No. 11-8976

In the Supreme Court of the United States

CALVIN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, when a defendant adduces evidence that he withdrew from a criminal conspiracy outside the applicable statute-of-limitations period, the burden of persuasion should be on the government to prove beyond a reasonable doubt that the defendant did not withdraw, or on the defendant to prove by a preponderance of the evidence that he did withdraw.

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OPINION BELOW

The opinion of the court of appeals (J.A. 10a-167a) is reported at 651 F.3d 30.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2011. A petition for rehearing was denied on November 30, 2011 (J.A. 170a-171a). The petition for a writ of certiorari was filed on February 27, 2012, and was granted on June 18, 2012, limited to question two presented by the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-2a.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of conspiracy to distribute narcotics and to possess narcotics with the intent to distribute them, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A); Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, in violation of 18 U.S.C. 1962(d) and 1963; murder in connection with a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848(e)(1)(A); and three counts of murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (Supp. 1995). Judgment, 1:00-cr-00157-RCL Docket entry No. 2183, at 1 (D.D.C. May 11, 2005) (Judgment). Petitioner was sentenced to concurrent terms of life imprisonment on each of the conspiracy and CCE murder counts, and to concurrent terms of imprisonment of 25 years to life on each of the three counts of murder while armed, all to be followed by five years of supervised release. *Id.* at 2-3. The court of appeals affirmed petitioner's conspiracy convictions and two of his convictions for murder while armed.[1] J.A. 10a-167a.

1. The question presented in this case concerns petitioner's conspiracy convictions under 21 U.S.C. 846 and 18 U.S.C. 1962(d). Section 846 makes it unlawful to "conspire[] to commit any offense" under, *inter alia*, 21 U.S.C. 841(a)(1), which in turn makes it unlawful "know-

[1] The court of appeals held (J.A. 120a) that petitioner presented a "colorable claim" that his trial counsel had rendered ineffective assistance as to the two counts associated with the murder of Anthony Dent. Concluding that "the current record does not conclusively resolve [the] claim," the court remanded those two counts "to the district court so that it may hold an evidentiary hearing and address [the] claim in the first instance." J.A. 124a; see J.A. 114a-124a, 153a.

ingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 1962(d) makes it unlawful to "conspire to violate" RICO, which in turn makes it unlawful to, *inter alia*, "conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity," where the enterprise "engage[s] in" or "affect[s]" "interstate or foreign commerce," 18 U.S.C. 1962(c). Neither 21 U.S.C. 846 nor 18 U.S.C. 1962(d) contains its own limitations period. Section 3282(a) of Title 18 provides a five-year limitations period for non-capital federal crimes.[2]

2. Petitioner was convicted of being part of a large drug organization that distributed heroin, cocaine, crack cocaine, and marijuana throughout Washington, D.C., from the late 1980s through 2000. J.A. 12a. Petitioner and other members of the organization committed numerous acts of violence—including 31 murders—to further the goals of the conspiracy. *Ibid.* For example, petitioner was convicted of murdering Eric Moore by shooting him to death in his own bedroom closet. J.A. 107a. As the court of appeals noted, "the superseding indictment and evidence at trial ma[d]e clear that one of the principal goals of the drug conspiracy was killing to enhance the conspiracy's power, protect the reputation of the conspiracy and its members, and collect money owed to the conspiracy." J.A. 136a.

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[2] At the time of petitioner's indictment, Section 3282 did not contain subsections. The full text of that version of Section 3282 now appears without alteration in Subsection (a) of Section 3282. Compare 18 U.S.C. 3282 (2000) with 18 U.S.C. 3282(a) (2006). For ease of reference, this brief refers to Section 3282(a).

In January 1994, petitioner was arrested for shooting Maurice Willis, an act that was charged as part of the conspiracy in this case. Second Superseding Indictment, 1:00-cr-00157-RCL Docket entry No. 102, at 18 (D.D.C. Nov. 17, 2000) (Superseding Indictment); 7/2/02 p.m. Trial Tr. 12-25, 30-35; see J.A. 183a-184a. Petitioner ultimately pleaded guilty to a felony in connection with that incident and was incarcerated for that crime. J.A. 183a. Petitioner confessed to a co-conspirator that he had agreed to the plea so that Kevin Gray, who was a leader of the drug organization and was also involved in the Willis shooting, would be charged with only a misdemeanor offense. J.A. 192a. Gray rewarded petitioner for pleading guilty by giving him marijuana and money while incarcerated and by sending money to petitioner's wife. J.A. 185a, 199a-200a, 262a-264a, 266a-268a.

Although petitioner has been incarcerated continuously since June 1994, see J.A. 285a, his relationship with Gray continued after that date. In 1997, for example, petitioner informed Gray about a rumor that one of their co-conspirators was an informant. J.A. 254a-260a. Also in 1997, Gray directed petitioner to murder a government witness who was also incarcerated in prison, although petitioner declined to carry out that order. See J.A. 187a-190a. Finally, during the trial in this case (*i.e.*, in 2002), petitioner and two associates threatened a cooperating witness in the courthouse cellblock. J.A. 207a-248a.

3. a. On November 17, 2000, a federal grand jury returned a 158-count second superseding indictment charging petitioner and 16 co-conspirators with a narcotics conspiracy, a RICO conspiracy, murder, and related offenses, in violation of federal and District of Colum-

bia law. Superseding Indictment 1-159; see J.A. 12a. As relevant here, petitioner was charged with conspiracy to distribute narcotics and to possess narcotics with the intent to distribute them, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A); RICO conspiracy, in violation of 18 U.S.C. 1962(d) and 1963; murder in connection with a CCE, in violation of 21 U.S.C. 848(e)(1)(A); and three counts of murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (Supp. 1995).[3]

b. Before trial, petitioner filed a motion to dismiss the narcotics conspiracy and RICO conspiracy counts, arguing that those charges were barred by the five-year limitations period in 18 U.S.C. 3282(a). See J.A. 177a-178a. The district court denied the motion, explaining that "the Government has alleged—and the Grand Jury found probable cause to believe—that the conspirac[ies] continued into the five-year period covered by the statute of limitations, and that [petitioner's] membership in the conspirac[ies] continued into the five-year period." J.A. 179a-180a.

c. Petitioner and five other defendants were tried before a jury in a trial lasting more than ten months. J.A. 12a. At the conclusion of the trial, the district court instructed the jury that, in order to prove that petitioner and his co-conspirators were guilty of the conspiracy charges, the government had to prove beyond a reasonable doubt that each defendant "knowing[ly] and willful[ly] particpat[ed] in * * * an agreement [that]

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[3] As petitioner notes (Br. 2 & n.3), he was also charged with using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c), and assault with intent to murder, in violation of D.C. Code § 22-503 (1989) and § 22-3202 (Supp. 1995). Those charges were dismissed before trial because petitioner committed the offenses outside of the five-year limitations period.

existed between at least two people to commit a federal crime"—either distribution of narcotics, possession of narcotics with the intent to distribute them, or a RICO violation. J.A. 287a (narcotics conspiracy); see J.A. 297a (RICO conspiracy). The judge also instructed the jury that it should convict petitioner of conspiracy if it found that the government had "proven beyond a reasonable doubt that there was a [narcotics or RICO] conspiracy, [petitioner] was a member of that [narcotics or RICO] conspiracy, and that the conspiracy continued in existence within five years before * * * May 5th, 2000." J.A. 289a; see J.A. 300a; see also J.A. 289a ("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 5th, 2000 * * * , you must find [petitioner] not guilty of" the narcotics conspiracy);[4] J.A. 299a-300a (same for RICO conspiracy). The court also specified that "the government must prove beyond a reasonable doubt * * * that a particular defendant knowingly and willfully participated in the conspiracy and did so with the specific intent to" commit the identified narcotics or RICO violations. J.A. 290a, 298a.

During the jury's deliberations, it returned a note asking the district court: "If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular

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[4] The court's instruction used the date of the first superseding indictment, which was filed on May 5, 2000, but did not charge petitioner. Petitioner was charged on November 7, 2000, in the second superseding indictment. Petitioner neither challenges the misstatement nor identifies any prejudice resulting from it, conceding instead that it "does not affect [his] arguments before this Court." Br. 32 n.18.

defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?" J.A. 174a. After consulting with counsel, the court responded that "[t]he relevant date for purposes of determining the statute of limitations is the date, if any, on which a conspiracy concludes or a date on which that defendant withdrew from that conspiracy." J.A. 328a. Over the defense's objections, see J.A. 307a-327a, the court then explained "what conduct constitutes withdrawal from a conspiracy" and who bears the burden of persuasion on whether a particular defendant has withdrawn from a charged conspiracy:

> 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. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing.
>
> In determining whether the defendant has proven that he withdrew from the conspiracy, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence regardless of who may have produced them.
>
> If the evidence appears to be equally balanced or if you cannot say upon which side it weighs heavier, you must resolve this question against the defendant. 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 coconspirators in a manner rea-

> sonably calculated to reach those coconspirators. Withdrawal must be unequivocal.

