No. 11-8976

IN THE
Supreme Court Of The United States

CALVIN SMITH AND JOHN RAYNOR,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS SUPPORTING REVERSAL

TIMOTHY P. O'TOOLE
Counsel of Record
JEFFREY HAHN
MILLER & CHEVALIER CHARTERED
655 Fifteenth St., N.W.
Suite 900
Washington, D.C. 20005
(202) 626-5800
Email: totoole@milchev.com

QUESTION PRESENTED

Whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of a conspiracy charge such that, once a defendant meets his burden of production that he did so withdraw, the burden of persuasion rests with the government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys.[1] As practitioners representing clients in criminal trials throughout the federal and state court system, NACDL has a keen interest in ensuring that every court, no matter the jurisdiction, holds the prosecution to its constitutional burden of establishing beyond a reasonable doubt each element of a criminal charge. The reasonable doubt standard is a criminal defendant's most effective counter-weight to the many advantages enjoyed by the prosecution. Because the decision of the court below, and others with which it is in agreement, threatens to dilute this vital protection in cases where a defendant properly raises the defense of withdrawal from a conspiracy prior to the statute of limitations (and potentially in other cases in which a defendant raises an element-negating defense), this case is of the utmost interest to NACDL.

---

[1] Pursuant to Sup. Ct. Rule 37.2(a), counsel of record for all parties received notice of the intent of *amicus curiae* to file a brief at least 10 days prior to the due date. Also pursuant to Sup. Ct. Rule 37.2(a), a letter of consent from each party accompanies this filing. Pursuant to Sup. Ct. Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The requirement that the prosecution prove each element of the offense beyond a reasonable doubt is perhaps the single most important safeguard against wrongful convictions. This requirement is in many respects "the great equalizer," returning a semblance of balance to a criminal justice process in which a lone individual must face the awesome investigative, charging and prosecutorial powers of the state. But where the government is absolved from having to disprove a properly raised element-negating defense, this balance is impermissibly skewed in favor of the government, which has a significantly stronger hand with respect to all aspects of the criminal process.

The problem is particularly acute in cases involving conspiracy, a notoriously vague offense that hinges largely on a criminal defendant's mental state, affords the prosecution significant evidentiary advantages, and subjects defendants to liability for acts they did not personally commit. As a result, the district court's withdrawal instruction in this case – which effectively absolved the Government from having to prove beyond a reasonable doubt that Mr. Smith participated in the conspiracies in question within the limitations period – serves only to further imperil defendants faced with conspiracy charges. As practitioners, we urge the Court to examine this problem closely and to restore the proper constitutional equilibrium on this important issue.

ARGUMENT

I. The Requirement that the Prosecution Prove Guilt Beyond a Reasonable Doubt Is a Criminal Defendant's Foremost Safeguard Against a Wrongful Conviction

"[T]he duty of the Government to establish . . . guilt beyond a reasonable doubt," Justice Frankfurter wrote, is "basic in our law and rightly one of the boasts of a free society." *Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting). It "provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law,'" and is thus "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970) (citation omitted). This Court in *Winship* thus confirmed that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. Indeed, the reasonable doubt standard is so important to the integrity of a criminal trial that "failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error." *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979); *see also Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (explaining that "a misdescription of the burden of proof . . . vitiates all the jury's findings.").

This Court's constitutional enshrinement of the reasonable doubt standard, however, is not grounded in mere theory or rhetoric, but rather in the recognition that it stands as the single most important corrective to the structural disadvantages faced by criminal defendants. And those disadvantages are many.

To build its case, the prosecution has behind it the investigatory capabilities and resources of the police and the subpoena power of the grand jury. In contrast, court-appointed lawyers who represent the bulk of criminal defendants often have crushing caseloads and minimal investigative resources, leaving them with neither the time nor the funding for anything approaching the government's investigation of the case. The reasonable doubt requirement mitigates this stark disparity by holding the prosecution's evidence to the strictest of standards.

