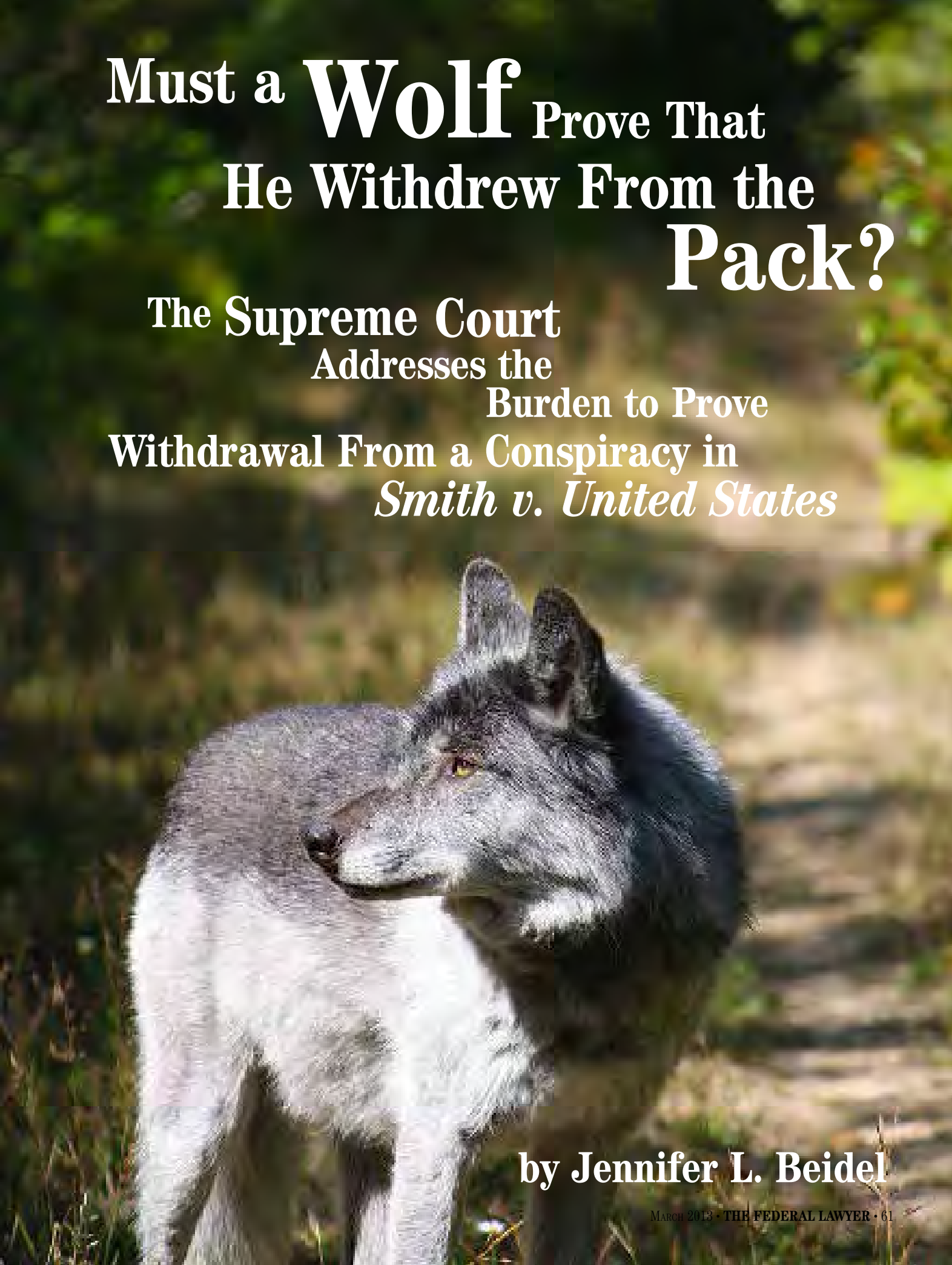
Must a Wolf Prove That He Withdrew From the Pack?

