No. 11-8976

IN THE SUPREME COURT OF THE UNITED STATES

CALVIN SMITH AND JOHN RAYNOR, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of review to the district court's rejection of petitioners' claim under Batson v. Kentucky, 476 U.S. 79 (1986).

2. Whether the district court erred in instructing the jury that petitioner Smith bore the burden of proving by a preponderance of the evidence the affirmative defense of withdrawal from the conspiracies charged in the indictment.

IN THE SUPREME COURT OF THE UNITED STATES

No. 11-8976

CALVIN SMITH AND JOHN RAYNOR, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-72) 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 (Pet. App. 74-75). The petition for a writ of certiorari was filed on February 27, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of conspiracy to distribute and 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; and multiple counts (six for petitioner Raynor and three for petitioner Smith) of murder while armed, in violation of D.C. Code §§ 22-2401, 22-3202 (Michie Supp. 1995). Petitioner Raynor was also convicted on five counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); tampering with a witness or informant by killing, in violation of 18 U.S.C. 1512(a)(1)(C); possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); five counts of illegal use of a firearm, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and (C)(i); and three counts of unlawful use of a communication facility, in violation of 21 U.S.C. 843(b). Raynor Judgment 1. Petitioner Smith was additionally convicted of murder in connection with a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A). Smith Judgment 1. Petitioners were each sentenced to a life term of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed in part petitioner Smith's convictions, but remanded for further proceedings with respect to his

claim that his counsel provided ineffective assistance in his defense against two of the murder counts. The court affirmed in part petitioner Raynor's convictions, but remanded the substantive drug charge for further consideration in light of Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011). Pet. App. 1-72.

1. Petitioners were members of a drug organization (led by co-defendants Rodney Moore and Kevin Gray) that distributed heroin, cocaine, crack cocaine, and marijuana in various areas throughout Washington, D.C., from the late 1980s through 2000. Gov't C.A. Br. 7-15; Pet. App. 15; 11/17/1999 Superseding Indictment 3. Petitioner Raynor was Moore's "right-hand man" through much of the conspiracy. Gov't C.A. Br. 174. Petitioners and other members of the organization committed numerous acts of violence, including multiple murders, to further the goals of the conspiracy. Id. at 8-11. Both petitioners were convicted of substantive murder offenses and of engaging in a conspiracy that included acts of murder to achieve its goals. Id. at 8-9, 262-266, 296-304; Pet. App. 50-53.

Starting in 1994, petitioner Smith was incarcerated after being arrested for and pleading guilty to shooting a man named Maurice Willis on December 23, 1993. Gov't C.A. Br. 9-10 n.8, 96 & n.66, 250 & n.150, 261, 294; see Pets. C.A. Br. 295. Petitioner Smith confessed to a co-conspirator that he had agreed to the plea so that Gray would be charged only with a misdemeanor offense.

Gov't C.A. Br. 294. Gray rewarded petitioner Smith by supplying Smith with marijuana while Smith was in prison and by sending money to Smith and his wife. Id. at 294-295. During his time in prison, petitioner Smith looked out for the interests of the conspiracy by providing information to Gray about a suspected cooperator and by threatening a cooperating witness. Id. at 295.

2. On November 17, 2000, the grand jury returned a 158-count superseding indictment charging petitioners, Gray, Moore, and 13 others with drug conspiracy, RICO conspiracy, murder, and other related charges, in violation of federal and District of Columbia law. Petitioners were tried before a jury with four co-defendants. Pet. App. 15-16.

a. Before jury selection, each potential juror completed a lengthy questionnaire and was individually interviewed at the bench. Gov't C.A. Br. 33. Because the government was seeking the death penalty for co-defendants Moore and Gray, see Gov't C.A. Br. 75, 81, questioning of potential jurors included inquiry into their views on the death penalty. See Pet. App. 17-19; Gov't C.A. Br. 34-67. The 90-person pool of potential jurors contained 68 African-Americans. Pet. App. 17. The government used 34 of its 37 peremptory challenges and seven of its eight alternate-juror peremptory challenges to strike African-American venirepersons. 5/7/02 Tr. 32, 45-46.

Petitioners objected to the government's use of peremptory challenges, claiming that the government struck potential jurors because they were African-American, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Pet. App. 16. The district court found that petitioners had established a prima facie case of racial discrimination and required the government to explain the basis for each of its strikes of an African-American venireperson. Ibid. Petitioners challenged the government's proffered justifications with respect to 22 potential jurors and the government supplemented its explanations as to those potential jurors. Gov't C.A. Br. 31; 5/7/02 Tr. 33-82. The hearing on the Batson challenges lasted several hours, during which time the district court consulted its notes, corrected and questioned counsel, and clarified the record about the racial composition of the venire and the pattern of the government's strikes. Pet. App. 16; 5/7/02 Tr. 19-25, 31-32, 45-46.

