

No. 11-8976

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2011

CALVIN SMITH and JOHN RAYNOR,

Petitioners,

v.

UNITED STATES OF AMERICA,


Respondent.

CERTIFICATE OF SERVICE

Lisa B. Wright, a member of the bar of this Court, certifies pursuant to Rule 29 of this Court, that on May 29, 2012, she served the within REPLY BRIEF FOR PETITIONERS on counsel for respondent by e-mailing them to SUPREMECTBRIEFS@USDOJ.GOV and by causing a copy to be deposited in the United States mail, first-class postage pre-paid, addressed to:

Honorable Donald B. Verrilli, Jr.
Solicitor General of the United States
Department of Justice, Room 5614
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

All parties required to be served have been served.



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

REPLY BRIEF FOR PETITIONERS

I. THE DECISION BELOW IS IN CONFLICT WITH SNYDER V. LOUISIANA.

The decision below is in conflict with this Court's decision in Snyder v. Louisiana, 552 U.S. 472 (2008). The government concedes that the D.C. Circuit's opinion only "addresses the prosecutor's primary justification for each of the challenged strikes" but argues that that "does not indicate that the court failed to consider the other justifications." (Opp. at 21). The government notes (id.) that the D.C. Circuit cited Snyder in saying that "[t]he overall facts and circumstances of this case

thus do not support appellant's claim of intentional discrimination." Pet. App. 17. But that statement, and the court's acknowledgment that "'all of the circumstances that bear upon the issue of racial animosity must be consulted'" (Pet. App. 17 (quoting Snyder, 552 U.S. at 478)), were made in reference to the court's discussion of circumstances other than the reasons given for each strike, such as the ultimate racial makeup of the jury. When the court then proceeded in the next section of its opinion to discuss the challenged strikes, it upheld each one based on the plausibility of a single justification. Under Snyder, an appellate court "cannot presume" that the trial court relied on a particular explanation. Snyder, 552 U.S. at 479. Contrary to Snyder, the D.C. Circuit simply "presume[d]" that the trial court relied on the reason the appellate court selected to discuss and that the pretextual nature of any explanation it did not review, would not have altered the D.C. Circuit's ultimate conclusion.

II. THE FACT THAT THE JURY SPECIFICALLY INQUIRED ABOUT ACQUITTING BASED ON WITHDRAWAL INDICATES THAT ANY BURDEN-OF-PROOF ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT, MAKING THIS A GOOD VEHICLE FOR RESOLUTION OF THE BURDEN-OF-PROOF CIRCUIT SPLIT.

The government acknowledges that there is a deep circuit split on the due process question presented by this petition: whether, where a defendant makes out a prima facie case of withdrawal from a conspiracy before the statute of limitations

period, due process requires that the government bear the burden of persuasion on the question whether the defendant was a member of the conspiracy during the relevant period.

The government finds the reasoning of the cases placing the burden of persuasion on the government "unpersuasive" (Opp. at 27), arguing that withdrawal is an affirmative defense and that the Due Process Clause is not violated "simply because evidence introduced to support an affirmative defense, on which the defendant bears the burden of proof, may 'tend to negate' an element of the crime." (Opp. at 28). The government also takes issue with the premise that withdrawal from a conspiracy before the statute of limitations period negates an element of the offense. (Opp. at 28-29). But whether the government's arguments on the merits are correct is the very question presented in this petition. The fact that the government believes its analysis is superior to that of some federal appellate courts is not a reason not to settle the question and resolve the circuit split.

The government also argues that, in any event, review is not warranted because Petitioner Smith will not benefit if the circuit split is resolved in his favor: "[E]ven if a court of appeals employing a burden-shifting framework might find that

petitioner Smith established a prima facie case of withdrawal,¹ the ample evidence establishing Smith's continued participation in the conspiracies rebutted any such showing." (Opp. at 32). But whether Mr. Smith's withdrawal evidence was adequately rebutted is a classic jury question - one the jurors were struggling with during deliberations - and it is hardly clear beyond a reasonable doubt that the outcome would have been the same if the burden of persuasion had been placed on the government instead of Mr. Smith.²

Indeed, the jurors would not have asked about withdrawal if they did not consider the issue potentially dispositive. Their note specifically asked whether they should acquit if they found a defendant left the conspiracy before the relevant date. Pet. App. 57 ("If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?"). The jurors would not have

¹ The district court instructed on withdrawal and the D.C. Circuit gave no indication that Mr. Smith had not met his burden of production such that the burden of proof question did not matter. In these circumstances, this Court should not deny review on the basis of a fact-specific inquiry never undertaken by the lower court. The D.C. Circuit applied an incorrect legal rule and should have the opportunity in the first instance to apply the correct rule to the facts of this case.

² Because the error at issue - burden-shifting in violation of due process - is constitutional in nature, the strict harmless error standard of Chapman v. California, 386 U.S. 18, 24 (1967), will apply.

asked this question if they did not think Smith's withdrawal was a legitimate issue raised by the evidence. Certainly, the issue of harmlessness raised by the government here is not so clear cut that it should not be addressed by the D.C. Circuit in the first instance. It is not a reason to deny review in this case.

The government does not dispute that the due process question presented by this petition is an important question that arises frequently in conspiracy trials. The existing circuit split creates uncertainty³ and inequity and should be resolved by this Court in this case.

Respectfully submitted,

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³ Here, when the jury note came, the government originally sought to put the withdrawal burden on the defendant but then, having looked at the circuit split, switched positions and decided not to object to the court placing the withdrawal burden on the government. (Pets. C.A. Br. 282). The district court, however, gave the instruction originally proposed by the government. (Pets. C.A. 283).