But even where the prosecution's evidence is thin, simply being charged with a criminal offense can be a stigma unto itself, no matter the eventual outcome. Here too, the reasonable doubt requirement protects individuals under investigation from the black mark of an unfounded criminal charge by ensuring that prosecutors bring only their most meritorious cases. Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L.J. 457, 458 (Mar. 1989). The American Bar Association's Standards for Criminal Justice require prosecutors to consider the likelihood of conviction in making their charging decision, a calculus that depends in large part on where the burden of proof lies. Specifically, Standard 3-3.9(a) provides that "[a] prosecutor

should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." *See* American Bar Association, *Standards For Criminal Justice*, Prosecution Function § 3-3.9, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#3.9 (last visited Aug. 23, 2012). If, as in this case, a critical disputed fact upon which a conviction turns is one that the prosecution need not prove beyond a reasonable doubt (here, that Mr. Smith's membership in the conspiracy occurred during the limitations period, despite Mr. Smith's introduction and elicitation of significant facts at trial suggesting he withdrew from the conspiracy before the onset of the limitations period), a prosecutor may well be more likely to bring a case that she otherwise would not.

The reasonable doubt standard is also a critical equalizer in the context of plea bargaining. Every criminal defendant faces the same choice: go to trial and risk the possibility of a potentially severe punishment, or opt for the guarantee of a more lenient sanction through a plea agreement. In making this decision, a key factor is the defendant's assessment of the prosecution's case, the strength of which directly correlates with the burden of proof. If the prosecution is relieved of its full constitutional burden as to a fact essential to conviction, a defendant may be more likely to plea. The reasonable doubt rule thus reduces the pressure defendants face to plead guilty to crimes they did not commit.

Once a case proceeds to trial, defendants also face evidentiary disadvantages for which the reasonable doubt requirement compensates. As virtually every prosecutor reminds jurors in opening statements, prosecutors represent the "people," the "state," or "the United States," and claim the mantle of the community in a way that tends to make jurors believe that prosecutors come to the case solely to do justice. By contrast, given the potential life-changing repercussions of a criminal conviction, criminal defendants begin their cases with their own interests front and center. This has many consequences for the criminal trial, the most important of which is that a criminal defendant's most compelling (and perhaps sole) exculpatory evidence – his own testimony – is inherently tainted by the defendant's interest in self-preservation. The trier of fact is thus likely to discount even the most credible and reliable exculpatory testimony offered by the accused. *See* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 Calif. L. Rev. 1665, 1695 (Oct. 1987). And this is before accounting for the myriad other factors unrelated to a defendant's guilt or innocence that can diminish the defendant's credibility in the eyes of the fact finder, such as a prior conviction, or simply whether the defendant appears nervous or unlikeable. Placing the burden of proof squarely, and solely, on the prosecution puts the onus on the prosecution's evidence, and ensures that the defendant's subjective credibility or objective bias does not become the issue upon which the case turns.

Not only is a criminal defendant's exculpatory testimony potentially counter-productive as an evidentiary matter, but putting

defendants in the position where they feel they have no choice but to offer such testimony impinges on the Fifth Amendment. This Court has made clear that "[e]very criminal defendant is privileged to testify in his own defense, *or to refuse to do so*." *Harris v. New York*, 401 U.S. 222, 225 (1971) (emphasis added). But where guilt or innocence turns on a fact that the prosecution is absolved from having to disprove, and for which the only evidence is the defendant's own testimony, a defendant effectively *cannot* refuse to testify in his own defense, since the alternative is likely to be a prison term. Ensuring that the prosecution is held fully to its constitutional burden of proving each element beyond a reasonable doubt thus gives effect to the Fifth Amendment's testimonial privilege.

In short, the prosecution's burden to prove guilt beyond a reasonable doubt offers vital protections to defendants at virtually every stage of the criminal justice process, from charging decisions, to plea agreements, to the conduct of trials themselves. Diluting the reasonable doubt requirement, therefore, would increase the number of defendants charged with crimes they did not commit, increase the likelihood that defendants will plea to such crimes, and increase the pressure on defendants to offer their own testimonial evidence despite their Fifth Amendment rights.

