR. KRAMER: Well, actually, in this case,
2 there was different statutes of -- I believe there were
3 three different statute of limitations that the district
4 court instructed the jury about because there were
5 superseding indictments and people were indicted at
6 different times.

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

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

22 Now, in such a case, once he produces the
23 evidence, does the government have to prove beyond a
24 reasonable doubt that he didn't have an intent to
25 return? Or does he -- is there any instance in which

1 the burden of persuasion shifts? Do you see what I'm
2 driving at?

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

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

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

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

21 MR. KRAMER: Yes.

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

1 burden of persuasion shifts to the defendant. So I'm
2 saying, did you ever find one? The Thomas Crown Affair
3 or some other instance, and your answer is, no, you
4 never have heard of it.

5 MR. KRAMER: Well, I guess --

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

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

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

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

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

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

1 JUSTICE BREYER: And how do you prove it?

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

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

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

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

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

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

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

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

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

25 MR. KRAMER: No, I disagree with that. I

1 think, in every case, it would actually be fairly simple
2 for them. If the defendant can't call that person to
3 support his defense, the government could just say,
4 well, you didn't hear any testimony from that person
5 supporting the defense. That's enough right there to
6 meet our burden.

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

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

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

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

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

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

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

4 JUSTICE BREYER: Yes, yes.

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

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

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

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

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

25 JUSTICE SCALIA: Well, you say that you --

1 you have to prove that the defendant was knowing and
2 willfully a member of the conspiracy, right?

3 MR. KRAMER: That was the --

4 JUSTICE SCALIA: That's what you said?

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

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

9 MR. KRAMER: Yes.

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

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

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

24 MR. KRAMER: Because the only way a
25 defendant can prove -- the way a defendant shows that he

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

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

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

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

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

25 MR. KRAMER: Well, as in this case, they had

1 a number --

2 JUSTICE ALITO: During the statute of
3 limitations.

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

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

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

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

24 MR. KRAMER: In this particular case, it was
25 the -- well, it was the jury that actually called the

1 issue to the attention of everybody in the first place,
2 by sending out a note saying that, if we -- the
3 conspiracy continued, but we think a defendant left,
4 must we find him not guilty?

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

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

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

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

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

25 JUSTICE SCALIA: Which -- which of those are

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

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

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

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

24 JUSTICE KAGAN: Mr. Kramer --

25 CHIEF JUSTICE ROBERTS: I'm -- I'm having

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

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

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

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

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

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

1 MR. KRAMER: Within the limitations -- his
2 membership within the period. So they can just say to
3 the jury, look, this evidence of withdrawal is nonsense,
4 you've heard the testimony, we've cross-examined him, it
5 makes no sense.

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

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

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

20 CHIEF JUSTICE ROBERTS: Believe what
21 evidence?

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

25 CHIEF JUSTICE ROBERTS: But there can't be

1 any evidence because nobody is willing to testify
2 under -- because they invoked their Fifth Amendment
3 rights.

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

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

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

23 JUSTICE SCALIA: They didn't have to prove
24 within the limitations period. They didn't have to
25 prove that. You acknowledged that that the -- look,

1 what's at issue here is not a defense of withdrawal.
2 It's the defense of the statute of limitations, right?

3 MR. KRAMER: Yes.

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

10 MR. KRAMER: I --

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

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

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

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

1 JUSTICE SCALIA: Why doesn't it have to be
2 contained in the indictment, if it's an element?

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

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

7 MR. KRAMER: I think, in Ledbetter, this
8 Court said that, although there doesn't have to be a
9 date in the indictment, the government -- it's
10 sufficient if the government proves a date before the
11 indictment within the limitations period, this Court
12 specifically referred to in Ledbetter, which is at page
13 21 of our brief.

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

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

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

20 (Laughter.)

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

1 participating during the statute of limitations, then he
2 hadn't committed the actual crime.

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Harrington?

2 ORAL ARGUMENT OF SARAH E. HARRINGTON

3 ON BEHALF OF THE RESPONDENT

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

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

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

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

23 JUSTICE KAGAN: Ms. Harrington --

24 JUSTICE BREYER: This is true, but his
25 point -- basic point -- and he has responded to the

1 points I've made, is that, of course, if there's a
2 five-year statute on robbery, it doesn't help the
3 government that he create -- he committed a robbery
4 before.