The Supreme Court Addresses the Burden to Prove Withdrawal From a Conspiracy in *Smith v. United States*



by Jennifer L. Beidel

In the case of *Smith v. United States*,[1] the U.S. Supreme Court recently heard oral argument on the question of who bears the burden of proving or disproving that a defendant was a member of a conspiracy during the relevant statute-of-limitations period. In the words of Justice Samuel Alito during the oral argument, conspiracy is "a dangerous thing," like "rounding up" a "pack of wolves."[2] Like any wolf pack, a conspiracy comports with the adage that there is strength in numbers. It follows that, as a matter of public policy, the law should encourage individual conspirators to withdraw from, and thereby weaken, the conspiracy.[3] It is this policy objective that gives rise to the affirmative defense of withdrawal. If a defendant has withdrawn from a conspiracy outside of the relevant statute-of-limitations period, he can no longer be charged with conspiracy. The question then becomes who bears the burden to prove such withdrawal—the defendant or the government?

The issue has given rise to a circuit split. The U.S. Courts of Appeals for the Second, Fifth, Sixth, Tenth, Eleventh, and District of Columbia (D.C.) Circuits have said that the burden of proving withdrawal always rests on the defendant. The U.S. Courts of Appeals for the First, Third, Fourth, Seventh, and Ninth Circuits have held that the burden of proving withdrawal shifts to the government once the defendant has met his burden of production on the withdrawal defense.[4] It remains to be seen how the Court will resolve this circuit split, but its resolution has the potential to make the withdrawal defense far less attractive to defendants. If a defendant bears the burden to prove withdrawal himself, he may not be willing to assert it, especially considering that an allegation of withdrawal is an implicit admission of prior membership.

The Facts of *Smith*

The case of *Smith* arose from a decades-long conspiracy to distribute drugs in Washington, D.C. From 1988 through March 2000, defendants Rodney Moore and Kevin Gray led a conspiracy of at least 14 members that operated the drug distribution ring. The ring wreaked havoc across the city and was accused of at least 31 murders. On Nov. 17, 2000, the defendants were charged in a 158-count superseding indictment and were tried by a jury for over 10 months. The jury returned guilty verdicts on many of the charges, including drug conspiracy, Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, and murder. The defendants generally received sentences in excess of life imprisonment.[5]

Under the federal system, a five-year statute of limitations is applicable to conspiracy.[6] Given this conspiracy's 12-year length and relatively large size, it stands to reason that some of its members may have withdrawn *prior to* the statute-of-limitations period and may, as a result, have a valid defense to the conspiracy charges. One such defendant, Calvin Smith, introduced evidence to establish that he had withdrawn prior to the statute-of-limitations period.[7] Smith offered a stipulation that starting in 1994, he was incarcerated after pleading guilty to a shooting and that as a result, he could no longer have been a member of the conspiracy. He further contended that as evidenced by testimony of a government witness, he told the witness that he had refused to comply with a directive from Gray to kill the witness. Another witness testified that Smith and Gray did not communicate after Smith's arrest and that Smith was upset with Gray for not sending him money.[8]

At trial, the government offered contradictory evidence that despite Smith's imprisonment, he was still an active participant in the conspiracy during the statute-of-limitations period. Such evidence included the fact that Smith confessed to a co-conspirator that he had agreed to the guilty plea that led to his imprisonment in an effort to assist Gray in getting reduced charges. The evidence further suggested that Smith struck this deal in exchange for a promise from Gray of drugs and money for Smith and his wife during Smith's prison term. The government further offered evidence that while in prison, Smith looked out for the interests of the conspiracy by threatening witnesses and providing information to Gray.[9]

On the statute-of-limitations issue, the district court instructed the jury that one of the elements of conspiracy was that the charged conspiracy existed for some time between 1988 and November 2000 "and continu[ed] within the period of the applicable statute of limitations."[10] In its jury instructions, the district court explained:

> If you find that the evidence at trial did not prove the existence of the narcotics conspiracy at a point in time continuing in existence within five years before ... May 5, 2000 for defendant Calvin Smith ... you must find the defendant[ ] not guilty of Count One.[11]