After considering the arguments from both sides, the district court stated:

> Assuming on the facts before me today that there is a prima facie case as to a race challenge under Bat[]son, I have heard the government's articulated reasons. I find they should be credited, and they are credited despite the reasons set forth by counsel for [petitioners] why I should not believe that race was a factor in the government's exercise of their peremptory strikes. I find that race was not a factor and the government had a basis other than race for the exercise of each peremptory strike.

5/7/02 Tr. 82-83. The court therefore denied petitioners' Batson objections. Id. at 83. Petitioners did not request more detailed findings. The 12-member jury ultimately included nine African-Americans. Pet. App. 17.

b. The district court instructed the jury that, as an element of proving that petitioners had engaged in a conspiracy, the government was required to prove that the charged conspiracy existed for some time between 1988 and November 2000 "and continuing within the period of the applicable statute of limitations." Gov't C.A. Br. 282. The court also instructed the jurors: "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 for [petitioner Smith] . . . you must find [petitioner Smith] not guilty of" the conspiracy count. Pet. App. 57.[1] During deliberations, the jury returned a note asking, "[i]f 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?" Ibid. Over

[1] The court's instruction used the date of the first superseding indictment, which was filed on May 5, 2000, but did not charge petitioner Smith. Petitioner Smith was charged on November 17, 2000, in the second superseding indictment. Gov't C.A. Br. 163-164. Petitioner Smith does not challenge that misstatement and has not identified any prejudice resulting therefrom.

petitioners' objection, 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." Gov't C.A. Br. 283-284. The court then explained the requirements for asserting a withdrawal defense:

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

Id. at 284-285 (brackets in original); see Pet. App. 57.

The jury convicted petitioners of conspiracy to distribute and possess narcotics with the intent to distribute them, in violation of 21 U.S.C. 846, 841(a)(1), and 841(b)(1)(A); RICO conspiracy, in violation of 18 U.S.C. 1962(d) and 1963; and multiple counts (six for petitioner Raynor and three for petitioner Smith) of murder while armed, in violation of D.C. Code §§ 22-2401, 22-3202 (Michie

Supp. 1995). Petitioner Raynor was also convicted on five counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); tampering with a witness or informant by killing, in violation of 18 U.S.C. 1512(a)(1)(C); possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); five counts of illegal use of a firearm, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and (C)(i); and three counts of unlawful use of a communication facility, in violation of 21 U.S.C. 843(b). And petitioner Smith was convicted of murder in connection with a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A). Raynor Judgment 1; Smith Judgment 1. Petitioners were each sentenced to a life term of imprisonment, to be followed by five years of supervised release. Raynor Judgment 3-4; Smith Judgment 2-3.

3. a. On appeal, petitioners asserted numerous challenges to their convictions and sentences. As relevant here, petitioners argued that the district court's "lack of findings" on their Batson objections "require[d] reversal." Pets. C.A. Br. 49. The court of appeals rejected that claim. Pet. App. 16-19. The court noted that "[t]he district court required three rounds of argument on each strike of an African-American juror: a prosecution opening in which the government individually justified each strike; a defense response disputing those government explanations; and a prosecution reply to every defense argument." Id. at 17. The court of appeals

observed that, "[t]hroughout the hearing, the district court questioned counsel, reviewed its own notes, and corrected mistakes by counsel" and acknowledged that the district court's conclusions were "based on the [parties'] arguments and [the court's] personal observation of the prosecutors and of the prospective jurors." Ibid.

Noting that petitioners had not cited any "controlling precedent requiring a trial court to render its decision in a strike-by-strike format," and commenting on "the obvious thoroughness of the district court's application of Batson's third step," the court of appeals "conclude[d] that the lack of strike-specific findings" did not "create[] the sort of 'exceptional circumstances' that would overcome [the court's] deference to the trial court." Pet. App. 17 (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008)). The court of appeals also observed that the final racial composition of the jury, which reflected the racial make-up of the venire, undermined the merits of petitioners' claim. Pet. App. 17. Nevertheless, acknowledging that "[t]he dismissal of even a single prospective juror on the basis of race violates equal protection principles," ibid., the court of appeals reviewed each of the 11 strikes challenged on appeal and concluded that the district court did not clearly err (or plainly err in the case of the unpreserved challenges) in finding that the reasons for the strikes were race-neutral, id. at 17-19.