J.A. 328a.

The jury found petitioner guilty of the charges enumerated above (see p. 5, *supra*), including the narcotics and RICO conspiracies. Judgment 1.

4. The court of appeals affirmed in relevant part. It rejected petitioner's argument that the district court erred by instructing the jury that petitioner bore the burden of proving by a preponderance of the evidence that he withdrew from the narcotics and RICO conspiracies. J.A. 124a-127a.

The court recognized that "[c]onspiracy is a crime that presumes continuity until accomplishment or termination," such that "once a defendant becomes a member of a conspiracy, he remains a member until he affirmatively withdraws or the conspiracy ends." J.A. 126a (citing *Hyde* v. *United States*, 225 U.S. 347, 368-370 (1912)). "[O]nce the government proves that a defendant was a member of an ongoing conspiracy," the court observed, "it has proven the defendant's continuous membership in that conspiracy unless and until the defendant withdraws." *Ibid.*

In view of those principles, the court perceived the question before it to be "whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of the conspiracy such that the government must prove that the defendant did not so withdraw." J.A. 126a. The court acknowledged that the courts of appeals are divided about which party bears the burden of persuasion on whether a defendant has withdrawn from a conspiracy, though all circuits at least require a defendant to meet a burden of production on the issue of withdrawal. J.A. 126a-127a. The court ad-

hered to circuit precedent holding, "albeit in the context of sentencing, that the defendant, not the government, 'has the burden of proving that he affirmatively withdrew from the conspiracy if he wishes to benefit from his claimed lack of involvement.'" J.A. 127a (quoting *United States* v. *Thomas*, 114 F.3d 228, 268 (D.C. Cir.), cert. denied, 522 U.S. 1033 (1997)). The court therefore "h[e]ld that the district court correctly instructed the jury that [petitioner] bore the burden of persuasion to show that he withdrew from the conspiracy outside of the statute of limitations period." *Ibid.*

SUMMARY OF ARGUMENT

A. The government proved beyond a reasonable doubt every fact necessary to convict petitioner of the conspiracy crimes with which he was charged when it proved that he knowingly and willfully agreed to participate in the relevant conspiracies and that the conspiracies existed within the time specified by the applicable statute of limitations. Once an individual joins a conspiracy, he is criminally liable for belonging to the conspiracy and for any acts taken by co-conspirators in furtherance of the conspiracy's goals even if the individual takes no overt action related to the conspiracy after agreeing to join.

Congress has separately provided a general five-year statute of limitations in 18 U.S.C. 3282(a), which requires the government to initiate a prosecution within five years after an offense was committed. It is well established that conspiracy is a continuing offense that is "committed" on an ongoing basis until accomplishing its goals. The government was therefore required to prove in this case that the charged conspiracies existed within the five-year period before the filing of the operative indictment. It is true that an individual member of a

conspiracy may commence the running of a limitations period as to him, even when the relevant conspiracy continues to exists, by withdrawing from the conspiracy. To accomplish withdrawal, however, a defendant must not only end his involvement with the conspiracy, but also take some affirmative action that is inconsistent with the objectives of the conspiracy: making a clean breast to authorities or communicating his withdrawal to co-conspirators. In the absence of such affirmative action on the part of a defendant, he remains a member of the conspiracy for as long as it exists regardless of whether he overtly reaffirms (through words or deeds) his membership.

B. Within the limits of due process, Congress has the authority to assign the burden of persuasion on any affirmative defense as it sees fit. Where, as here, Congress does not specify in a statute which party should bear that burden, this Court must determine what Congress would have intended in the context of the particular offense at issue. Here, all relevant indicators point in the same direction: when Congress enacted the conspiracy statutes at issue here in 1970, it would have expected a defendant to bear the risk of nonpersuasion on the issue of withdrawal. At common law, a defendant bore the burden of persuasion on all affirmative defenses. And for 70 years after this Court first articulated the defense of withdrawal from a conspiracy, federal courts consistently allocated the burden of persuasion on that defense to defendants. Although the Court has held that, when raised, the statute of limitations requires the government to prove that the charged conspiracy existed within the limitations period, tradition does not support imputing to Congress an intent that

the government *disprove* a defendant's affirmative defense to his continued membership in the conspiracy.

C. Substantial practical reasons justify allocating to a defendant the burden of persuasion on a defense of withdrawal. Withdrawal requires a defendant to take affirmative action inconsistent with the conspiracy and can be accomplished by abandoning the conspiracy and clearly communicating such action to co-conspirators. The defendant and his co-conspirators will therefore be in a better position than the government to adduce evidence relevant to the issue of withdrawal. Indeed, the government is particularly ill-equipped to prove the absence of withdrawal given its inability to compel conspiracy defendants to testify about their activities. And, while a conspiracy defendant will presumably know whether he intends to assert a withdrawal defense, he is under no obligation to notify the government of that strategy. If the government bears the risk of nonpersuasion on that issue, a defendant could easily scuttle the government's ability to investigate a withdrawal claim, let alone disprove it beyond a reasonable doubt. Requiring the defendant to bear the burden of persuasion, in contrast, discourages spurious assertions of withdrawal and properly balances the rights of a defendant and public safety.

D. Requiring a defendant to bear the burden of persuasion on the affirmative defense of withdrawal also comports with the requirements of the Due Process Clause. This Court has repeatedly made clear that, as long as the government proves beyond a reasonable doubt every fact necessary to establish that he committed a crime, Congress need not require the government to disprove any available affirmative defense. Petitioner seems to suggest that it is an "element" of the crime of

conspiracy that a defendant have committed some overt act of membership within a particular time frame. That is incorrect. If that were the case, the government would have to prove that in every conspiracy case, regardless of whether a defendant claims to have withdrawn. Even petitioner does not go that far. Nor does a withdrawal defense negate any element of a conspiracy charge. The opposite is true: a defendant cannot withdraw from a conspiracy that has already concluded or that he had not already joined.

E. Finally, even if petitioner were correct that the district court should have instructed the jury that the government had the burden of proving beyond a reasonable doubt the absence of withdrawal, such error would not be structural. This Court has previously analyzed similar instructional errors under the harmless-error standard and petitioner conceded in his certiorari-stage pleadings that the harmless-error standard would apply here. And in this case ample evidence rebuts any evidence petitioner could produce in support of a *prima facie* case of withdrawal.

ARGUMENT

THE COURT OF APPEALS CORRECTLY INSTRUCTED THE JURY THAT PETITIONER BORE THE BURDEN OF PERSUASION ON THE AFFIRMATIVE DEFENSE THAT HE WITHDREW FROM A CONSPIRACY OUTSIDE THE STATUTE-OF-LIMITATIONS PERIOD

The Due Process Clause requires the government to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [a defendant] is charged" in order to secure a conviction. *In re Winship*, 397 U.S. 358, 364 (1970). It does not, however, require the government to "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses

related to the culpability of an accused." *Patterson* v. *New York*, 432 U.S. 197, 210 (1977); see *Martin* v. *Ohio*, 480 U.S. 228, 234-235 (1987). Although a legislature may choose to allocate the burden of persuasion on an affirmative defense to the government by statute, Congress has not opted to require the government to bear the risk of nonpersuasion with respect to the affirmative defense of withdrawal from the conspiracy crimes charged in this case. Here, the government proved beyond a reasonable doubt every fact necessary to establish that petitioner committed the charged conspiracy crimes. Those showings carried the government's burden to establish petitioner's guilt on those crimes; the burden to show that he withdrew from the conspiracies outside the limitations period fell on petitioner.[5]

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[5] The term "burden of proof" has been used to refer to two distinct concepts: "the 'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced, and the 'burden of production,' *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding." *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005) (citing *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994)). The issue in this case concerns the allocation of the burden of persuasion. Every court of appeals that has considered the question has held that the initial burden of producing evidence of withdrawal is properly placed on the defendant. See, *e.g., United States* v. *Steele*, 685 F.2d 793, 804 (3d Cir.), cert. denied, 459 U.S. 908 (1982); *United States* v. *Green*, 599 F.3d 360, 368 n.9 (4th Cir.), cert. denied, 131 S. Ct. 271 and 131 S. Ct. 340 (2010); *United States* v. *Read*, 658 F.2d 1225, 1236 (7th Cir. 1981); *United States* v. *Grimmett*, 236 F.3d 452, 454 (8th Cir. 2001); *United States* v. *Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992); cf. *United States* v. *Bailey*, 444 U.S. 394, 415 (1980) (defense of duress or necessity in a prison-escape case requires the defendant to "proffer evidence" on the ingredients of the defense). Petitioner does not challenge that rule. See Br. 45-47.