After nearly 12 days of deliberation, the jury posed the following question to the court: "If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?"[12] Smith argued that the question should simply be answered "yes."[13] Over Smith's objections, and as requested by the government, the court told that jury: "Once the Government has proven that a defendant was a member of a conspiracy, *the burden is on the defendant* to prove withdrawal from a conspiracy by a preponderance of the evidence."[14] The court further explained: "The defendant must meet his burden by showing that he took affirmative acts inconsistent with the goals of the conspiracy and that those acts were communicated to the defendant's co-conspirators in a manner reasonably calculated to reach those co-conspirators. Withdrawal must be unequivocal."[15]

Smith's Appeal to the D.C. Circuit

Among Smith's many grounds for appeal to the D.C. Circuit was that the district court erred in instructing the jury that he bore the burden to prove that he had withdrawn from the conspiracy. Smith's position is that because he met his burden of proof to show that he withdrew from the conspiracy, due process required the government to prove that he was a member of the conspiracy during the relevant period.[16]

In its decision, the D.C. Circuit noted that due process requires the government to prove all of the elements of an offense beyond a reasonable doubt. When the defendant raises a defense that negates an element of the offense, the government bears the burden to disprove the defense. As a result, the issue, in the D.C. Circuit's view, turned on whether or not withdrawal is a defense that negates an element of the offense, namely, membership in the conspiracy. The D.C. Circuit affirmed, concluding that *withdrawal did not negate* an element of the crime of conspiracy and that as a result, Smith bore "the burden of proving that he affirmatively withdrew from the conspiracy if he wished to benefit from his claimed lack of involvement."[17] The court's decision was premised, in large part, on its previous decision in the sentencing context that a defendant bears the burden to prove withdrawal from a conspiracy.[18] The court did not undertake a detailed analysis in an effort to resolve the circuit split presented in *Smith*.

Smith sought rehearing and rehearing en banc on the issue, arguing that the sentencing cases relied upon by the D.C. Circuit did not implicate the same due process considerations that apply in the context of jury instructions that shift the burden of proof at trial to the defense. The D.C. Circuit denied the rehearing request, making the circuit split 6-5 on the issue.[19]

The Petition for Writ of Certiorari

Smith filed a petition for writ of certiorari on Feb. 27, 2012. In it, Smith stated the importance of the question as follows:

> The burden of proof question presented by this petition is an important and recurring constitutional question that has seriously divided the federal appellate courts. Because conspiracies are ongoing crimes that often exist over several years, with membership changing throughout, and because conspiracies are often prosecuted only after years of investigation, whether a particular defendant withdrew from a particular conspiracy before the statute of limitations period is a question that arises with great frequency in conspiracy trials.[20]

The Court granted the petition for writ of certiorari on June 18, 2012.

Conspiracy, Withdrawal, and the Statute of Limitations

A conspiracy is an agreement between two or more persons to commit an unlawful act.[21] Conspiring is seen as an independent societal ill, distinct from any substantive offenses that the conspirators may commit.[22] It follows then that a conspiracy conviction simply requires proof of: (1) the existence of the conspiracy; and (2) the defendant's membership in it.[23] Once established, a conspiracy generally continues until abandonment or success, at which time the statute of limitations is triggered. As long as two people share the conspiracy's goals, it continues, meaning that conspiracies survive membership changes.[24] Generally, a conspirator is liable for the acts of his co-conspirators during the entire course of the conspiracy even absent knowledge of or participation in the crimes at issue.[25] As Justice Oliver Wendell Holmes observed: "Plainly a person may conspire for the commission of a crime by a third person."[26] However, this liability for the acts of others cannot go on indefinitely or it would conflict with the statute of limitations' goal of bringing a definitive end to potential criminal exposure. Therefore, to be relevant, the defendant's membership in the conspiracy must have occurred at some point during the limitations period (i.e., within the five years preceding the date of the indictment).[27]

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This is where withdrawal comes into play: if a defendant withdrew from a conspiracy prior to the five years preceding the date of the indictment, he cannot be convicted of conspiracy. To withdraw from a conspiracy, a conspirator must disavow or abandon its purposes and goals. Withdrawal must be accompanied by an affirmative action; mere cessation of activity is not enough.[28] Standing alone, withdrawal merely exonerates the defendant from liability for criminal acts completed by his co-conspirators *after* he withdrew. This is because the crime of conspiracy is complete once a person has entered into a proscribed agreement. However, when coupled with the statute of limitations, withdrawal operates as a complete defense. If the defendant has withdrawn from the conspiracy outside of the statute-of-limitations period, he cannot be convicted of conspiracy, regardless of whether the acts at issue occurred *before or after* withdrawal.[29]

Who Bears the Burden to Prove Withdrawal?

