

## Recent Supreme Court Decision Clarifies Key Principles Concerning Withdrawal from Criminal Conspiracies

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### *Smith v. United States* Has Significant Implications for White Collar Prosecutions

In *Smith v. United States*, No. 11-8976 (Jan. 9, 2013), the Supreme Court resolved a circuit split at “the intersection of a withdrawal defense and a statute-of-limitations defense.” The decision clarified core principles of conspiracy law, and it also served as an important reminder that a defendant’s withdrawal, while a potential defense in certain criminal cases, “achieves more modest ends than exoneration.” Calvin Smith learned that legal lesson the hard way, when the Supreme Court unanimously rejected his appeal. While a drug case, *Smith* has significant implications for white collar prosecutions as well.

#### Background

Smith was convicted of various crimes, including conspiracy under 21 U.S.C. § 846 and 18 U.S.C. § 1962(d), for his role in a violent drug organization that, over a decade, sold crack, cocaine, heroin and marijuana and also committed dozens of murders. Smith appealed, noting that the statute of limitations for conspiracy is five years under 18 U.S.C. § 3282, but that by the time when the indictment issued against him, he had already been in prison for six years.

Smith argued that he could not have actively engaged in the charged conspiracy during the limitations period, because when he went behind the prison walls, he effectively withdrew from the conspiracy. The trial court, D.C. Circuit and Supreme Court all rejected his claim.

#### The nature of conspiracy

If two or more people agree to commit a crime, and they take any step to accomplish their unlawful goal, they both have committed the crime of conspiracy. As the Supreme Court explained, “[t]he essence of conspiracy is the combination of minds in an unlawful purpose.”

For example, robbing a bank is a crime, but agreeing to rob a bank constitutes the distinct crime of conspiracy. Would-be bank robbers can be convicted of conspiracy even if they failed to pull off their planned job (because they were inept), could never have pulled it off (because it was impossible), or decided not to go through with their scheme (because they opted to pursue honest work instead).

When a conspirator “join[s] forces to achieve collectively more evil than he could accomplish alone, [he] ties his fate to that of the group” and assumes criminal responsibility for the conduct of his co-conspirators “in pursuit of their common plot,” even if he never actively assists or participates in any of that conduct. Further, because conspiracy is a “continuing offense,” a conspirator “continues to violate the law through every moment of [the conspiracy’s] existence.”

Thus, even if a defendant joined a criminal conspiracy more than ten years ago, he can still be convicted (absent sufficient evidence of his withdrawal), so long as the conspiracy existed within the past five years, the statute of limitations for such a prosecution.

#### The defense of withdrawal

A person who joins a conspiracy can withdraw from it. When a co-conspirator walks away, he ceases to be liable for the subsequent acts of his conspirators. Nevertheless, “he remains guilty of conspiracy.” The fact remains that the defendant entered the unlawful agreement in the first place, which was itself a crime. Withdrawal separates the former conspirator from what other conspirators may do in the future, but it does not forgive him for what he has done in the past.

Moreover, to be effective, withdrawal must be active and unequivocal. “Passive non-participation in the continuing scheme is not enough to sever the meeting of the minds that constitutes the conspiracy.” It is not enough, therefore, for a defendant to show that, after having joined a conspiracy, he was “entirely inactive” – that he did not “do” anything. The defense of withdrawal requires more.

The law puts the burden on the defendant to prove that he actively and unequivocally withdrew from the charged conspiracy. In *Smith*, the Supreme Court made clear that the government bears no “constitutional responsibility to prove that [the defendant] did not withdraw.”

## The issue of timing

What if a person withdraws from a conspiracy at least five years before the government secures an indictment?

That was the issue raised in *Smith*, because as the Supreme Court recognized, the “union of withdrawal with a statute-of-limitations defense can free [a] defendant of criminal liability.” Had *Smith* actually withdrawn from the conspiracy when he went away to prison, more than five years before he was indicted, he could have avoided conviction (at least, on this charge).

But his appeal failed for two reasons. His incarceration constituted, at best, “passive non-participation” in the ongoing conspiracy, not active and unequivocal withdrawal from it. In addition, it was *Smith*’s burden to prove his own withdrawal, not the government’s burden to prove his active participation. In fact, the government never has to show that, after having joined a charged conspiracy, a defendant actively engaged in it.

Putting this burden on the defendant is fair, according to the Supreme Court, because “the informational asymmetry heavily favors the defendant.” A defendant knows what, if anything, he has done to dissociate himself and can direct the court to relevant evidence, but it is “nearly impossible” for the government “to prove the negative that the act of withdrawal never happened.”

## Importance of *Smith* in the white collar context

With the government aggressively pursuing criminal conspiracy cases in the white collar context, the recent decision by the Supreme Court in *Smith* merits attention. The decision stands for three basic principles:

1. it is fairly difficult for a defendant to withdraw from a criminal conspiracy;
2. the defendant must prove that he, in fact, walked away; and
3. withdrawal is a complete defense only if it occurred more than five years before the indictment.

These principles apply with equal force whether the conspiracy is one to sell crack cocaine or to trade on inside information or to inflate corporate earnings. Those charged with conspiracy in the corporate context should understand that, unless they can present evidence of their active and unequivocal withdrawal before the five-year limitations period, even their complete inactivity in a conspiracy will not shield them from criminal liability.

As the Supreme Court concluded in *Smith*:

*Having joined forces to achieve collectively more evil than he could accomplish alone, Smith tied his fate to that of the group. His individual change of heart (assuming it occurred) could not put the conspiracy genie back in the bottle. We punish him for the havoc wreaked by the unlawful scheme, whether or not he remained actively involved.*

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