A. The Government Established Every Element Necessary To Secure Petitioner's Conviction On The Charged Conspiracy Counts

In establishing criminal sanctions, it is the province of the legislature to define the elements of a statutory crime. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986). In order to secure a conviction under 21 U.S.C. 846, Congress requires the government to prove beyond a reasonable doubt that a defendant knowingly and willfully participated in an agreement with at least one other person to commit certain drug offenses. See *United States* v. *Shabani*, 513 U.S. 10, 13-16 (1994). And, in order to secure a conviction under 18 U.S.C. 1962(d), Congress requires the government to prove beyond a reasonable doubt that a defendant knowingly and willfully participated in an agreement with at least one other person to commit a RICO violation. *Salinas* v. *United States*, 522 U.S. 52, 63-65 (1997). As petitioner concedes (Br. 26 n.15), neither offense requires proof of an overt act in furtherance of the conspiracy. *Shabani*, 513 U.S. at 15; *Salinas*, 522 U.S. at 65. Petitioner does not dispute that the government proved beyond a reasonable doubt that petitioner knowingly and willfully participated in the charged narcotics and RICO conspiracies.

Petitioner instead relies on the five-year limitations period separately provided in 18 U.S.C. 3282(a). But petitioner misunderstands the import of the limitations period as applied to the charged conspiracies. This Court has made clear that a statute of limitations period begins to run upon the completion of a crime. *Toussie* v. *United States*, 397 U.S. 112, 114-115 (1970). A conspiracy is a continuing offense that is not complete until it has come to "full fruition" through the "accomplishment" of its objectives. *Hyde* v. *United States*, 225 U.S.

347, 369 (1912); see *Toussie*, 397 U.S. at 122 (noting that a conspiracy requiring overt acts "continues as long as the conspirators engage in overt acts in furtherance of their plot"); *United States* v. *Kissel*, 218 U.S. 601, 608 (1910) (a "conspiracy is a partnership in criminal purposes" that "may have continuation in time," as "shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act"). Thus, the limitations period does not begin to run on a conspiracy until the goals of the conspiracy have been attained, rendering the conspiracy complete. As applied to the crimes charged in this case, Section 3282(a) therefore required the government to prove that the charged conspiracies continued to exist within the five years preceding the filing of the operative indictment. *Grunewald* v. *United States*, 353 U.S. 391, 396 (1957).

Petitioner does not dispute that the government proved beyond a reasonable doubt that the narcotics and RICO conspiracies of which he was a knowing and willful participant continued to exist within the limitations period. He argues instead that the government was required to prove beyond a reasonable doubt that petitioner himself committed some affirmative or overt act of "participation" in the conspiracy within the limitations period.[6] Petitioner is incorrect. It is true that an individual member of a conspiracy may start the running of a limitations period as to his participation in a conspiracy by withdrawing from the conspiracy. But he may not

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[6] Petitioner never specifies what type of evidence the government could rely on to prove a particular defendant's continued "membership" in an ongoing conspiracy. Presumably, he would require proof either of an overt act in furtherance of the conspiracy or of an overt declaration of continued membership.

accomplish such withdrawal or trigger the commencement of the limitations period except by taking some "affirmative action * * * to disavow or defeat the purpose" of the conspiracy. *Hyde*, 225 U.S. at 369. "Mere cessation of activity is not enough to" establish withdrawal and "start the running of the statute [of limitations]; there must also be affirmative action, either the making of a clean breast to the authorities, or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S. 960 (1965); see, *e.g.*, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 & n.38 (1978) (action was sufficient to establish withdrawal when it was "inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators"); *United States* v. *Davis*, 682 F.3d 596, 613 (7th Cir. 2012) ("In order to withdraw from a conspiracy, a criminal defendant must take some affirmative act of withdrawal, such as confessing to the authorities or communicating his withdrawal to his co-conspirators."); *United States* v. *Randall*, 661 F.3d 1291, 1294-1295 (10th Cir. 2011) (in order to establish withdrawal, conspirator must either "give authorities information with sufficient particularity to enable the authorities to take some action to end the conspiracy" or "communicate his withdrawal directly to his coconspirators in a manner that reasonably and effectively notifies the conspirators that he will no longer be included in the conspiracy * * * in any way").

Unless or until a conspirator affirmatively withdraws from a conspiracy, he remains a member for as long as the conspiracy continues to exist and is criminally liable not only for belonging to the conspiracy, but also for any

contemplated or reasonably foreseeable acts taken by co-conspirators in furtherance of the conspiracy's objectives. See *Pinkerton* v. *United States*, 328 U.S. 640, 646-648 (1946); see also John Wilder May, *The Law of Crimes* § 89, at 99 (1881) (noting common law rule that each conspirator "is responsible for all acts of his confederates, done in pursuance of the original purpose"). But the government is not required to prove that a particular member of a conspiracy had recently or contemporaneously made an overt declaration (through words or deeds) of his continued membership at the time of his co-conspirator's action in order for the action to be attributable to him. Nor need the government prove such an overt declaration in order to establish that a defendant remains part of an existing conspiracy. "[A]s at the first moment of [a conspirator's] confederation, and consciously through every moment of [the conspiracy's] existence," a conspirator is continuously offending even when he neither acts in furtherance of the conspiracy nor reaffirms his membership—until he withdraws from the conspiracy or the conspiracy accomplishes its goals. *Hyde*, 225 U.S. at 369.

In sum, the government established the elements of conspiracy under Sections 846 and 1962(d)—and proved facts to satisfy Section 3282(a)'s five-year limitations period—by proving beyond a reasonable doubt that petitioner knowingly and willfully participated in narcotics and RICO conspiracies and that those conspiracies existed within the five years preceding the government's filing of the operative indictment.

B. Congress Allocated To The Defendant The Burden Of Proving That He Withdrew From A Conspiracy Outside The Limitations Period

Within the limits of the Due Process Clause (see pp. 32-45, *infra*), Congress may allocate the burden of persuasion with respect to affirmative defenses as it sees fit. Where, as here, Congress does not specify in a statute whether an affirmative defense is available and, if so, who must bear the risk of nonpersuasion, courts must "effectuate the [particular] affirmative defense * * * as Congress 'may have contemplated' it in an offense-specific context." *Dixon* v. *United States*, 548 U.S. 1, 17 (2006) (quoting *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 n.3 (2001)). The question is quintessentially one of congressional intent and requires a determination of what Congress would have understood the relevant background legal principles to be at the time it enacted the statute in question. *Id.* at 8-16; see *id.* at 17 (Kennedy, J., concurring) ("When issues of congressional intent with respect to the nature, extent, and definition of federal crimes arise, we assume Congress acted against certain background understandings set forth in judicial decisions in the Anglo-American legal tradition.").

1. As this Court noted in *Dixon* v. *United States*, "it bears repeating that, at common law, the burden of proving 'affirmative defenses—indeed, "all . . . circumstances of justification, excuse or alleviation"—rested on the defendant.'" 548 U.S. at 8 (quoting *Patterson*, 432 U.S. at 202, and 4 William Blackstone, *Commentaries on the Laws of England* 201 (1769)); see *Mullaney* v. *Wilbur*, 421 U.S. 684, 693 (1975). The Court in *Martin* v. *Ohio* explained that: "[T]he common-law rule was that affirmative defenses, including self-defense,

were matters for the defendant to prove. 'This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified.'" 480 U.S. at 235 (quoting *Patterson*, 432 U.S. at 202). That common-law rule "accords with the general evidentiary rule that 'the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.'" *Dixon*, 548 U.S. at 8 (quoting 2 John W. Strong, *McCormick on Evidence* § 337, at 415 (5th ed. 1999) (*McCormick*)). Indeed, "until the end of the 19th century, common-law courts generally adhered to the rule that 'the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule.'" *Ibid.* (quoting George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 898 (1968)).

Even for statutes that explicitly contemplate an affirmative defense in a statutory proviso (which Sections 846 and 1962(d) do not), the Court acknowledged in *Dixon* that the "settled rule in this jurisdiction [is] that an indictment or other pleading . . . need not negative the matter of an exception made by a proviso or other distinct clause . . . and that it is incumbent on one who relies on such an exception to set it up and establish it." 548 U.S. at 13 (quoting *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922)) (alterations in original); see *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841)). In the context of the defense of withdrawal, moreover, the common-law rule "accords with the doctrine that 'where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.'" *Dixon*, 548 U.S. at 9. As in *Dixon*, the

Court should "assume" that the Congress that enacted Sections 846 and 1962(d) in 1970[7] "was familiar with * * * the long-established common-law rule * * * and that it would have expected federal courts to apply a similar approach to any affirmative defense that might be asserted as a justification or excuse for violating the new law." *Id.* at 13-14; see *id.* at 18 (Kennedy, J., concurring) (acknowledging the Court's reliance on "the state of the law at the time the statute was enacted," and emphasizing the need to consider "guiding principles upon which Congress likely would have relied").

2. In 1912, this Court settled the question whether a defense of withdrawal should be available to a charge of conspiracy in *Hyde*, holding that a conspirator may invoke such a defense to start the running of the statute of limitations by taking an affirmative act of withdrawal. 225 U.S. at 369. In the wake of the *Hyde* decision, and for about 70 years thereafter, the federal courts of appeals to consider the matter consistently interpreted *Hyde* as placing on a defendant the risk of nonpersuasion as to the defense of withdrawal.[8] See, *e.g.*,

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[7] In 1970, Congress enacted 21 U.S.C. 846 as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Tit. II, § 406, 84 Stat. 1265, and 18 U.S.C. 1962(d) as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Tit. IX, § 901(a), 84 Stat. 941-943.