Generally, the burden to prove an affirmative defense rests with the defendant, while the government must prove the elements of a crime beyond a reasonable doubt.[30] One common justification for this burden allocation is that the defendant is typically in a better position to know and provide evidence regarding a defense, particularly when it involves issues of the defendant's subjective thoughts, beliefs, or actions.[31]

But, where the defense negates an element of the crime itself,

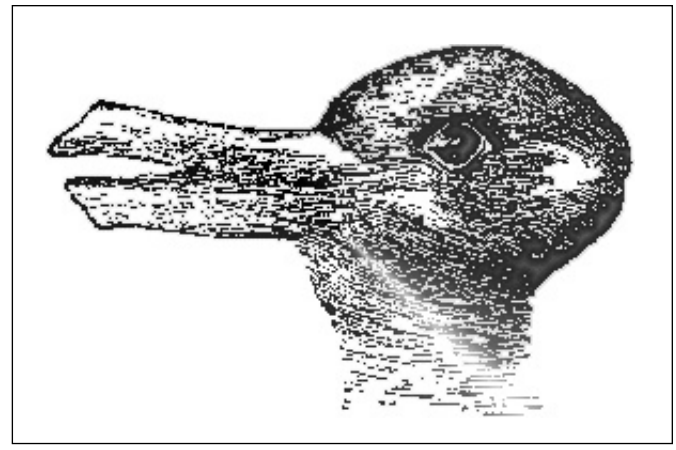
the proof question becomes murky. Were the burden to prove the defense to rest with the defendant, he would be called upon to establish his innocence, which contravenes the reasonable doubt standard and, with it, principles of due process.[32] Accordingly, the Court has held that a defendant does not bear the burden to prove a defense that negates "the critical fact in dispute."[33] So, for example, the defense of heat of passion negates the element of malice aforethought for a murder conviction and must, therefore, be proved by the government.[34] Other examples are less clear. The Court has held that the burdens to prove self-defense or extreme emotional disturbance may still rest on defendants because, although certainly related to the elements of a crime, they do not negate them.[35]

So, is withdrawal an affirmative defense that must be proved by the defendant because it is unrelated to the elements of the crime? Or, like heat of passion, does withdrawal negate an element of the crime, namely, membership in the conspiracy, such that it must be proved by the government? Or is withdrawal somewhere in the middle, like self-defense or extreme emotional disturbance, in that it is related to but does not negate one of the elements of conspiracy? As recognized by the Seventh Circuit in *United States v. Read*,[36] it was "well-settled" through the 1980s in almost every court that the burden of proving withdrawal rested on the defendant. *Read* sparked a change in that pattern by finding that withdrawal directly negates the element of membership in the conspiracy, requiring the burden of proof to be borne by the government.[37] From there, the present circuit split has evolved.

So which is it? Some argue that because the withdrawal defense is based on a procedural requirement like the statute of limitations, it is unrelated to the defendant's blameworthiness for a criminal act and cannot, therefore, be seen as negating an element of the crime. After all, if the defendant was a member of a conspiracy but seeks to escape liability on a "technicality" like the statute of limitations, he has not proved that he is "innocent" in the traditional sense of the word. In fact, "a defendant's withdrawal from a conspiracy tends to confirm, rather than deny, his membership in it," and the statute-of-limitations defense "operates to preclude the imposition of criminal liability on defendants, notwithstanding a showing that they committed criminal acts."[38] Others argue that "technicalities" like the statute of limitations are just as important to a determination of guilt or innocence as are the more substantive elements of a crime. If the statute of limitations can be the difference between imprisonment and freedom, surely it can be considered an element of a crime.[39] And, here, perhaps membership is akin to a mental state or *mens rea* requirement, in which case the government should bear the burden to prove that the defendant intended to be a member of the conspiracy during the statute-of-limitations period.[40]