b. The court of appeals also rejected petitioner Smith's contention that the district court erred by instructing the jury that he, rather than the government, bore the burden of proving that he withdrew from the conspiracy. See Pet. App. 57. The court acknowledged that the courts of appeals are divided on that issue. Ibid. The court noted, however, that it did "not write on a blank slate" because the D.C. Circuit had previously held, albeit in the sentencing context, "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.'" Id. at 57-58 (quoting United States v. Thomas, 114 F.3d 228, 268 (D.C. Cir.), cert. denied, 522 U.S. 1033 (1997)). The court of appeals therefore held that "the district court correctly instructed the jury that [petitioner Smith] bore the burden of persuasion to show that he withdrew from the conspiracy outside of the statute of limitations period." Id. at 58.

c. Judge Rogers filed a separate opinion, concurring in part in the portion of the court's per curiam opinion addressing petitioners' Batson challenges. Pet. App. 67-72. Because she viewed the district court's findings as "conclusory, without sufficient explanation to permit meaningful appellate review," she would not have applied "the usual deferential review," but would instead have asked "whether [the court of appeals], upon review of the record, finds by a preponderance of the evidence that [peti-

tioners] ha[ve] established purposeful discrimination by the prosecutor." Id. at 71. Even applying a de novo standard of review to the record in this case, however, Judge Rogers concluded that petitioners' "Batson challenges do not entitle them to reversal of their convictions." Ibid. Judge Rogers set out her view of why the government's strike of prospective juror 5773 was not discriminatory and explained that, "[f]or essentially the same reasons stated by [the majority of] the court with respect to the remaining strikes, each likewise survives de novo review of the record." Id. at 72 (internal citation omitted).

ARGUMENT

Petitioners challenge (Pet. 3-11) the court of appeals' review of whether each of the challenged peremptory strikes of potential jurors was discriminatory. The court of appeals' determination that none was does not warrant review because the court's decision was correct and does not conflict with any decision of this Court or another court of appeals. Petitioner Smith also argues (Pet. 11-15) that the district court erred in refusing to instruct the jury that the government bears the burden of proving beyond a reasonable doubt that he did not withdraw from the charged conspiracies outside the limitations period. Although the courts of appeals are divided on the proper allocation of proof when a defendant asserts a withdrawal defense, further review is not warranted in this case because any error in the district court's

instruction was harmless and petitioner would therefore not benefit from the resolution of the question presented.

1. Petitioners urge this Court to grant their petition for a writ of certiorari in order both to "resolve" whether a district court's rejection of a challenge under Batson v. Kentucky, 476 U.S. 79 (1986), should be reviewed under a clear-error or de novo standard and to "make clear that where a prosecutor proffers multiple justifications for striking a particular juror and the trial judge does not make specific findings as to each reason, the reviewing court must –– whatever the standard of review –– review each reason." Pet. 7. Review of those issues is not warranted because the court of appeals correctly resolved them and because resolution of those questions in petitioners' favor would not result in a different outcome in this case.

a. Batson establishes a three-step process for determining whether a prosecutor has discriminated on the basis of race in exercising peremptory challenges. 476 U.S. at 96-98. First, the defendant must establish a prima facie case of discrimination by establishing that the "relevant circumstances raise an inference" of racial discrimination. Id. at 96-97; Hernandez v. New York, 500 U.S. 352, 358 (1991) (plurality opinion). Second, if a defendant makes such a showing, the government must come forward with a race-neutral explanation for each challenged strike. Batson, 476 U.S. at 97-98; Purkett v. Elem, 514 U.S. 765, 767 (1995) (per

curiam). Third, if the government provides a race-neutral explanation for each strike, "the trial court must * * * decide * * * whether the opponent of the strike has proved purposeful racial discrimination." Purkett, 514 U.S. at 767; Batson, 476 U.S. at 98. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768.

The "ultimate question of discriminatory intent" is a "pure issue of fact," Hernandez, 500 U.S. at 364 (plurality opinion), that turns on "whether the trial court finds the prosecutor's race-neutral explanations to be credible," Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) (Miller-El I). The court's assessment of "[c]redibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Id. at 339; Hernandez, 500 U.S. at 365 ("There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge"). Because the trial court is in the best position to assess credibility, its determination of that issue receives "great deference on appeal" and is reviewed only for clear error. Hernandez, 500 U.S. at 364 (plurality opinion). Relying on Judge Rogers' concurrence, petitioners argue (Pet. 3-11) that the court of appeals erred in reviewing the district court's

conclusion that each of the juror strikes at issue was not racially motivated under a clear-error standard rather than reviewing each determination de novo.[2]

b. As an initial matter, petitioners did not argue in the court of appeals that the court should review the district court's Batson conclusions under a de novo standard of review. On the contrary, petitioners acknowledged that the district court's findings are entitled to great deference. Petitioners also conceded application of the rule they now ask this Court to overturn –– namely, that preserved Batson challenges are reviewed for clear error and that unpreserved Batson challenges are reviewed for plain error. Pets. C.A. Br. 15-17. This Court normally does not review questions neither pressed nor passed on below, and should not do so here where the court of appeals adopted the standard of review advocated at the time by petitioners. See United States v. Ortiz, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time on appeal by a party who advocated a contrary position in the court below).