5 MS. HARRINGTON: Correct.

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

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

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

25 This is a question of whether he was a

1 member of the conspiracy during the time period that you
2 charged in the indictment. That's his point. So what
3 is the response?

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

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

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

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

20 MS. HARRINGTON: And an -- but when
21 Petitioner talks about the membership or participation
22 element, what he is really talking about is the
23 agreement element. The government has to prove that
24 each defendant who is charged with a conspiracy
25 intentionally agreed to join the conspiracy. And there

1 is no dispute that the government proved that with
2 respect to Petitioner in this case --

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

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

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

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

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

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

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

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

24 The jury was charged, he didn't do anything,
25 the court said he didn't do anything. The court said,

1 it's fine, he's still a member of the conspiracy because
2 he has not taken an affirmative act to withdraw from the
3 conspiracy.

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

11 JUSTICE SCALIA: Did the government charge
12 in the indictment that the conspiracy existed during
13 this five-year period?

14 MS. HARRINGTON: Yes.

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

17 MS. HARRINGTON: Yes.

18 JUSTICE SCALIA: Did it have to do that?

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

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

24 MS. HARRINGTON: Right. And, to be clear,
25 I'm not sure it specifically used that phrase, but it

1 charged -- it charged overt acts that were part of the
2 conspiracy that happened within the five-year period.

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

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

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

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

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

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

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

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

24 JUSTICE SCALIA: So I guess the issue here
25 is whether the government's statement that the

1 conspiracy existed within this five-year period causes
2 that to be an element of the crime?

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

9 And, again --

10 CHIEF JUSTICE ROBERTS: But what if it is?

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

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

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

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

24 MS. HARRINGTON: That's true, but
25 once the -- it's true that that's his argument. But

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

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

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

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

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

25 JUSTICE BREYER: And then I'm -- I'm sort

1 of -- I'm torn here. I actually can see it either way.

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

6 So --

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

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

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

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

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

25 MS. HARRINGTON: It's true, but the

1 government has to prove that the defendant joined the
2 conspiracy and the conspiracy continued to exist. And
3 to bring you back to the Hyde --

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

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

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

16 MS. HARRINGTON: Yes.

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

23 MS. HARRINGTON: Right.

24 JUSTICE SOTOMAYOR: You don't have to prove
25 that the defendant was part of that conspiracy or joined

1 that conspiracy during the statute of limitations;
2 that's your point.

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

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

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

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

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

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

3 (Laughter.)

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

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

9 (Laughter.)

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

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

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

23 MS. HARRINGTON: Absolutely. The way the
24 statute of limitations defense operates within the
25 conspiracy context is it asks the question whether and

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

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

11 JUSTICE SCALIA: I wish I had -- we had the
12 supervening indictment before us. It's -- it's not in
13 the Joint Appendix.

14 MS. HARRINGTON: It's very long.

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

24 So apparently, according to that
25 description, it -- it was not charged as a conspiracy

1 during those five years. It was just charged as a
2 conspiracy.

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

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

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

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

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

20 (Laughter.)

21 MS. HARRINGTON: Definitely a rabbit.

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

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

3 MS. HARRINGTON: Insanity is another.

4 JUSTICE SCALIA: Insanity.

5 JUSTICE BREYER: Insanity.

6 MS. HARRINGTON: Yes.

7 JUSTICE BREYER: Anything else?

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

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

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

1 you walk away, and you do nothing.

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

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

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

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

22 So your case accepts that there is a
23 withdrawal defense. Indeed, the judge gave a charge to
24 the jury on -- so the contest, as I understand it, the
25 difference between the two of you is you say, defendant

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

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

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

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

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

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

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

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

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

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

17 MS. HARRINGTON: Because once --

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

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

1 these crimes, that's how the Court approached this
2 question as to duress in Dixon.

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

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

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

22 JUSTICE SCALIA: Suppose this thing doesn't
23 come up in the -- in the statute of limitations context.
24 Suppose it comes up in the context of whether this
25 defendant is liable for an act committed by the

1 co-conspirators after he withdrew. So it's the same
2 issue of whether -- whether he withdrew or not, before
3 the murder of somebody, okay?

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Justice Kennedy?