The Oral Argument

It is against this backdrop that the Court heard oral argument on *Smith*. The argument centered around the key question of whether membership in the conspiracy *during the limitations period* is an element that is negated by the defense of withdrawal. Some members of the Court explicitly saw it as a close question. Justice Stephen Breyer referred to it as a "rabbit-duck."[41] As shown above, the rabbit-duck is an ambiguous figure



that has its origins in psychology. When an individual views the figure, her brain switches back and forth between seeing a duck and seeing a rabbit. Psychologists use the illusion to prove that context matters: when viewing the figure on Easter Sunday, people are more likely to see a rabbit than at any other time.[42]

Justice Breyer's analogy certainly highlights the point that the seemingly simple question of who bears the burden to prove withdrawal is actually quite complex and can be viewed in different ways depending upon the context. In considering the question, the Court focused on four main points: (1) the statute of limitation's treatment elsewhere as a waivable, affirmative defense; (2) the fact that withdrawal does not negate previous membership; (3) that the defendant is in the better position to prove the facts of withdrawal; and (4) whether conspiracy is a group or individual defense.

Is the Statute of Limitations a Waivable, Affirmative Defense?

Justices Ruth Bader Ginsburg and Antonin Scalia noted that the government can prove a crime beyond a reasonable doubt without the statute-of-limitations issue ever having been raised (i.e., the statute of limitations is a waivable defense). Justice Ginsburg also noted that in civil jurisprudence, the statute of limitations is an affirmative defense that must be pled and proved by the defendant. Smith countered that the Court has never referred to the *criminal* statute of limitations as an affirmative defense; instead, the Court has referred to it as part of the merits of the case. Although the statute of limitations does not need to be pleaded in the indictment, the government must present evidence of it and prove it.[43]

Does Withdrawal Negate the Membership Element?

The government argued that membership during the statute-of-limitations period is not an element in the constitutional sense. To be an element in the constitutional sense, (1) the government has to allege the issue in the indictment, (2) the government has to prove it in every case, (3) the jury has to be instructed on it in every case, and (4) the defendant cannot waive it by failing to raise it. According to the government, none of these factors applies to membership during the limitations period.[44]

The government further argued that active membership is not an element of the crime because the Court held in *Hyde v. United States*[45] that membership continues absent withdrawal, even if such membership is not active.[46] Justice Ginsburg seem-

ingly endorsed this position when she noted that withdrawal "doesn't reach back to negate that there was membership at some time, it just says: After withdrawal we no longer prosecute."[47]

Nonetheless, Smith argued that withdrawal from a conspiracy negates the key element of participation. Unlike in a self-defense case, according to Smith, the element and the affirmative defense cannot co-exist. While a defendant may simultaneously have the intent to kill and act in self-defense, he cannot simultaneously withdraw from and participate in a conspiracy. Yet, Justice Breyer observed: "The fact that there is a statute of limitations [issue] makes [Smith's] case weaker, not stronger, because the statute of limitations is less directly connected to the elements of the offense than is self-defense or duress."[48]

Is Conspiracy a Group or Individual Defense?

To Chief Justice John Roberts, the issue "basically reduces to the fact that when it comes to the statute of limitations, [Smith argues that the Court should] treat the conspirators as individuals rather than as members of the conspiracy." The Chief Justice pointed out that such individual treatment does not occur for other aspects of the crime of conspiracy because, for example, one conspirator can be held liable for the acts of another.[49] Yet, the chief justice later noted: "You've indicted an individual, and it's not clear to me why you didn't have to show that that individual's conduct was within the statute of limitations period."[50]

Who Is in the Better Position to Prove Withdrawal?