c. Even if petitioners had preserved their argument on the proper standard of review, review by this Court would be unwar-

---

[2] On appeal, petitioners challenged 11 of the prosecution's 37 peremptory strikes. In the district court, however, petitioners objected to only seven of those 11 strikes. Pet. App. 17. The court of appeals therefore reviewed the four other challenges for plain error. Id. at 19. In their petition for a writ of certiorari, petitioners do not appear to challenge the standard of review as to those four peremptory strikes.

ranted both because the court of appeals correctly deferred to the district court's findings and because petitioners have made no effort to demonstrate that they would benefit from a de novo standard of review.

i. The court of appeals carefully reviewed the district court's rejection of petitioners' Batson challenges, noting that the court was required "to closely analyze the prosecutor's proffered reason for each disputed strike in light of all the relevant circumstances," Pet. App. 16-17 (citing Miller-El v. Dretke, 545 U.S. 231, 241-242, 251-252 (2005) (Miller-El II)), and concluding that "[t]he record here demonstrates that the district court appropriately exercised its Batson responsibilities," id. at 17. As the court of appeals described, the district court's final ruling followed "three rounds of argument on each strike of an African-American juror: a prosecution opening in which the government individually justified each strike; a defense response disputing those government explanations; and a prosecution reply to every defense argument." Ibid. "Throughout the hearing," moreover, "the district court questioned counsel, reviewed its own notes, and corrected mistakes by counsel." Ibid. Although the district court did not offer strike-specific reasons for its decision, the court of appeals properly concluded that the district court was justified in concluding "that the government's race-neutral explanations were genuine" and accordingly rejecting petitioners' Batson challenges

"based on the arguments" of counsel and on the court's "personal observation of the prosecutors and of prospective jurors' demeanor." Ibid.

In addition to looking at the totality of the district court's handling of petitioners' Batson challenge, the court of appeals reviewed each of the 11 juror strikes challenged on appeal (including the four strikes petitioners failed to object to in the district court). Pet. App. 17-19. The court of appeals correctly affirmed the district court's rejection of those challenges, concluding that petitioners had failed on appeal either to rebut the government's race-neutral justifications or to demonstrate the type of "exceptional circumstances" that would overcome the usual deference to a district court's findings about the demeanor of potential jurors. Ibid. (quoting Snyder v. Louisiana, 552, U.S. 472, 477 (2008)). In addition, Judge Rogers (concurring in the majority's conclusion on the Batson issue) explained that even under a de novo standard of review of each of the challenged strikes she agreed that petitioners had not established purposeful discrimination by the prosecutor. Id. at 67-72.

The court of appeals also considered the context of the challenged strikes. Pet. App. 16-17; see Miller-El II, 545 U.S. at 240-241, 253-266 (considering "all relevant circumstances," as directed by this Court in Batson, 476 U.S. at 96-97). The court of appeals noted that the racial composition of the jury ultimately

empaneled "mirrored the make-up of the venire." Id. at 17. And the court observed that "in this case there are no extrinsic indicators of racial discrimination of the kind found in successful Batson challenges" such as a widely known policy of excluding black jurors. Ibid. Thus, although the court correctly stated that "[t]he dismissal of even a single prospective juror on the basis of race violates equal protection principles," the court properly took note of the fact that "the circumstances of this case strongly suggest that the prosecution did not use its peremptory strikes to discriminate on the basis of race." Ibid.

ii. Although petitioners argue (Pet. 7-9) that a district court's findings of fact as to a Batson challenge are not entitled to deference when the court fails to provide detailed factual findings on the record as to each challenged juror, they do not cite a single case that supports their argument. In fact, "federal law has never required explicit fact-findings following a Batson challenge, especially where a prima facie case is acknowledged and the [non-moving party] presents specific nondiscriminatory reasons on the record." Smulls v. Roper, 535 F.3d 853, 860 (8th Cir. 2008) (en banc), cert. denied, 556 U.S. 1168 (2009)). See also, e.g., Miller–El I, 537 U.S. at 347 ("We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it."); Haynes v. Thaler, 438 Fed. Appx. 324, 329 (5th Cir. 2011) ("Although the Supreme Court stated in Batson that

'a [trial] court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,"' the Court has not gone further and stated that a trial court must also make detailed on-the-record findings about that inquiry.") (internal citations omitted; brackets in original), cert. denied, No. 11-7988, 2012 WL 1379750 (Apr. 23, 2012); Green v. Lamarque, 532 F.3d 1028, 1030 n.2 (9th Cir. 2008) ("The Court in Batson did not state that the trial judge must describe this analysis on the record, only that it must 'undertake' such an analysis.").