[8] Although this Court has not opined on which party should bear the risk of nonpersuasion as to the withdrawal defense established in *Hyde*, it did have occasion to comment on the operation of that defense in a civil context. In *Local 167, International Brotherhood of Teamsters* v. *United States*, 291 U.S. 293 (1934), this Court considered various objections to an injunction entered in a civil suit brought by the United States following a successful criminal prosecution for conspiracy to violate the Sherman Act. The Court rejected the defendants' contention that they had abandoned the conspiracy before

United States v. *Chester*, 407 F.2d 53, 55 (3d Cir.) ("a defendant must prove an affirmative action * * * to disavow or defeat the purpose of the conspiracy") (internal quotation marks and brackets omitted) (alteration in original), cert. denied, 394 U.S. 1020 (1969); *Borelli*, 336 F.2d at 388 ("[T]he burden of establishing withdrawal lies on the defendant."); *United States* v. *Cohen*, 145 F.2d 82, 90 (2d Cir. 1944) (defendant "had the burden of satisfying [the jury] that he had withdrawn from the enterprise"), cert. denied, 323 U.S. 799 and 323 U.S. 800 (1945); *Blue* v. *United States*, 138 F.2d 351, 360 (6th Cir. 1943) ("[w]hen once a conspiracy is shown to exist, * * * it continues to exist as to all persons involved until there is shown some affirmative act of withdrawal by persons who attempt to evade responsibility"), cert. denied, 322 U.S. 736 and 322 U.S. 771 (1944); see also Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 957-958 (1959) (*Developments in the Law*) (noting that, when a defendant alleged that he withdrew from a conspiracy outside the applicable limitations period, the federal courts had interpreted *Hyde* to "impose[] upon the defendant the burden of persuading the jury of his withdrawal").

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the commencement of the civil suit. *Id.* at 297-298. Relying on *Hyde*, the Court held that, "[i]n the absence of *definite proof* to that effect, abandonment will not be presumed." *Id.* at 298 (emphasis added). Noting that the defendants had presented no evidence to "[]contradict[]" the government's "substantial evidence" that they had "continued" to "participat[e]" in the conspiracy, the Court concluded that the defendants "were *unable to show* that they had abandoned the conspiracy and did not intend further to participate in it." *Ibid.* (emphasis added). The Court's references to "definite proof" and the inability to "show" abandonment suggest that the Court viewed the burden of persuasion as resting with the defendants in that case.

The first court of appeals decision to depart from this practice by explicitly holding that the burden of persuasion on withdrawal ultimately rests with the government was *United States* v. *Read*, 658 F.2d 1225 (7th Cir. 1981), decided 11 years after Congress enacted Sections 846 and 1962(d). The current circuit conflict described in the certiorari-stage pleadings in this case developed only after the decision in *Read*.[9] See *id.* at 1235 (acknowledging that "[p]resent law," as of 1981, placed "the burden of establishing withdrawal * * * on the defendant"); *id.* at 1233 & n.5 (citing earlier decisions of the Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits "hold[ing] that the burden is on the defendant to 'prove' or 'establish' withdrawal"); *id.* at 1236 ("over-

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[9] Petitioner overreads (Br. 45-46) the earlier decisions in *Mansfield* v. *United States*, 76 F.2d 224 (8th Cir.), cert. denied, 296 U.S. 601 (1935), and *Buhler* v. *United States*, 33 F.2d 382 (9th Cir. 1929), neither of which held that the government must bear the burden of persuasion on a withdrawal defense. In *Mansfield*, the court rejected the defendants' argument that the district court's withdrawal instruction placed the burden on them "of proving a withdrawal from the conspiracy." 76 F.2d at 229. But in doing so, the court did not opine on the proper allocation of proof burdens, holding that the given instruction did not "relieve the government of the burden of establishing [the defendants'] guilt beyond a reasonable doubt" and that the instruction "was favorable to the [defendants] and cannot be said to have resulted in prejudice." *Id.* at 230. And, although the Ninth Circuit in *Buhler* reversed a conspiracy conviction because the defendant had not "continued to participate in the alleged conspiracy" within the limitations period, it relied heavily on the defendant's own evidence to that effect, did not address which party bore the burden of persuasion, and ultimately concluded that it "ha[d] difficulty in perceiving in what respect [the defendant] *failed to bring himself within*" the defense of withdrawal. 33 F.2d at 385 (emphasis added). That can hardly be construed as an endorsement of petitioner's view of the proper allocation of burdens.

rul[ing]" previous Seventh Circuit decisions that "impos[ed] the burden of proving withdrawal on the defendant"). That relatively recent development obviously cannot inform this Court's analysis of what Congress would have understood to be the background principles against which it was legislating in 1970. Nor would it help petitioner if the division of authority had developed before 1970. As this Court explained in *Dixon*, petitioner would need to show "an overwhelming consensus among federal courts that," in a departure from the common-law rule, "it is the Government's burden to disprove the existence of [the defense of withdrawal] beyond a reasonable doubt." 548 U.S. at 14-15. Instead, "[t]he existence today of disagreement among the Federal Courts of Appeals on this issue, * * * —the very disagreement that caused [the Court] to grant certiorari in this case * * * —demonstrates that no such consensus has ever existed." *Id.* at 15.

3. Petitioner largely ignores the relevant background principles governing the defense of withdrawal, focusing instead on the law governing statutes of limitations. But the critical question here concerns the withdrawal defense. Congress's provision of a period of limitations, which the government must satisfy with proof when it is placed in issue, see *Grunewald*, 353 U.S. at 396, does not undermine the conclusion that Congress would have intended petitioner to bear the burden of persuasion on the affirmative defense of withdrawal.

As petitioner concedes (Br. 10), the traditional common law did not provide for any limitations-period defenses. Congress has departed from that tradition with respect to most crimes—including the conspiracy crimes with which petitioner was charged. By enacting the free-standing limitations period in 18 U.S.C. 3282(a),

Congress required the government to institute a prosecution within the five years after the "offense shall have been committed." As a general matter, if a criminal defendant fails to raise the statute of limitations as a defense, it is waived. See pp. 38-40, *infra*. In a conspiracy prosecution, when the defendant does raise the limitations defense, the government has the burden to show that the individual defendant became a member of the conspiracy and that the conspiracy continued within the applicable limitations period; once the government has presented those facts, it has carried its burden on the limitations issue.[10] See *Grunewald*, 353 U.S. at 396. That is all *Grunewald* requires; as petitioner acknowledges (Pet. Br. 21 n.11), no withdrawal defense was at issue in that case. Nor did the Court in *United States*

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[10] Although the Court in *Grunewald* held that it was "incumbent on the Government to prove that the conspiracy * * * was still in existence" within the limitations period specified by Section 3282, 353 U.S. at 396, the Court did not discuss the scope of the government's burden (*i.e.*, whether proof of the timing must be by a preponderance of the evidence or beyond a reasonable doubt). Very little discussion of that question appears in federal case law. Although several courts of appeals have assumed that the government bears the burden on the limitations issue, see, *e.g.*, *United States* v. *York*, 888 F.2d 1050, 1057 & n.10 (5th Cir. 1989) (noting that government bears beyond-a-reasonable-doubt burden); *United States* v. *Hankin*, 607 F.2d 611, 612 (3d Cir. 1979) (noting that government bears "burden of proof" without specifying what degree of burden), none analyzes the question at any length. At least one court of appeals has held that the government bears the burden of proving by a preponderance of the evidence that a statute of limitations should be tolled when it would otherwise apply. See *United States* v. *Gonsalves*, 675 F.2d 1050, 1053-1054 (9th Cir.), cert. denied, 459 U.S. 837 (1982). In this case, the jury was instructed that the government had to prove beyond a reasonable doubt that the charged conspiracies continued into the limitations period. J.A. 288a-289a, 299a-300a.

Gypsum Co. suggest that the government bore the burden on the issue of withdrawal. 438 U.S. at 464-465. Withdrawal differs fundamentally from the underlying limitations issue because it provides an affirmative basis for avoiding liability that a defendant has already been shown to have incurred: *i.e.*, responsibility for the conspiracy that he joined. Thus, when Congress enacted the conspiracy provisions at issue here, it had every reason to expect that the established tradition of placing the burden on the defendant to show withdrawal would continue.

C. Substantial Practical Considerations Support Placing The Burden On A Conspiracy Defendant To Prove That He Withdrew Before The Limitations Period

The same general principles that undoubtedly informed the historical practice of requiring a defendant to prove withdrawal apply with equal force today and support the conclusion that Congress would have intended petitioner to bear the burden of persuasion on his withdrawal defense.