Justice Breyer focused on the aspect of the withdrawal defense that requires proof of the defendant's mental state. He analogized the issue to the Thomas Crown Affair. If Thomas Crown robs an art museum but produces evidence of his subjective intent to return the art, Justice Breyer asked who bears the burden to prove Thomas Crown's intent? Justice Breyer's point with the Thomas Crown analogy appeared to be that the defendant in both scenarios is in a better position to prove his subjective mental state (i.e., to return the stolen art in the Thomas Crown Affair or to withdraw in the case at issue). Nonetheless, Smith argued that for Thomas Crown, the subjective intent to return negates the element of the defense that requires an intent to permanently deprive an owner of his property, so that the burden should be placed on the government.[51]

Several of the justices questioned in detail what the government's proof burden would look like. Justice Ginsburg asked if the government would have to prove membership twice. She said: "They prove membership in the conspiracy, and then you say once he alleges that he withdrew, they have to prove it again."[52] Smith argued that the government could rest on its original proof of membership, including an attack on the credibility of any testifying witnesses, and the permissive inference that he was a member during the limitations period.[53] But, Chief Justice Roberts questioned how that could qualify as proof beyond a reasonable doubt.[54] Chief Justice Roberts also observed that the government may face an evidentiary burden. If the defendant allegedly told a co-conspirator that he withdrew, the government certainly could not call that co-conspirator as a witness because of the Fifth Amendment protection against self-incrimination. Smith countered that the government could simply call in to question why the witness had not come forward to support the defendant's story.[55]

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In an effort to sum up, Justice Sonia Sotomayor noted that Smith's "intuitive argument is, I can't be responsible for a crime I wasn't a part of during the limitations period," which makes membership during the limitations period an element of the offense.[56] The government responded that it "proved that the crime was committed within the limitations period because the conspiracy existed in the limitations period."[57] It remains to be seen how the Court will decide this question.

Conclusion

Who bears the burden to prove withdrawal is both a basic and a complex question. Its outcome is likely to turn on the Court's decision as to whether withdrawal negates or is simply related to the membership element of the offense of conspiracy. Jurisprudence on this issue is less than clear. While withdrawal arguably negates the element of membership, the defendant is certainly in a better position to prove withdrawal than is the government. The Court's decision on this issue is likely to turn on whether it is more persuaded by the intellectual argument that withdrawal negates membership or by the more pragmatic proof issues that would be faced by the government if it bore the burden.

Whatever the Court decides, resolution of *Smith* will affect whether defendants are willing to bear the risk of asserting a withdrawal defense. A defendant who alleges that he withdrew from a conspiracy implicitly admits that he was once a member of the conspiracy. He will be more likely to accept this risk if the government, rather than he, bears the burden of proof on the issue. Such a resolution would also further the asserted policy rationale of the withdrawal defense (i.e., to reduce the effectiveness of the conspiracy by encouraging its wolves to leave the pack). ⊙

Editor's Note

As this article was going to print, the Supreme Court issued its decision in *Smith v. United States* on Jan. 9, 2013. In an opinion delivered by Justice Scalia, the Court held that the defendant bears the burden to prove withdrawal from a conspiracy. The Court concluded that withdrawal does not negate an element of the crime of conspiracy because commission of a crime "within the statute-of-limitations period is not an element of the conspiracy offense." In so deciding, the Court noted the "informational asymmetry" that heavily favors imposing the burden on the defendant. As the Court noted, the ultimate decision-making authority here rests with Congress, which remains free to alter the burdens via statute if it so chooses. *Smith v. United States*, 133 S. Ct. 714, 720 (2013) (emphasis in original).

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Endnotes

[1]No. 11-8976, slip op. (U.S. Jan. 9, 2013).

[2]*See* Oral Argument Transcript, dated Nov. 6, 2012, at 16.

[3]Linda Cantoni, *Withdrawal From Conspiracy: A Constitutional Allocation of Evidentiary Burdens*, 51 Fordham L. Rev. 438, 440 (Dec. 1982) (discussing the policies behind the withdrawal defense).

[4]*United States v. Moore*, 651 F.3d 30, 90 (D.C. Cir. 2011).

[5]*Id.* at 39-40, 65.

[6]*See id.* at 65 (citing 18 U.S.C. § 3282).

[7]*See Smith v. United States*, No. 11-8976, 2012 WL 2337350, at *11 (U.S. Feb. 27, 2012).

[8]*See Smith v. United States*, No. 11-8976, 2012 WL 3027176, at **3-4, 30 (U.S. May 14, 2012); *Smith v. United States*, No. 11-8976, 2012 WL 3613366, at *3 (U.S. Aug. 20, 2012); Oral Argument Transcript, dated Nov. 6, 2012, at *7.