II. By Relieving the Prosecution from Having to Prove that Mr. Smith Participated In the Conspiracy During the Limitations Period, the D.C. Circuit's Opinion Highlights the Very Imbalance the Reasonable Doubt Standard Serves to Correct

The District Court's withdrawal instruction in this case absolved the Government from having to prove beyond a reasonable doubt an element essential for a conspiracy conviction. While that is problematic – and unconstitutional – in any case, it is particularly troubling in this case, where the crime is conspiracy, and the omitted element is relevant to the defendant's mens rea. Conspiracy cases offer the Government unique advantages unavailable in other cases, and present defendants with equally unique perils; if balance needs to be restored in any direction, it is on the side of defendants, not the Government. And while mens rea requirements are meant to protect defendants from unwarranted conviction, they have been markedly diluted in recent years, a trend that the D.C. Circuit's opinion will serve only to exacerbate.

A. Mr. Smith's Withdrawal Defense Negated the "Participation" Element of Conspiracy

As an initial matter, even the D.C. Circuit acknowledged that "when a defendant raises (by meeting his burden of production) a defense that negates an element of the charged offense, the government bears the burden of persuasion to disprove [that] defense." *United States v. Moore*, 651 F.3d 30, 89 (D.C. Cir. 2011). This rule is

compelled by simple logic: where a properly raised defense negates an element of the charged crime, the prosecution necessarily cannot prove that element "beyond a reasonable doubt" without disproving the defense. Demanding that the prosecution disprove an element-negating defense, therefore, ensures that the prosecution has satisfied its constitutional burden of proof. Conversely, where the prosecution need not disprove a defense even if it negates an element of the charged crime, the prosecution is relieved of its burden to establish every element beyond a reasonable doubt.

Not even the Government can dispute that the defense at issue in this case – withdrawal from a conspiracy prior to the statute of limitations period – directly negates the "knowingly participated" element of the two conspiracy offenses (a narcotics conspiracy and a RICO conspiracy) with which Mr. Smith was charged. With respect to the narcotics conspiracy, the district court instructed the jury that the Government must prove beyond a reasonable doubt "that a particular defendant knowingly and willfully participated in the conspiracy . . . ." J.A. 287-91. The district court similarly told the jury that a RICO conspiracy requires "that the particular defendant . . . knowingly and intentionally agreed with another person to conduct or participate in the conduct of the affairs of the enterprise." J.A. 298. Of course, a defendant who has withdrawn from a conspiracy prior to the statute of limitations period cannot also have "participated" in it during the limitations period; the two are mutually exclusive. *See United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981) ("Withdrawal, then, directly negates the element of

membership in the conspiracy during the period of the statute of limitations.").

Thus, after Mr. Smith met his burden of production that he withdrew from the conspiracies prior to the statute of limitations period, the Government at that point could not possibly have proven "beyond a reasonable doubt" that Mr. Smith participated in the conspiracies during the limitations period unless it disproved Mr. Smith's withdrawal defense. Nevertheless, the district court excused the prosecution from having to do exactly that, and instead foisted on Mr. Smith the burden of proving his withdrawal defense by a preponderance of the evidence, and in so doing violated his Due Process rights. While unconstitutionally shifting the burden to the defendant to prove an element-negating defense increases "the risk of convictions resting on factual error" in any type of case, *In re Winship*, 397 U.S. 358, 363 (1970), it is particularly dangerous here, where the crime is conspiracy, and the element concerns the defendant's mental state.

B. Requiring the Defendant to Prove Withdrawal Makes Defendants Even More Vulnerable to Baseless Conspiracy Convictions

The district court's withdrawal instruction, if approved by this Court, would vest in the prosecution yet another advantage among the many it already enjoys in cases charging conspiracy, "that elastic, sprawling and pervasive offense." *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). Even 60 years ago, when conspiracy law was still in its early

stages, Justice Jackson recognized that "loose practice as to [conspiracy] constitutes a serious threat to fairness in our administration of justice." *Id.* at 446. That was true then; it is equally true now.