1. First, the defendant will usually be better situated than the government to adduce evidence on a purported withdrawal defense. As noted, a defense of withdrawal requires that a defendant took "[a]ffirmative acts inconsistent with the object of the conspiracy" such as fully cooperating with authorities or "communicat[ing]" his withdrawal "in a manner reasonably calculated to reach co-conspirators." *United States Gypsum Co.*, 438 U.S. at 464-465. Such a defense will frequently turn on what the defendant told his fellow conspirators, and a defendant will necessarily know better than the government whether or when such communications took place. This Court has recognized that pragmatic factors are rele-

vant in assessing where to place the burden of proving a particular defense. As the Court observed in *Patterson*:

> The placing of the burden of proof on the defense [of acting under extreme mental distress], with a lower threshold * * * is fair because of defendant's knowledge or access to the evidence other than his own [testimony] on the issue. To require the prosecution to negative the 'element' of mitigating circumstances is generally unfair.

432 U.S. at 212 n.13 (quoting with approval *People* v. *Patterson*, 347 N.E.2d 898, 909 (N.Y. 1976) (Breitel, C.J., concurring), aff'd, 432 U.S. 197 (1977)). See *Cooper* v. *Oklahoma*, 517 U.S. 348, 366 (1996) ("[T]he difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue."); *Morrison* v. *California*, 291 U.S. 82, 91 (1934) (observing that the burden of proof may properly be placed on the defendant if there exists "a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception").

Because withdrawal depends on a defendant's undertaking "affirmative action" to "disavow or defeat the purpose" of a conspiracy, *Hyde*, 225 U.S. at 369, it would be anomalous to require the government to prove beyond a reasonable doubt that no such action ever occurred. Historically, "the party having in form the affirmative allegation" is the one who pulls the laboring oar—that is, the proponent of a proposition should prove it, rather than the other party having to prove a negative. 9 John H. Wigmore, *Evidence* § 2486, at 288 (1981) (Wigmore) (emphasis omitted); *id.* at 290 (noting that the burden of proving a fact is ordinarily placed on the

one "who presumably has peculiar means of knowledge" enabling him to prove it) (emphasis omitted). Additionally, requiring the defendant to prove that he took affirmative steps to withdraw from a conspiracy accords with the "frequently significant consideration" of assigning the burden of proof based on "the judicial estimate of the probabilities of the situation." *McCormick* § 337, at 413; see *ibid.* ("The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred.").

Second, in most cases in which a defendant raises a claim of withdrawal, the government will be unable to call the witnesses most likely to have information bearing on the point, *i.e.*, the defendant and his co-conspirators. Because evidence tending to establish withdrawal from a conspiracy also tends to confirm the existence and membership of a conspiracy to begin with, see *United States* v. *Hamilton*, 538 F.3d 162, 174 (2d Cir. 2008), the most likely witnesses generally can be expected to assert their Fifth Amendment rights against compelled self-incrimination. Petitioner's proposed rule—that a defendant need introduce only enough evidence to present a *prima facie* case of withdrawal—could affirmatively undermine the government's ability to rebut such evidence. The Federal Rules of Evidence generally permit the introduction of out-of-court statements made by a defendant's "coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). But a defendant may rely on a defense of "withdrawal as a means of limiting the admissibility against him of the subsequent acts and declarations of the other conspirators." Wayne R. LaFave, *Criminal Law* § 12.4(a), at 687 (5th ed. 2010) (LaFave); see also *United States* v. *Patel*, 879 F.2d 292, 293 (7th Cir. 1989) (Posner, J.), cert. de-

nied, 494 U.S. 1016 (1990). If a defendant could defeat Rule 801(d)(2)(E)'s exception to the hearsay rule merely by asserting a defense of withdrawal, rather than by having to prove withdrawal by a preponderance of the evidence, the government could well be hamstrung in its ability to rebut the defendant's assertion.

Third, while a conspiracy defendant will presumably know whether he will raise a withdrawal defense, he is generally under no obligation to notify the government before trial that he intends to do so. 1A Charles A. Wright & Andrew D. Liepold, *Federal Practice and Procedure* § 193, at 433 & n.66 (4th ed. 2008) (defendant may raise a limitations defense for the first time "at trial") (citing cases); see *United States* v. *Wilson*, 26 F.3d 142, 159 (D.C. Cir. 1994) (same, where the question of whether the prosecution was "time barred" was "bound up with evidence about the alleged offense itself"), cert. denied, 514 U.S. 1051 (1995). Often, then, the government will have little or no opportunity to investigate the claim and to identify and locate witnesses capable of rebutting such a defense, let alone disproving it beyond a reasonable doubt.

Fourth, requiring the defendant to establish the defense of withdrawal helps protect against spurious claims of withdrawal. The defendant and his co-conspirators are the likeliest source of evidence in support of withdrawal, they have the most to gain from offering false testimony in support of it, and, as this very case reflects, they will often seek to protect one another even after they are apprehended and even at the expense of some of their interests. See, *e.g.*, J.A. 185a, 192a, 199a-200a, 262a-264a, 266a-268a (petitioner agreed to plead guilty to a shooting so that co-conspirator Gray would be charged with only a misdemeanor in connec-

tion with the shooting, and Gray in return rewarded petitioner by giving him marijuana and money while he was in prison). At the same time, because withdrawal will often turn heavily or even exclusively on what the defendant "[a]ffirmative[ly] * * * communicated" to his co-conspirators, in secret, about his continued involvement, *United States Gypsum Co.*, 438 U.S. at 464-465, the government can be expected to have a difficult time rebutting (beyond a reasonable doubt) even the most questionable *prima facie* case of withdrawal. See R. Michael Cassidy & Gregory I. Massing, *The Model Penal Code's Wrong Turn: Renunciation as a Defense to Criminal Conspiracy*, 64 Fla. L. Rev. 353, 375-376 (2012) ("The secrecy with which conspiracies are conducted and the absence of formality with which they are executed makes it very difficult to prove when an agreement has ceased. * * * The government may be particularly ill-equipped to rebut fabricated claims of withdrawal when the theory of withdrawal advanced by the defendant involves notice to coconspirators rather than notice to authorities."). Indeed, the "clear purpose[]" of the withdrawal defense is "to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object and, by encouraging his withdrawal, to weaken the group which he has entered." *Developments in the Law* 957. The allocation of the burden of persuasion should further that goal. But given the difficulty of proving a lack of withdrawal beyond a reasonable doubt, placing the burden on the government would undermine defendants' incentive to withdraw.

Given those realities, requiring the government to prove beyond a reasonable doubt that a defendant did *not* withdraw—within a particular time-frame from a

conspiracy that the government has already proved beyond a reasonable doubt he willingly joined—would overprotect defendants while jeopardizing important interests in punishing those who violate the law. "The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is * * * an increased risk that the guilty will go free." *Patterson*, 432 U.S. at 208. Although "our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits." *Ibid.* In the context of withdrawal—where the defendant has engaged in a conspiracy with the requisite mental state, is presumed to continue in that conspiracy, and yet seeks to be excused from the violation because the prosecution is purportedly brought too late—society should not have to bear the risk that the government may be unable to negate the excuse. Rather, it is appropriate to place on a defendant the comparatively light burden of proving by a preponderance of the evidence that he is entitled to be excused from liability.

2. Petitioner does not directly address the foregoing practical problems. Instead, petitioner leans heavily on the proposition that "statutes of limitations must 'be liberally interpreted in favor of repose.'" Br. 13 (quoting *Bridges* v. *United States*, 346 U.S. 209, 216 (1953)); see Br. 9-19, 50-52. Although that is undoubtedly an established principle of federal law, it has no application in this case, which does not involve an interpretation of the applicable statute of limitations. There is no dispute that Section 3282(a) requires the government to prove that the charged conspiracies took place within the five years preceding the indictment. See *Grunewald* v. *United States*, *supra*. Nor does this case involve any

question of tolling. The disputed question pertains to the affirmative defense of withdrawal once the government has shown a conspiracy within the limitations period. And this Court instructed in *Dixon* that courts should "effectuate [an] affirmative defense," including by allocating burdens of persuasion, "as Congress 'may have contemplated' it *in an offense-specific context.*" 548 U.S. at 17 (quoting *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 491 n.3) (emphasis added).

It is true, as petitioner's amicus points out (NACDL Amicus Br. 12-13), that a conspiracy defendant is liable for a broad range of conduct related to the charged conspiracy—once the government proves that he intentionally joined the conspiracy and that the conspiracy continued within the limitations period. But that imposition of liability for the substantive results of a conspiracy one has joined reflects the long-recognized reality that the conspirators "act for each other in carrying [the agreement] forward." *Pinkerton*, 328 U.S. at 646. The dangers of conspiracy warrant holding each conspirator liable for his confederates' crimes in furtherance of the illegal agreement. As this Court explained in *Iannelli* v. *United States*:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality.