Indeed, petitioners acknowledge (Pet. 8) that this Court in Snyder, supra, "adopted a clear error standard of review." Petitioners nevertheless urge the Court to adopt, for the first time, a de novo standard of review for Batson challenges arising in federal trials. Relying on Judge Rogers' concurring opinion, petitioners explain that, when the Court established the clearly erroneous standard of review in Hernandez, supra, it expressed "federalism concerns" about permitting too searching a review of state-court determinations –– concerns that would not arise in appellate review of federal district court Batson decisions. Pet. 8 (citing Pet. App. 70 n.3 (Rogers, J., concurring)). But the Court in Hernandez invoked federalism concerns as a reason not to apply a standard of review of state-court factual findings that is more searching than that applied to factual findings of federal district courts. 500 U.S. at 369. The Court had already noted

both that it treats intentional-discrimination findings as factual findings and that it had held that factual findings made in a criminal case by a federal district court on issues other than guilt are subject to clearly erroneous review. Id. at 364-366. Petitioners offer no reason to depart from that longstanding practice now.

iii. At any rate, this case would not present an appropriate vehicle in which to reconsider the precise degree of deference owed to a trial court's ultimate conclusion under the third step of the Batson analysis because a resolution of that question in petitioners' favor would not entitle them to a new trial. Even under her de novo review of the record, Judge Rogers concluded that petitioners had not met their burden of establishing purposeful discrimination. Pet. App. 71-72. Petitioners do not even attempt to establish that the panel majority would have reached a different result had it applied the same de novo standard of review. Indeed, although the panel majority reviewed in detail each of the 11 strikes petitioners challenge, id. at 17-19, petitioners do not take issue in their petition for a writ of certiorari with any particular conclusion on the majority's part. Petitioners do not discuss any individual struck juror, instead merely requesting that the court of appeals be instructed to redo its task under a stricter standard of review (a standard not even requested by petitioners when they were before the court of appeals). Given the

thoroughness of the panel majority's review of the record, nothing suggests that the majority's independent and thorough review of the record would yield a different result. As a result, this Court's reconsideration of the appropriate standard of review would be unlikely to alter the outcome in this case.

d. Petitioners also argue (Pet. 8-11) that the court of appeals' analysis, which focused on "one plausible justification for each strike" where "multiple justifications [were] proffered," Pet. 9, conflicts with this Court's decision in Snyder. That claim is without merit. In Snyder, the prosecutor had offered two race-neutral justifications for a challenged juror strike, one that was demeanor-based and one that was not. The state trial court rejected the Batson challenge without indicating which of the two explanations (or both) it was crediting. Snyder, 552 U.S. at 478-479. This Court reviewed the trial court's decision under a clearly erroneous standard, noting that deference was due to any determinations by the trial court about credibility and demeanor. See id. at 477. The Court concluded that the non-demeanor-based justification "fail[ed] even under the highly deferential standard of review that is applicable here." Id. at 479. Because the state court did not indicate its basis for accepting the prosecution's argument, this Court "c[ould]not presume" that the trial court had credited the prosecutor's demeanor-based explanation rather than the explanation this Court found to be invalid. Ibid. The Court

therefore reversed the conviction and remanded for further proceedings. Id. at 485-486.

The court of appeals' decision in this case does not conflict with the decision in Snyder. The court of appeals acknowledged the statement in Snyder that, "in reviewing a ruling claimed to be Batson error, 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). After considering multiple factors, the court of appeals then concluded that "[t]he overall facts and circumstances of this case * * * do not support appellants' claims of intentional discrimination." Ibid. The fact that the court of appeals' opinion addresses the prosecutor's primary justification for each of the challenged strikes does not indicate that the court failed to consider the other justifications. Petitioners and their co-defendants briefed their Batson arguments at length, see Pets. C.A. Br. 14-53, and the government presented a lengthy and detailed response to those claims, see Gov't C.A. Br. 27-74. The salient difference between Snyder and this case is that the Court in Snyder found one of the proffered justifications to be a pretext for intentional discrimination; it was therefore critical that the reviewing courts could not tell which justification the trial court had in fact relied on. In their petition for a writ of certiorari, petitioners do not identify a single justification found by the

court of appeals to be valid that this Court should conclude is pretextual.[3]

Finally, petitioners do not even suggest that the court of appeals' approach to considering multiple proffered explanations from the prosecutor conflicts with any decision from another court of appeals. That is a sufficient reason not to grant review of that question.