First, given the secrecy associated with conspiracy and the perceived difficulty in proving its central act – an agreement – prosecutors are afforded significant evidentiary advantages. To prove an agreement, the prosecutor need not produce evidence of a formal offer and acceptance (or "meeting of the minds"); rather, "[t]he elements of conspiracy . . . can be proven entirely by circumstantial evidence." *United States v. Brodie*, 403 F.3d 123, 134 (3d Cir. 2005). The jury thus "may infer conspiracy from the defendants' conduct and other circumstantial evidence indicating coordination and concert of action." *United States v. Dazey*, 403 F.3d 1147, 1159 (10th Cir. 2005). As a result, "the illusory quality of agreement is increased by the fact that it, like intent, must inevitably be based upon assumptions about what people acting in certain ways must have had in mind." Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 410 (1959). In addition, the Federal Rules of Evidence exempt from the hearsay rules a co-conspirator's out-of-court statements. *See* Fed. R. Evid. 801(d)(2)(E). With such relaxed evidentiary standards, the prospect that a jury will wrongfully convict a defendant in a conspiracy case based on tenuous evidence and untested out-of-court statements increases markedly.

Compounding matters is the inchoate nature of conspiracy, which often results in the merger of

the crime's mens rea and actus reus requirements, making the prosecution's job even easier. This is because with conspiracy, "the criminal agreement itself is the *actus reus*." *United States v. Shabani*, 513 U.S. 10, 16 (1994). And as explained above, an agreement, seeing as it almost never takes the form of a formal agreement or written document, hinges almost entirely on inferences regarding a defendant's intentions and state of mind. The same conduct, therefore – often, a defendant's words – can serve both to prove his guilty mind and guilty conduct. *Id.* While some conspiracy crimes, to be sure, also require the prosecution to prove an overt act, many do not. *See, e.g., id.* at 17 (holding that "proof of an overt act is not required to establish a violation of 21 U.S.C. § 846," *i.e.*, Title I drug conspiracies); *Whitfield v. United States*, 543 U.S. 209, 219 (2005) ("we hold that conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), does not require proof of an overt act"). But even for the crimes for which an overt act is required, it hardly levels the playing field, since virtually anything can serve as an "overt act." *See United States v. Scallion*, 533 F.2d 903, 911 (5th Cir. 1976) (holding that traveling to another city is an overt act); *Bartoli v. United States*, 192 F.2d 130 (4th Cir. 1951) (holding that a phone call is an overt act).

While all of this would be troubling on its own, it is even more so because of the consequences a conspiracy conviction carries. Under *Pinkerton v. United States*, 328 U.S. 640 (1946), a defendant convicted of conspiracy can be held vicariously liable for all "reasonably foreseeable" crimes of his co-conspirators. While the foreseeability

requirement, in theory, is meant to assure a degree of connection between the conspirator and the acts of his co-conspirators for which he is vicariously liable, in practice it offers little assurance at all. *United States v. Hansen*, 256 F. Supp. 2d 65, 67 n.3 (D. Mass 2003), *aff'd*, 434 F.3d 92 (1st Cir. 2006) ("'Foreseeability' is the language of negligence law. It is not a usual criminal law concept and surely not a concept that puts meaningful due process limits on criminal liability."); Mark Noferi, *Towards Attenuation: A 'New' Due Process Limit on Pinkerton Conspiracy Liability,* 33 Am. J. Crim. L. 91, 113 (2006) ("courts have criticized the 'reasonably foreseeable' requirement as providing no meaningful limits on vicarious liability."). Thus, a defendant convicted of conspiracy could well find himself also convicted of a substantive crime he did not commit – even first degree murder – based on evidence (such as the hearsay of a co-conspirator) that would be insufficient or even inadmissible in a stand-alone murder trial against the defendant who actually committed the murder. *See also United States v. Sklena*, No. 11-2589 (7th Cir. Aug. 23, 2012) (holding that evidence against defendant convicted of wire and commodities fraud was insufficient to prove actual knowledge or conscious avoidance, but sufficient for purposes of *Pinkerton* liability). Armed with the cudgel of vicarious liability and relaxed evidentiary standards, prosecutors have overwhelming leverage to extract plea bargains from defendants in conspiracy cases. If the defendant instead chooses to force the Government to prove its case in court, he places his fate in the vagaries of conspiracy law and its many attendant advantages for the prosecution.