420 U.S. 770, 778 (1975); see also *United States* v. *Jimenez Recio*, 537 U.S. 270, 275 (2003) ("[A] conspiracy poses a 'threat to the public' over and above the threat of the commission of the relevant substantive crime—

both because the '[c]ombination in crime makes more likely the commission of [other] crimes' and because it 'decreases the probability that the individuals involved will depart from their path of criminality.'") (quoting *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961) (second and third alterations in original)).

Indeed, this Court considered the interplay between the withdrawal and statute-of-limitations defenses in *Hyde*, rejecting the contention that treating a conspiracy as a "continuous" offense "take[s] the defense of the statute of limitations [away] from conspiracies" and unduly undermines a defendant's interest in repose. 225 U.S. at 369. The Court concluded that there is "certainly * * * no hardship" in "requr[ing]" a defendant to undertake "affirmative action" to withdraw from a conspiracy, and it emphasized that a defendant "is in no situation to claim the delay of the law" until he does so. *Ibid.* The same is true of requiring a defendant to prove by a preponderance of the evidence that he in fact took the required affirmative action to effectuate a withdrawal outside the limitations period.

D. Placing The Burden On The Defendant To Establish Withdrawal By A Preponderance Of The Evidence Does Not Violate The Due Process Clause

Petitioner contends (Br. 23-24, 31-41) that the Due Process Clause forbids Congress from placing on a defendant the burden of proving the defense that he withdrew from a conspiracy before the limitations period by a preponderance of the evidence. But the due process rule on which petitioner relies applies to offense elements—not to defenses provided as a matter of policy. Particularly with respect to a showing that operates as an affirmative defense (withdrawal) *within* an affirmative defense (the statute of limitations), the Due Pro-

cess Clause does not place any burden of persuasion on the government.

1. In a series of cases, this Court has made clear that a legislature may place the burden of persuasion on a criminal defendant to establish an affirmative defense without violating the Due Process Clauses of the Fifth or Fourteenth Amendments. In *Leland* v. *Oregon*, 343 U.S. 790, 792-793 (1952), the Court rejected a murder defendant's due process challenge to a state statutory requirement that he establish the defense of insanity beyond a reasonable doubt. In upholding Oregon's allocation of burdens, the Court clarified that its previous decision in *Davis* v. *United States*, 160 U.S. 469 (1895)—which had required the government to disprove the defense of insanity beyond a reasonable doubt—was not a constitutional ruling and was not consistent with the background common-law rule. *Leland*, 343 U.S. at 797.

After the Court's subsequent decision in *In re Winship*, 397 U.S. at 364, which held that due process requires the government to prove beyond a reasonable doubt every fact necessary to establish that a defendant committed the charged crime, the Court reaffirmed the validity of the rule articulated in *Leland*. See *Patterson*, 432 U.S. at 205 (rejecting claim that "*Leland* had been overruled by *Winship*"). In *Patterson*, the Court considered a due process challenge to a state statutory scheme that defined second-degree murder as the intentional killing of another person and allowed a defendant to reduce his crime to manslaughter by proving the affirmative defense of extreme emotional disturbance. 432 U.S. at 198, 206-207. Taking note of the historical context, the Court explained that the statutory defense at issue "is a considerably expanded version of the common-law defense of heat of passion on sudden provo-

cation," a defense as to which a defendant bore the burden at common law. *Id.* at 202. The Court also noted that:

> Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant.

Id. at 211.

The particular statutory scheme at issue in *Patterson*, the Court explained, was comparable to that upheld in *Leland*, whereby "once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence." 432 U.S. at 206. Such a scheme, the Court held, does not violate the Due Process Clause because the affirmative defense of extreme emotional disturbance "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder," but rather "constitutes a separate issue on which the defendant is required to carry the burden of persuasion." *Id.* at 206-207. The Court thus declined to "adopt as a constitutional imperative" a requirement that a State "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Id.* at 210; see *ibid.* ("Proof of the nonexistence of all affirmative defenses has never been constitutionally required.").

The Court again reaffirmed the holdings of *Leland* and *Patterson* in *Martin* and *Dixon*. In *Martin*, the

Court rejected a due process challenge to a State's placing the burden of proving self-defense on a defendant charged with aggravated murder, a charge that required proof that she acted with prior calculation and design. 480 U.S. at 230-231, 236. The Court was "not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former." *Id.* at 234. Although evidence adduced by the defendant tending to show that she was acting in self-defense might create a reasonable doubt in jurors' minds about whether she acted with the requisite prior calculation and design, the Court explained, requiring the defendant to bear the risk of nonpersuasion as to self-defense did "not shift to the defendant the burden of disproving any element of the state's case." *Ibid.* The State was still required to prove beyond a reasonable doubt that the defendant acted with prior design and calculation in order to secure a conviction for aggravated murder. *Ibid.*; see *Gilmore* v. *Taylor*, 508 U.S. 333, 341 (1993) ("States must prove guilt beyond a reasonable doubt with respect to every element of the offense charged, but * * * they may place on defendants the burden of proving affirmative defenses."). In *Dixon*, the Court again relied on *Martin* and *Patterson* in rejecting a due process challenge to requiring a defendant to bear the burden of persuasion as to the "affirmative defense" of duress in a firearms offense prosecution under 18 U.S.C. 922(a)(6) and (n). 548 U.S. at 8-17. The Court explained that the duress defense "may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself." *Id.* at 6.

2. Petitioner's due process claim rests entirely on the inaccurate premise that "one of the elements the government was required to prove" under 21 U.S.C. 846 and 18 U.S.C. 1962(d) was petitioner's personal (or "individual") overt "participation" "within the statutory period." Br. 9, 21 n.11, 27; see Br. 40 ("The jury here was never advised of the Government's burden to prove beyond a reasonable doubt that [p]etitioner himself participated in the charged conspiracy within the limitations period."); see also, *e.g.*, Br. 22-23, 31-34, 37, 40-41. Petitioner argues that, because such active "participation" within the limitations period is an "element" of the charged conspiracy offenses and because "[p]articipation and withdrawal are two inconsistent things," proof of withdrawal would "negate" the required proof of participation. Br. 34; see Br. 8-9, 26, 30, 50; see NACDL Amicus Br. 8-10. Petitioner is incorrect.

a. Statutes of limitations are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time." *Toussie*, 397 U.S. at 114. Such statutes "may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Id.* at 115. And they provide a form of "amnesty" after the elapse of a sufficient interval of time. *Stogner* v. *California*, 539 U.S. 607, 611 (2003) (quoting Fracis Wharton, *Criminal Pleading and Practice* § 316, at 210 (8th ed. 1880)).

For policy reasons, then, a limitations defense permits a defendant to escape liability for certain categories of criminal conduct that would have been punishable if the government had initiated the prosecution sooner. A successful limitations defense renders the defendant's conduct nonprosecutable, not noncriminal. Such a de-

fense is "nonexculpatory" and is "not at all grounded in a lack of culpability of the defendant." 2 LaFave § 9.1(a), at 473; see *United States* v. *Scott*, 437 U.S. 82, 111 (1978) (Brennan, J., dissenting) (observing that a limitations defense "operates to preclude the imposition of criminal liability on defendants, notwithstanding a showing that they committed criminal acts"). Like the defense of duress in *Dixon*, a limitations defense at most "excuse[s]" "conduct which violates the literal language of the criminal law." *Dixon*, 548 U.S. at 7 n.5.

b. In part because a limitations defense is a nonexculpatory exemption from prosecution, the government is not required to prove that it satisfied the limitations requirement as an element of the conspiracy offense (or any other offense). A limitations defense also cannot be thought to negate an element of the crime of conspiracy. Federal practice for at least the past 140 years illustrates the point by making clear that the government need not have alleged facts bearing on the limitations period in the indictment. In *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 178 (1872), this Court concluded that a defendant could not raise a limitations defense solely by means of a "demurrer"—*i.e.*, by admitting to the indictment's factual allegations and then seeking outright dismissal based on the allegedly expired limitations period. The Court explained that the government was not required to plead in an embezzlement indictment that the defendant committed the offense within the limitations period. *Id.* at 179. Rather, the question of timing of the alleged illegal activity was one for the defendant to "give * * * in evidence" at trial, because "*time [was] not of the essence of the offence*" of embezzling. *Id.* at 179-180 (emphasis added). Significantly, the Court relied on the fact that the limitations exemption was

contained in a proviso rather than incorporated in the statutory clause defining the criminal offense. *Id.* at 177. In such a statutory scheme, the Court held, "it is not necessary for the plaintiff in suing for the penalty to negative such proviso." *Ibid.* (quoting *Steel* v. *Smith*, 106 Eng. Rep. 35, 37 (1817)). Instead, "it is for the party for whom matter of excuse is furnished * * * to bring it forward in his defence." *Id.* at 176. Here, the limitations requirement is found in an entirely separate statute.