23 JUSTICE KENNEDY: I was just -- I was
24 curious. In 1997, the Petitioner did report the
25 identity of another cooperating witness to Gray. You

1 don't -- you don't rely on that as showing that he was,
2 indeed, part of the conspiracy? That's just irrelevant
3 to your case?

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

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

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

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

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

25 MS. HARRINGTON: Yes, certainly. I mean,

1 under -- under both views -- you know, it all -- all the
2 evidence goes to whether -- you know, he had joined the
3 conspiracy and whether he proved withdrawal.

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

14 MS. HARRINGTON: Not.

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

21 MS. HARRINGTON: It's never an element. It
22 is true that the government -- if a defendant raises a
23 statute of limitations defense, the government has the
24 burden of proving that the crime was committed within
25 the limitations period. This Court said that in

1 Grunewald. It did not offer any explanation for that,
2 but we have accepted that as our burden.

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

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

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

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

25 The first is that the defendant will almost

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

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

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

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

25 But under the government's -- under the

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

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

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

22 JUSTICE SCALIA: I suppose he could present
23 his defense in the alternative, I didn't belong to the
24 conspiracy, and anyway, I withdrew. I mean, he can make
25 both of those points, can't he?

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

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

8 MS. HARRINGTON: That --

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

11 That's a little different in a criminal
12 context.

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

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

1 advancing that illegal objective.

2 CHIEF JUSTICE ROBERTS: You have -- you have
3 to prove that every defendant did?

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

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

13 MS. HARRINGTON: No, no, no. No. I'm
14 sorry.

15 CHIEF JUSTICE ROBERTS: So you don't have to
16 prove --

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

19 CHIEF JUSTICE ROBERTS: Yes.

20 MS. HARRINGTON: -- satisfied all these
21 things. I'm sorry --

22 CHIEF JUSTICE ROBERTS: You have to treat
23 them as individuals.

24 MS. HARRINGTON: That's what I meant, yes,
25 yes.

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

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

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

15 If there are no further questions?

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

21 So does the allocation of burden of
22 persuasion to the defendant versus proof of production
23 to the defendant, persuasion to the government, does it
24 really make much difference? Does it have much
25 practical consequence?

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Well, but I think
24 it's a little much to say it wouldn't make a difference
25 because the jury would definitely have ruled in your

1 favor.

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

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Ms. Harrington.

8 Mr. Kramer, you have four minutes remaining.

9 REBUTTAL ARGUMENT OF A.J. KRAMER

10 ON BEHALF OF THE PETITIONERS

11 MR. KRAMER: Thank you.

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

20 JUSTICE KAGAN: Well, that's because they
21 thought that you had the burden. And it -- it does
22 strike me that, if you are right that this is an
23 element -- membership in the conspiracy at a particular
24 time -- and the government has the burden, this idea
25 that the government could -- you know, just sort of say,

1 well, we don't have any evidence, but we think you
2 should presume that we're right, I mean, that's -- the
3 government couldn't do that if you are right.

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

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

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

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

19 JUSTICE ALITO: I think the crux of your
20 argument is that the government is going to have to
21 prove, beyond a reasonable doubt, active participation
22 in the conspiracy during the statute of limitations
23 period because it is impossible for the prosecution to
24 prove beyond a reasonable doubt that on no day, during a
25 five-year period, did the defendant withdraw from the

1 conspiracy.

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

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

11 JUSTICE ALITO: And say what? That there
12 was insufficient evidence to prove --

13 MR. KRAMER: No.

14 JUSTICE ALITO: -- the opposite of what they
15 have to prove?

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

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

24 MR. KRAMER: It is. And the prosecution
25 stands up and says, we presented plenty of evidence

1 that -- that there is no reasonable doubt here at all.
2 And that happens every day, needless to say, that people
3 are convicted by that argument when --

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

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

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

18 JUSTICE ALITO: Couldn't you argue they have
19 the burden of proving that the defendant did not
20 withdraw during this five-year period? They have the
21 burden of proving that. And did you hear any evidence
22 from them that -- did you hear evidence disproving
23 that -- that he didn't withdraw during that period?
24 There is no evidence on that.

25 MR. KRAMER: Of course --

1 JUSTICE ALITO: You can make that argument?

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

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

10 MR. KRAMER: Right.

11 JUSTICE BREYER: Okay.

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

17 Thank you very much.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

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

22

23

24

25

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