Against this backdrop, this Court should not vest the prosecution with yet another advantage in conspiracy cases. By requiring the Government to disprove that a defendant who met his burden of production on withdrawal did not in fact withdraw, this Court – in addition to being faithful to the Due Process Clause – would finally restore some semblance of balance to the heavily lopsided field of conspiracy law.

C. Relieving Prosecutors of Their Burden to Prove a Defendant's Mental State Is Uniquely Prejudicial to Defendants

The district court's withdrawal instruction, and the similar approach taken by other courts, not only adds to the perils defendants face in conspiracy cases. It also highlights the drift away from robust mens rea requirements, since the element negated by Mr. Smith's withdrawal defense – the "knowing" participation in a conspiracy – goes directly to Mr. Smith's mens rea.

Relieving prosecutors of their full constitutional burden to establish a defendant's mental state is especially troublesome to the amicus and its members. The mens rea requirement "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). But as this Court recognized in *Mullaney v. Wilbur*, unlike other elements of a charged crime, "intent is typically considered a fact peculiarly within the knowledge of the defendant." 421 U.S.

684, 702 (1975). As a result, if prosecutors need not disprove an element-negating mental state – such as "knowingly" partaking in a conspiracy – defendants may have no choice but to testify in their own defense, with all of the evidentiary and constitutional downsides that such testimony entails. Not only may such testimony be counter-productive at trial by taking the jury's focus off of the prosecution's case and shifting it to the defendant's perceived credibility, but the possibility of being forced to offer it would certainly factor into the defendant's decision whether to accept a plea or go to trial.

The problem of relieving prosecutors of their obligation to sufficiently prove a criminal defendant's mental state, as happened in this case, is an especially salient one. A joint report released in 2010 by NACDL and the Heritage Foundation detailed the proliferation of federal criminal offenses with a deficient or non-existent mens rea requirement. *See* Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, at IX (Apr. 2010), http://www.nacdl.org/criminaldefense.aspx?id=10287&terms=withoutintent (explaining that of the 446 non-violent criminal offenses proposed by the 109th Congress, "57 percent lacked an adequate *mens rea* requirement"). The groups recognized that "[*m*]ens *rea* requirements . . . not only help to assign appropriate levels of punishment, but also to protect from unjust criminal punishment those who committed prohibited conduct accidentally or indadvertently." *Id.* at 4-5. With "the disappearance of adequate *mens rea* requirements,"

the criminal law "becomes a broad template for the misuse and abuse of governmental power." *Id.* at 10.

Ensuring that prosecutors bear fully the burden of establishing a defendant's mental state, therefore, is a critical check on prosecutorial power. But the district court's instruction effectively absolved the Government of that obligation here by requiring Mr. Smith to prove by a preponderance of the evidence that he withdrew from the charged conspiracies, and that he thus did not "*knowingly* participat[e]" in them. This Court should put a stop to the continued dilution of mens rea requirements.

* * *

None of this is to suggest that Mr. Smith or other criminal defendants in like circumstances should play no role in establishing their withdrawal from a conspiracy prior to the statute of limitations (or in establishing any other element-negating defense). To the contrary, this Court in *Wilbur*, after holding that Maine impermissibly required a defendant charged with murder to prove that he acted in the heat of passion, explicitly approved of the requirement in many states that the defendant "show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element." *Wilbur*, 421 U.S. at 702 n.28. Indeed, the Court made clear that "[n]othing in [its] opinion is intended to affect that requirement." *Id.* Thus, even if this Court reverses, Mr. Smith and others in his position would still be required to at least meet their burden of production regarding their element-negating defenses.

But once an element negating defense is properly raised, the prosecution, in order to satisfy its constitutional burden to prove each element beyond a reasonable doubt, must disprove that defense. Relieving the prosecution of this obligation not only offends this Court's precedents and the United States Constitution, but, as explained, it substantially undermines the fairness of trial by diluting one of the most important protections against wrongful convictions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and remanded.

Respectfully submitted,

TIMOTHY P. O'TOOLE
Counsel of Record
JEFFREY HAHN
MILLER & CHEVALIER CHARTERED
655 Fifteenth St., N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Email: totoole@milchev.com

August 27, 2012