The reasoning of *Cook* strongly undermines petitioner's primary assertion that a defendant's personal, active "participation" "within the statutory period" is "one of the elements" of conspiracy "the government [is] required to prove." Pet. Br. 9; see, *e.g.*, Br. 22-23, 31-34, 37, 40-41. If personal and overt participation within the limitations period were an element of conspiracy, one would expect to find either mention of such an element in the text of the conspiracy statutes or a long tradition of cases holding that the government must allege the issue of timing in the indictment. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998) ("An indictment must set forth each element of the crime that it charges."). But petitioner cites no such cases—at least none predating *Read*—and analogous cases, like *Cook*, have indicated the contrary.

For example, this Court reaffirmed in *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917), that "[t]he statute of limitations is a defense" that "must be asserted on the trial by the defendant in criminal cases." Similarly, in *United States* v. *Sisson*, 399 U.S. 267, 288 (1970), the Court stressed that "[i]t has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses." Accord *United*

States v. *Titterington*, 374 F.3d 453, 456-457 (6th Cir. 2004) (Sutton, J.) (relying on *Cook* and *Sisson* to hold that the government did not have to allege in the indictment that the defendant's fraud, RICO, and smuggling offenses occurred within the limitations period, because time is "not an essential element" of those offenses), cert. denied, 543 U.S. 1153 (2005). And the courts of appeals have consistently held that "[t]he statute of limitations is an affirmative defense which a criminal defendant has the responsibility of raising and preserving before or at trial if he seeks its benefit." *United States* v. *Franco-Santiago*, 681 F.3d 1, 12 (1st Cir. 2012); see *id.* at 12-13 n.18 (surveying case law, and noting that some courts of appeals treat a defendant's failure to raise the defense as a waiver while others treat it as a forfeiture); see also, *e.g.*, *United States* v. *Najjar,* 283 F.3d 1306, 1308 (11th Cir.) (waiver), cert. denied, 537 U.S. 823 (2002); *United States* v. *LeMaux,* 994 F.2d 684, 689-690 (9th Cir. 1993) (same); *United States* v. *Arky,* 938 F.2d 579, 582 (5th Cir. 1991) (same), cert. denied, 503 U.S. 908 (1992); *United States* v. *Gallup,* 812 F.2d 1271, 1280 (10th Cir. 1987) (same); *United States* v. *Karlin,* 785 F.2d 90, 92-93 (3d Cir. 1986) (same), cert. denied, 480 U.S. 907 (1987); *United States* v. *Walsh*, 700 F.2d 846, 856 (2d Cir.) (same), cert. denied, 464 U.S. 825 (1983); *United States* v. *Williams,* 684 F.2d 296, 299-300 (4th Cir. 1982) (same), cert. denied, 459 U.S. 1110 (1983).

If the statute of limitations had the character of an "element," the defendant could not waive it by failing to raise it, and the government would be required to prove it (and to secure a jury instruction on it) in every case. See, *e.g.*, *United States* v. *Higdon*, 638 F.3d 233, 241-243 (3d Cir. 2011) (holding that a defendant may not remove

an element of an offense from the jury's consideration by stipulating to it); see also *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) (holding that the government is required to prove every element of an offense even if the defendant does not contest a particular element); *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988) (a defendant's plea of not guilty "puts the prosecution to its proof as to all elements of the crime charged"). Petitioner makes no contention that that is the case, and settled federal practice is to the contrary.[11]

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[11] State cases confirm that no settled tradition exists on the treatment of statutes of limitations as "elements." See, *e.g.*, *State* v. *Ward*, No. 18898, 2012 WL 4094274, at *4 (Conn. Sept. 18, 2012) ("Statutes of limitation are generally considered an affirmative defense which must be proved by the defendant by a preponderance of the evidence.") (internal quotation marks omitted); *Proctor* v. *State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998) (en banc) (holding that a defendant forfeits a limitations defense by failing to raise it, but that the government bears the burden of proving beyond a reasonable doubt that the limitations period has been satisfied once the defendant raises the issue); *People* v. *Eitzen*, 117 Cal. Rptr. 772, 780 (Cal. Ct. App. 1974) (noting that limitations issue is jurisdictional, not an affirmative defense); see also Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1199 n.207 (1950) (noting division of authority among state courts). That strongly supports the conclusion that due process does not require treating the limitations period as an element. See *Patterson*, 432 U.S. at 201-202 (due process not violated unless a state procedure, "including [allocating] the burden of producing evidence and the burden of persuasion, * * * offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (internal quotation marks omitted); see also *Medina* v. *California*, 505 U.S. 437, 445-446 (1992) (finding "no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence," and therefore rejecting due process claim under the *Patterson* test)

Petitioner misreads *Cook*, taking out of context the Court's statement that "the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, to show that the offense was committed within two years next before the indictment was found and filed." Br. 19-20 (quoting *Cook*, 84 U.S. (17 Wall.) at 180) (emphasis omitted). Although it is true that the limitations period in Section 3282(a) requires the government to prove that the charged conspiracy "was committed within [five] years next before the indictment was found and filed," *Cook*, 84 U.S. (17 Wall.) at 180, it does not follow that the government bears the burden of establishing beyond a reasonable doubt that petitioner committed an affirmative act of membership in that time. As discussed, the government satisfied its burden under Section 3282(a) when it proved beyond a reasonable doubt that the conspiracy "was still in existence" during the limitations period. *Grunewald*, 353 U.S. at 396;[12] see J.A. 288a-289a, 299a-300a (jury instructions).

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[12] When the Court in *Grunewald* allocated to the government the burden to prove satisfaction of a limitations requirement (when a defendant raises the issue), it was not because the limitations requirement is an element of the crime of conspiracy; it is not. See pp. 36-37, *supra*, pp. 42-45, *infra*. Nor do the general federal limitations provisions allocate a burden of proof. See, *e.g.*, Rev. Stat. §§ 1043-1048 (1875). To the extent that the *Grunewald* Court considered the allocation of the burden of proof to be "merely a question of policy and fairness based on experience in the different situations," Wigmore § 2486, at 291, allocating to the government the burden of persuasion on a limitations question may reflect a judgment that, because the government is already required to prove beyond a reasonable doubt that the charged crime occurred, it is generally fair to require the government to prove *when* the crime happened if the defendant puts that at issue.

It is not the case that an individual defendant's active "participation" "within the statutory period" is "one of the elements" of conspiracy "the government [is] required to prove." Pet. Br. 9. Petitioner's reliance (Br. 20) on *United States* v. *Barber*, 219 U.S. 72 (1911), and *United States* v. *Oppenheimer*, 242 U.S. 85 (1916), in support of that contention is misplaced. Those cases noted that the question whether the government complied with a statute of limitations went to the "merits" of the charges at issue. But the same can be said of any affirmative defense—if a defendant establishes that he is entitled to such a defense, he cannot be convicted and will prevail on the merits of the underlying charge. This Court has made clear, however, that the government need not bear the burden of persuasion on an affirmative defense merely because it may preclude the imposition of liability. See pp. 18-20, 32-36, *supra*.

If petitioner's view—that the government must establish an individual's overt participation in the conspiracy within the limitations period—were correct, the government would need to prove in every case involving a conspiracy that was formed outside the relevant limitations period that every charged conspirator took an affirmative act to reaffirm his membership within the limitations period. That implication is particularly incongruous for conspiracy statutes like Section 841 and RICO, which do not require *any* proof of an overt act to establish the elements of the offense. See p. 14, *supra*. It is equally incongruous for overt-act conspiracy offenses, like 18 U.S.C. 371, that do not require that a particular defendant have performed the overt act; "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *Pinkerton*, 328 U.S. at 646-647; see *Salinas*, 522 U.S. at

63-64 (allegation that particular defendant committed an overt act is unnecessary; "so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators") (citing *Bannon* v. *United States,* 156 U.S. 464 (1895)). Notably, although that is certainly the logical conclusion of petitioner's position, even he does not make that assertion. Such an argument would, in any event, be directly at odds with this Court's holding in *Hyde* that the defendant in that case remained part of a conspiracy even though, as his jury was charged, he "did not do anything within the [limitations] period, but remained acquiescent." 225 U.S. at 368 (internal quotation marks omitted). Because of the "continuous" nature of the crime of conspiracy, the Court explained, the acts of a defendant's co-conspirators are attributable to him for statute-of-limitations purposes, absent some "affirmative" withdrawal on his part. *Id.* at 368-369; see *Pinkerton*, 328 U.S. at 646; *Kissel*, 218 U.S. at 608; see also J.A. 126a ("[O]nce the government proves that a defendant was a member of an ongoing conspiracy, it has proven the defendant's continuous membership in that conspiracy unless and until the defendant withdraws.").