2. Petitioner Smith also contends (Pet. 11-15) that the district court erred in refusing to instruct the jury that the government bears the burden of proving beyond a reasonable doubt that petitioner did not withdraw from the charged conspiracies. The court of appeals correctly rejected that argument. Pet. App. 57-58. Although the courts of appeals are divided on the proper allocation of proof when a defendant asserts the affirmative defense of withdrawal, resolution of that division is not appropriate in this case. Because any error in the district court's instructions was harmless, petitioner would not be entitled to a

---

[3] Petitioners acknowledge in passing (Pet. 11 (cross-reference cite to Snyder, 552 U.S. at 485)) that this Court has "le[ft] open [the] question whether, where one explanation is pretextual, [the] government might be able to save [a] strike by proving it would have stricken [the] jur[or] for nonpretextual reasons alone." But petitioners did not raise that particular question below and do not identify it as a question presented in their petition for a writ of certiorari. See Pet. i. Nor do petitioners identify any disagreement among the court of appeals on that question. In any case, because petitioners have not identified any pretextual justifications proffered by the government, that issue is not presented in this case.

new trial regardless of the resolution of the question presented. Further review of this question is therefore not warranted.

a. As the court of appeals correctly noted, due process requires the government in every criminal trial to prove beyond a reasonable doubt every element of the charged offense. Pet. App. 57 (citing, inter alia, In re Winship, 397 U.S. 358 (1970)). The absence of withdrawal is not, however, an element of the crime of conspiracy. Withdrawal is an affirmative defense and the court of appeals correctly held that a defendant asserting such a defense bears the burden of proving that he withdrew from a conspiracy.

When the government proves beyond a reasonable doubt that a defendant was a member of an ongoing conspiracy, it has satisfied its burden under the Due Process Clause. And, as the court of appeals recognized, a conspiracy is a crime that is presumed to continue until accomplishment of the aim of the conspiracy or termination of the agreement. Pet. App. 57. A defendant who has been shown to be part of an ongoing conspiracy remains a member of such conspiracy –– and therefore remains liable for the ongoing crimes of his co-conspirators –– unless or until he withdraws from the conspiracy. Hyde v. United States, 225 U.S. 347, 368-370 (1912). Thus, a defendant's participation in the conspiracy continues even if he does not perform any acts in furtherance of the conspiracy. Such a defendant may not assert a withdrawal

defense "until he does some act to disavow or defeat the purpose" of the conspiracy. Id. at 369.

This Court has long held that a defendant who claims that he withdrew from a conspiracy must show some "affirmative action" constituting withdrawal. Hyde, 225 U.S. at 369. In particular, a defendant must show both that he ceased participating in the conspiracy and that he either disclosed the conspiracy to the authorities or performed some "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." United States v. United States Gypsum Co., 438 U.S. 422, 464 (1978). Significantly, even if a defendant can establish that he withdrew from the conspiracy, such withdrawal does not excuse him from criminal liability for his prior conspiratorial acts and those of his co-conspirators. Rather, a proven withdrawal from a conspiracy both terminates a defendant's liability for future acts of his former co-conspirators and starts the running of the statute of limitations on his own liability for pre-withdrawal actions by and for the conspiracy. See id. at 465 n.38.

b. In keeping with this Court's statement in Hyde that a defendant wishing to assert the affirmative defense of withdrawal from a conspiracy must establish some "affirmative action" constituting withdrawal, 225 U.S. at 369, a majority of the courts of appeals have held that a defendant bears the burden of proving

that he withdrew from a conspiracy. See, e.g., United States v. Fishman, 645 F.3d 1175, 1196-1197 (10th Cir. 2011), cert. denied, 132 S. Ct. 1046 (2012); United States v. Eppolito, 543 F.3d 25, 49 (2d Cir. 2008), cert. denied, 555 U.S. 1148 (2009); United States v. Westry, 524 F.3d 1198, 1216-1217 (11th Cir.), cert. denied, 555 U.S. 909 (2008); United States v. Brown, 332 F.3d 363, 374 (6th Cir. 2003); United States v. Pettigrew, 77 F.3d 1500, 1514 (5th Cir. 1996); United States v. Dyer, 821 F.2d 35, 38-39 & n.6 (1st Cir. 1987).[4]

The Fourth, Seventh, and Ninth Circuits have held that, although a defendant bears the initial burden of presenting prima facie evidence that he withdrew from the conspiracy, if he does so the burden of persuasion as to the lack of withdrawal shifts back to the government. See, e.g., United States v. Lothian, 976 F.2d 1257, 1261-1262 (9th Cir. 1992); United States v. West, 877 F.2d 281, 289 (4th Cir.), cert. denied, 493 U.S. 959 (1989); United States v. Read, 658 F.2d 1225, 1236 (7th Cir. 1981). The Third Circuit has adopted a similar burden-shifting model, although that court's approach to what type of evidence is necessary to establish withdrawal (as opposed to who has the burden of proving withdrawal)