[9]*Smith*, 2012 WL 3027176, at **3-4, 30.

[10]*Id.* at *6.

[11]*United States v. Moore*, 651 F.3d 30, 89 (D.C. Cir. 2011).

[12]*Id.*

[13]*Smith*, 2012 WL 3613366, at *4.

[14]*Moore*, 651 F.3d at 89 (emphasis added).

[15]*Smith*, 2012 WL 3027176, at *8.

[16]*Moore*, 651 F.3d at 89.

[17]*Id.* at 90.

[18]*Id.* at 89-90.

[19]*United States v. Smith*, No. 11-8976, 2012 WL 2337350, at *14 (U.S. Feb. 27, 2012).

[20]*Id.* at *15.

[21]*United States v. Jimenez Recio*, 537 U.S. 270 (2003) (citing *Iannelli v. United States*, 420 U.S. 770 (1975)).

[22]*Iannelli*, 420 U.S. at 778-79.

[23]*United States v. Read*, 658 F.2d 1225, 1232 (7th Cir. 1981) (citing *Grunewald v. United States*, 353 U.S. 391, 396 (1957)).

[24]*Smith v. United States*, No. 11-8976, 2012 WL 3613366, at *26 (U.S. Aug. 20, 2012).

[25]*Pinkerton v. United States*, 328 U.S. 640, 647 (1946) ("The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime .... If [the overt act] can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.").

[26]*Salinas v. United States*, 522 U.S. 52, 64 (1997) (quoting *United States v. Holte*, 236 U.S. 140, 144 (1915)).

[27]*Read*, 658 F.2d at 1232.

[28]*Hyde v. United States*, 225 U.S. 347, 369-70 (1912).

[29]*Read*, 658 F.2d at 1232-33 (citing *Hyde*, 225 U.S. at 369); *see also* Barton D. Day, *The Withdrawal Defense to Criminal Conspiracy: An Unconstitutional Allocation of the Burden of Proof*, 51 Geo. Wash. L. Rev. 420, 423 (1983).

[30]*Patterson v. New York*, 432 U.S. 197, 211-12 n.13 (1977); *In re Winship*, 397 U.S. 358, 363 (1970); *United States v. Moore*, 651 F.3d 30, 89-90 (D.C. Cir. 2011).

[31]*Morrison v. California*, 291 U.S. 82, 88-89 (1934).

[32]*In re Winship*, 397 U.S. at 364; *Davis v. United States,* 160 U.S. 469, 485-87 (1895).

[33]*Mullaney v. Wilbur*, 421 U.S. 684, 699-701 (1975).

[34]*Id.*

[35]*See, e.g., Patterson v. New York*, 432 U.S. 197 (1977); *Martin v. Ohio*, 480 U.S. 228 (1987).

[36]658 F.2d 1225 (7th Cir. 1981).

[37]*Id.* at 1233, 1236.

[38]*Smith v. United States*, No. 11-8976, 2012 WL 3027176, at *28 (U.S. May 14, 2012) (quoting *United States v. Hamilton*, 538 F.3d 162, 174 (2d Cir. 2008) and *United States v. Scott*, 437 U.S. 82, 111 (1978)).

[39]Cantoni, *supra* note 2, at 455.

[40]*Smith v. United States*, No. 11-8976, 2012 WL 3680424, at **14-16 (U.S. Aug. 27, 2012).

[41]Oral Argument Transcript, dated Nov. 6, 2012, at 15.

[42]*See* mathworld.wolfram.com/Rabbit-DuckIllusion.html (last visited Dec. 15, 2012).

[43]Oral Argument Transcript, dated Nov. 6, 2012, at 1-2, 10.

[44]*Id.* at 10.

[45]225 U.S. 347, 369-70 (1912).

[46]*Id.* at 12.

[47]*Id.* at 2.

[48]*Id.* at 6.

[49]*Id.* at 3.

[50]*Id.* at 16.

[51]*Id.* at 3-4.

[52]*Id.* at 4.

[53]*Id.*

[54]*Id.* at 8.

[55]*Id.* at 5.

[56]*Id.* at 14.

[57]*Id.*