c. Because the timing of a defendant's actions demonstrating membership in a conspiracy is not an element of the conspiracy offense, petitioner cannot be correct in asserting that due process requires the government to negate a withdrawal defense beyond a reasonable doubt. Withdrawal functions as an affirmative defense to the government's showing that it brought criminal charges within the time allowed by the limitations period. The claim that a defendant withdrew from a conspiracy at an earlier point does not negate the government's showing; it simply takes advantage of a bar to the imposition of liability that is available as a matter of policy. The Court

has made clear in the *Winship* line of cases that due process requires the government to prove only the elements of the offense as defined by the legislature and interpreted by the courts. See, *e.g.*, *Martin*, 480 U.S. at 231-232, 235; *Engle* v. *Isaac*, 456 U.S. 107, 120-121 (1982). As the Court observed in *Patterson*, "[t]he applicability of the reasonable-doubt standard * * * has always been dependent on how a [legislature] defines the offense that is charged in any given case." 432 U.S. at 211 n.12; see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986); *Dixon*, 548 U.S. at 7; *id.* at 21, 29 (Breyer, J., dissenting).[13] Here, those elements include proof of knowing and intentional membership (at some point) in the conspiracy and proof that the conspiracy writ large existed within five years—not proof that petitioner reaffirmed his membership through words or deeds within that five-year period. Accordingly, the government bears no burden of proof on the issue of withdrawal. Petitioner's amicus is incorrect in asserting that "[n]ot even the Government can dispute that the defense

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[13] Nothing in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), or the cases following in its wake (many of which predated *Dixon*) alters the analysis this Court has employed in allocating burdens of persuasion as to affirmative defenses. In *Apprendi*, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. That holding "leaves undisturbed the principle that while the prosecution must indeed prove all the elements of the offense charged beyond a reasonable doubt * * * the legislation creating the offense can place the burden of proving affirmative defenses on the defendant." *United States* v. *Brown*, 276 F.3d 930, 932 (7th Cir.) (citations omitted), cert. denied, 537 U.S. 829 (2002); see *Apprendi*, 530 U.S. at 485 n.12 (discussing *Patterson*); *Jones* v. *United States*, 526 U.S. 227, 241 (1999) (same).

* * * [of] withdrawal from a conspiracy prior to the statute of limitations period[] directly negates the 'knowingly participated' element of the two conspiracy offenses * * * with which [petitioner] was charged." NACDL Amicus Br. 9. On the contrary, the withdrawal defense tends to confirm, rather than refute, that a conspiracy defendant knowingly participated in the charged conspiracy, for a defendant would have nothing from which to withdraw if he had not joined the conspiracy in the first place.

d. Finally, the Court did note in *Patterson* that the Due Process Clause might prevent a legislature from requiring a defendant to bear the burden on a particular affirmative defense when doing so would "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 432 U.S. at 202 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958)). This is not such a case. The Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion); see *Medina* v. *California*, 505 U.S. 437, 446 (1992). And given the longstanding common-law rule that a defendant bore the risk of nonpersuasion on affirmative defenses, see *Dixon*, 548 U.S. at 8, 17, it cannot be that requiring petitioner to prove a separate issue that does not negate an element of the offense and as to which he has superior knowledge runs afoul of the people's deeply rooted traditions and conscience.

E. Even If Petitioner Were Correct That The Government Bears The Burden Of Persuasion On The Issue Of Withdrawal, He Would Not Be Entitled To An Outright Reversal Of His Conviction

Petitioner argues (Br. 52-53) that, if the government does bear the burden of persuasion on his claimed defense of withdrawal, the district court's contrary instruction to the jury was "structural error" requiring automatic reversal. But petitioner did not raise the issue of structural error in his petition for a writ of certiorari or in his reply brief in support thereof. On the contrary, he argued in his reply that the "harmless error standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), will apply" if this Court endorses his argument that the government bears the burden of persuasion. Reply Br. in Supp. of Cert. 4 n.2.

In any event, petitioner's claim of structural error is without merit. In *Rose* v. *Clark*, 478 U.S. 570 (1986), this Court applied harmless-error review to a jury instruction that erroneously shifted the burden of proof to the defendant on the element of malice in a state prosecution for first-degree murder. *Id.* at 579-582. That type of error, the Court reasoned, "is not 'so basic to a fair trial' that it can never be harmless." *Id.* at 580 (quoting *Chapman*, 386 U.S. at 23). And in *Neder* v. *United States*, 527 U.S. 1 (1999), the Court applied harmless-error review where the jury instructions omitted an element of the charged offense altogether. *Id.* at 8-15; see also *Carella* v. *California*, 491 U.S. 263, 266-267 (1989) (per curiam) (applying harmless-error review when jury was erroneously instructed that it must presume an element of the charged offense from the establishment of certain predicate facts). Petitioner relies (Br. 52) on *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), in which the

Court declined to apply harmless-error review when a jury received a defective reasonable-doubt instruction that applied to all of its findings. But this Court has already declined to extend *Sullivan* in the manner petitioner proposes, explaining in *Neder* that the failure to properly instruct a jury on one element of an offense (as was the case in *Neder* and as petitioner argues was the case here) does not call into question the validity of the jury's verdict generally. 527 U.S. at 11-13; *id.* at 11 ("By contrast [to *Sullivan*], the jury-instruction error here did not 'vitiat[e] *all* the jury's findings.'") (second brackets in original) (quoting *Sullivan*, 508 U.S. at 281). Accordingly, if the Court concludes that the withdrawal instruction here was erroneous, it should remand to the court of appeals to consider in the first instance whether the error was harmless. Cf. *Skilling* v. *United States*, 130 S. Ct. 2896, 2934-2935 & n.46 (2010). That approach would be especially appropriate because petitioner acquiesced to it in his certiorari-stage pleadings. See Reply Br. in Supp. of Cert. 4-5 & n.1 (because "the issue of harmlessness * * * is not * * * clear cut," the court of appeals "should have the opportunity in the first instance to apply the correct rule to the facts of this case").

The record, moreover, contains ample evidence to rebut any *prima facie* showing of withdrawal. Although petitioner does not identify in his brief what evidence he would rely on to satisfy his burden of production as to withdrawal, in the court of appeals he relied on the fact of his incarceration beginning in 1994 and on the testimony of a government witness that petitioner told the witness he refused in 1997 to comply with a 1997 directive from Gray (a leader of the conspiracy) to kill that witness. Pet. C.A. Br. 294-296. But "[n]either authority

nor reason would suggest that imprisonment necessarily shows a withdrawal." *Borelli*, 336 F.2d at 389; see also, *e.g.*, *United States* v. *Fishman*, 645 F.3d 1175, 1196 (10th Cir. 2011), cert. denied, 132 S. Ct. 1046 (2012); *United States* v. *Mangual-Santiago*, 562 F.3d 411, 422-423 (1st Cir.), cert. denied, 130 S. Ct. 293 (2009); *United States* v. *Diaz*, 176 F.3d 52, 98 (2d Cir.), cert. denied, 528 U.S. 875 and 528 U.S. 957 (1999); *United States* v. *Gonzalez,* 940 F.2d 1413, 1427 (11th Cir. 1991), cert. denied, 502 U.S. 1047 and 502 U.S. 1103 (1992). At most, petitioner's imprisonment, standing alone, might have demonstrated a cessation of activity—which is not sufficient to establish the type of affirmative action necessary to demonstrate withdrawal, let alone that petitioner effectively communicated his intent to withdraw to his co-conspirators.

A review of the evidence presented at trial in fact reveals that petitioner continued to be an active member of the conspiracy while incarcerated. The evidence established that petitioner pleaded guilty to the felony offense that sent him to prison in order to allow Gray to plead guilty to a misdemeanor offense. J.A. 184a, 192a. Gray, in turn, rewarded petitioner by supplying him with marijuana while in prison and by sending money to petitioner and his wife. J.A. 185a, 199a-200a, 262a-268a. In addition, petitioner looked out for the interests of the conspiracy while he was in prison by providing information to Gray about a suspected cooperator and by threatening a cooperating witness. J.A. 254a-260a, 207a-248a. Far from establishing that petitioner took some affirmative step to withdraw from the conspiracy, the evidence thus shows that he continued his association with Gray and other members of the conspiracy within the limitations period while he was in prison. Nor does petitioner's alleged refusal to commit one murder, see

J.A. 187a-190a, establish that he committed acts that were inconsistent with the goals of the narcotics and RICO conspiracies or that he "communicated" his withdrawal "in a manner reasonably calculated to reach co-conspirators," *United States Gypsum Co.*, 438 U.S. at 464-465. Indeed, that alleged incident occurred in 1997 (within the limitations period) and could easily be viewed as evidence that petitioner remained part of the conspiracy when the conspiracy's leader asked him to commit the murder—or at the very least that he had not communicated any withdrawal to his co-conspirators.

* * * * *

The record evidence of petitioner's non-withdrawal only underscores the appropriateness of placing the burden of persuasion on the defendant. If evidence exists that shows withdrawal, it is uniquely in the hands of petitioner, who did not produce it. It would risk serious unfairness to allow petitioner to escape liability for a conspiracy he willingly joined only because the government could not provide proof based on facts only known to petitioner and his co-conspirators. The court of appeals' sensible rule that petitioner should shoulder that burden is consistent with tradition and common sense. And it should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 1962 provides in pertinent part:

Prohibited activities

* * * * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

2. 18 U.S.C. 3282 provides in pertinent part:

Offenses not capital

(a) In General—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

3. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

4. 21 U.S.C. 846 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.