---

[4] The court of appeals cited Dyer as taking the minority view, Pet. App. 57, and petitioners do as well, Pet. 13-14. But in Dyer, the First Circuit upheld a challenged instruction stating that, although the government bears the burden of proving the essential elements of conspiracy, a defendant who "contends he withdrew or was abandoned from the conspiracy" bears the burden of demonstrating that defense. 821 F.2d at 39 & n.6.

is somewhat different than that of other courts of appeals. See United States v. Antar, 53 F.3d 568, 583 (3d Cir. 1995), abrogated on other grounds by Smith v. Berg, 247 F.3d 532 (3d Cir. 2001).[5] The Eighth Circuit may also have adopted the burden-shifting approach. That court has stated that the defendant has the burden of proving withdrawal without distinguishing between the burden of production and the burden of persuasion, see United States v. Wessels, 12 F.3d 746, 750 (1993), cert. denied, 513 U.S. 831 (1994); United States v. Boyd, 610 F.2d 521, 528 (1979), cert. denied, 444 U.S. 1089 (1980), more recently in the context of deciding sentencing issues, see United States v. Williams, 605 F.3d 556, 569 (2010); United States v. Spotted Elk, 548 F.3d 641, 676 (2008), cert. denied, 556 U.S. 1145 (2009). In United States v. Grimmett, 236 F.3d 452, 454 (2001), however, the court relied on

---

[5] In Antar, the Third Circuit explained:

> [I]f the defendant completely severs his or her relationship with the enterprise, he or she has established a prima facie showing of withdrawal from the conspiracy without showing any other affirmative act inconsistent with the conspiracy and without giving any further notice to his or her co-conspirators. Once the defendant makes this showing, the burden shifts to the government either to rebut the defendant's showing or to establish that the defendant continued to participate as a co-conspirator. However, if the defendant has not completely severed his ties with the enterprise, then in order to establish a prima facie case, he must demonstrate either that he gave notice to his co-conspirators that he disavows the purpose of the conspiracy or that he did acts inconsistent with the object of the conspiracy.

53 F.3d at 583.

the Third Circuit's decision in Antar, supra, stating that "[t]hough [the defendant] had the burden to prove withdrawal, the government had the burden to come forward with evidence rebutting her prima facie showing."

Only the Seventh and Ninth Circuits have provided a rationale for the burden-shifting allocation of proof. In Read, supra, the Seventh Circuit construed this Court's decision in Hyde as holding that the defendant has "only the burden of going forward" but that the government had the burden of disproving withdrawal beyond a reasonable doubt. 658 F.2d at 1233-1236. In the Seventh Circuit's view, proof of withdrawal "negates" one of "the essential element[s]" of a charge of conspiracy, namely "membership." Id. at 1236. In order to comport with due process, the court reasoned, the government bears the burden of persuasion to disprove the defense of withdrawal once a defendant meets his burden of going forward with evidence that he withdrew prior to the limitations period. Ibid. The Ninth Circuit adopted similar reasoning in Lothian (which involved mail and wire fraud charges rather than conspiracy), although in its view proof of withdrawal "negates the element of agreement to the conspiracy's unlawful objective." 976 F.3d at 1261 (citing Read, 658 F.2d at 1232).

The reasoning of those courts is unpersuasive. The Due Process Clause does not require the government to bear the burden of disproving an affirmative defense. See Patterson v. New York,

432 U.S. 197, 210 (1977) ("Proof of the nonexistence of all affirmative defenses has never been constitutionally required."). Nor is the Due Process Clause 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. Martin v. Ohio, 480 U.S. 228, 233-234 (1987) (holding that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense even though "evidence offered to support the defense may negate a purposeful killing by prior calculation and design").

Moreover, the premise of those decisions' due process analysis -- that withdrawal from a conspiracy negates an element of the offense -- is incorrect. "To the contrary, a defendant's withdrawal from a conspiracy tends to confirm, rather than deny, his prior membership in it." United States v. Hamilton, 538 F.3d 162, 174 (2d Cir. 2008). Although withdrawal may "become[] a complete defense * * * when coupled with the defense of the statute of limitations," Read, 658 F.2d at 1233, even then it does not negate the element of membership in the conspiracy or agreement to the conspiracy's unlawful objective. Rather, the statute of limitations defense "operates to preclude the imposition of criminal liability on defendants, notwithstanding a showing that they committed criminal acts." United States v. Scott, 437 U.S. 82, 111 (1978). Thus, like the duress defense that this Court

considered in Dixon v. United States, 548 U.S. 1 (2006), it does not "controvert any of the elements of the offense itself," but instead "allows the defendant to avoid liability." Id. at 6-7 (internal quotation marks and citation omitted). See also United States v. Titterington, 374 F.3d 453, 456 (6th Cir. 2004), cert. denied, 543 U.S. 1153 (2005); United States v. Knipp, 963 F.2d 839, 844 (6th Cir. 1992); United States v. Walsh, 700 F.2d 846, 856 (2d Cir.), cert. denied, 464 U.S. 825 (1983). Indeed, like the defendant in Martin (which addressed the affirmative defense of self-defense), petitioner Smith does not appear to dispute the existence of the elements to establish a conspiracy; he instead contends that he is entitled to an affirmative defense to liability for his conspiratorial actions and the criminal actions of his co-conspirators. See Martin, 480 U.S. at 234. Thus, as was the case in Dixon with respect to the defense of duress, due process is not offended by jury instructions that place the burden on a defendant to prove withdrawal from the conspiracy. See 548 U.S. at 8.

c. In any event, this case is not an appropriate vehicle to resolve any conflict in the courts of appeals on this issue because petitioner Smith will not benefit even if the circuit split is resolved in his favor. Although petitioner Smith does not identify in his petition for a writ of certiorari what evidence he would rely on in support of his withdrawal defense, 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 Smith told the witness he refused in 1997 to comply with a 1997 directive from Gray (a leader of the conspiracy) to kill that witness. Pets. C.A. Br. 294-296. Even in the courts of appeals that have adopted some version of a burden-shifting framework that petitioner Smith presumably prefers, such evidence would not establish the affirmative defense of withdrawal.

Under the Third Circuit's approach, petitioner Smith would not have met his prima-facie burden because he neither "gave notice to his co-conspirators that he disavow[ed] the purpose of the conspiracy" nor "did acts inconsistent with the object of the conspiracy." Antar, 53 F.3d at 583. At most, petitioner Smith's imprisonment resulted in a "mere cessation of activity," which is not "sufficient to establish withdrawal." Id. at 582. And his alleged refusal to commit one murder does not establish that he committed acts that were inconsistent with the goals of the drug-trafficking and RICO conspiracies. In any case, that alleged incident occurred in 1997 –– i.e., within the limitations period[6] –– and could easily be viewed as evidence that petitioner Smith was still part of the conspiracy when the conspiracy's leader asked him to commit the murder. See Gov't C.A. Br. 292-294.

---

[6] As noted at n.1, supra, petitioner Smith was charged in the second superseding indictment, filed on November 17, 2000. The statute of limitations for the conspiracy counts against him is five years. 18 U.S.C. 3282.

Petitioner Smith would not have fared any better in the other circuits that employ a burden-shifting approach. The mere fact of petitioner Smith's imprisonment did not establish that he withdrew from the conspiracies. See, e.g., United States v. Nava-Salazar, 30 F.3d 788, 799 (7th Cir.) (noting that "the mere fact of Nava's arrest and incarceration was insufficient to show withdrawal" without evidence that he took affirmative action to withdraw and defendant therefore was not entitled to withdrawal instruction), cert. denied, 513 U.S. 1002 (1994); cf. United States v. Diaz, 176 F.3d 52, 98 (2d Cir.) ("[N]either authority nor reason would suggest that imprisonment necessarily shows a withdrawal.") (quoting United States v. Borelli, 336 F.2d 376, 389 (2d Cir. 1964)), cert. denied, 528 U.S. 875 (1999). On the contrary, the evidence presented at trial established that petitioner Smith pleaded guilty to the offense that sent him to prison in order to allow Gray to plead guilty to a misdemeanor offense. Gov't C.A. Br. 294-296. Gray, in turn, rewarded petitioner Smith by supplying Smith with marijuana while Smith was in prison and by sending money to Smith and his wife. Id. at 294-295. In addition, petitioner Smith 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. Id. at 295. Far from establishing that petitioner Smith took some affirmative step to withdraw from the conspiracy, the evidence thus shows that

Smith continued his association with Gray and other members of the conspiracy while he was in prison.

Thus, even if a court of appeals employing a burden-shifting framework might find that petitioner Smith established a prima facie case of withdrawal, the ample evidence establishing Smith's continued participation in the conspiracies rebutted any such showing. Any instructional error about who bore the ultimate burden on the defense of withdrawal was therefore harmless. Because resolution of the proper allocation of such burdens would not make a difference in the outcome of petitioner Smith's case, the issue does not warrant review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

KIRBY A. HELLER
Attorney

MAY 2012