No. 99-863

In the Supreme Court of the United States

DON PRINCE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury that it could not find one defendant guilty of conspiracy and the other defendant not guilty, because the government had to prove "that the two defendants entered into the unlawful agreement charged."

2. Whether the district court committed reversible error in admitting evidence that petitioner aided his co-defendant when he was a fugitive.

3. Whether the district court committed reversible error in admitting evidence that petitioner's co-defendant used a racial epithet.

4. Whether the district court committed reversible error in letting the jury consider an admission by petitioner's co-defendant that mentioned petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is unpublished, but the decision is noted at 187 F.3d 632 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1999. A petition for rehearing was denied on August 17, 1999. On November 8, 1999, the Chief Justice extended the time for filing a petition for certiorari until December 15, 1999, and the petition for a writ of certiorari was filed on November 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the District of South Carolina on two counts of conspiring in a murder-for-hire scheme, in violation of 18 U.S.C. 1958(a), and one count of travel in interstate commerce with intent to commit murder-for-hire, in violation of 18 U.S.C. 1958(a). Petitioner was sentenced to 211 months' imprisonment, to be followed by three years' supervised release, and was fined $5000. The court of appeals affirmed. Gov't C.A. Br. 3; Pet. App. 1-15.

1. Petitioner's co-defendant brother, Bill Prince, and Charlie Dorn Smith were convicted in 1992 for the contract murder of Bill Prince's foster father, Billy Graham. Frederick "Peaches" Andrews testified for the State about Bill Prince's and Smith's involvement in the murder. The South Carolina Supreme Court reversed Smith's conviction, but affirmed Bill Prince's. After Bill Prince's petition for rehearing was denied on August 26, 1994, he became a fugitive until his capture a year later. Petitioner helped Prince remain a fugitive by running his businesses, arranging doctor's appointments, and finding places for him to stay. When petitioner's ex-girlfriend learned of the scheme to evade the authorities, petitioner threatened her to keep her quiet. Petitioner also worked with his brother's lawyers to procure affidavits in support of a motion for new trial or post conviction relief. Gov't C.A. Br. 4; Pet. App. 2-3. After Bill Prince was arrested in August 1995, petitioner frequently visited him in prison and continued to seek affidavits in the hopes of obtaining a new trial for him. In particular, petitioner prepared affidavits for Peaches Andrews and Charlie Dorn Smith, but they did not sign them. Gov't C.A. Br. 4-5; Pet. App. 3.

In October 1995, Bill Prince, while in prison, began talking to another inmate, FBI informant Scott Sherpinskas, about arranging for the contract murders of Andrews and Smith. Bill Prince told Sherpinskas that petitioner would travel from North Carolina to pay Sherpinskas's hit man in South Carolina, and further said that petitioner would find someone else to commit the murders if Sherpinskas could not find a hit man. Gov't C.A. Br. 5; Pet. App. 3-4.

Bill Prince asked another inmate, George Thomas Young, to commit the murders after Young's release from prison on December 1, 1995. Bill Prince gave Young maps to the houses of Smith's girlfriend and Andrews, and told Young that petitioner would assist Young in locating the houses and would pay him for the murders. Gov't C.A. Br. 5-6; Pet. App. 4.

After traveling from North to South Carolina, petitioner met with Young on December 1, 1995, and showed him the residences of Smith's girlfriend and of Andrews. Petitioner paid Young approximately $2000 and gave him telephone charge cards to use for calling petitioner. During the next week, Young called petitioner several times, and petitioner called Young on at least one occasion. Petitioner and Young met again on December 7, 1995, to discuss the murder plots. Gov't C.A. Br. 6; Pet. App. 4-5.

On December 8, 1995, Sherpinskas pretended that his hit man had murdered Andrews, showing Bill Prince a picture allegedly depicting Andrews' dead body. Bill Prince agreed to pay for Andrews' murder and to make a down payment for Smith's murder, assuring Sherpinskas that petitioner would meet the hit man and make the payments. The men agreed that petitioner would use the code word "Turbeville" so the hit man would recognize him. Gov't C.A. Br. 6-7; Pet. App. 5.

On December 14, 1995, petitioner visited his brother in prison. After the meeting, petitioner traveled to a remote rest area located off Interstate 20. When petitioner approached the hit man, who was an undercover agent, at the prearranged location, he asked, "You don't know how to get to Turbeville, do you?" The men discussed the pay-off, and petitioner told the agent to get rid of the envelopes that contained the $5000. The agent asked petitioner whether he had seen the newspaper story reporting the disappearance of Andrews, and petitioner responded that he had been called about the article that morning. The agent asked whether he should "do Smith," and petitioner told him to "hold on it" because "things are buzzing about [Andrews]." The men discussed a mix-up regarding the payments on the Smith deal, and the agent asked whether petitioner would talk to his brother to clear it up. Petitioner responded that he did not like to talk about these issues on the telephone because "my lines were bugged [when Bill was on the run] * * * and they still may be." Gov't C.A. Br. 7; Pet. App. 5.

After paying the agent, petitioner was arrested. He remarked in a disgusted voice, "The things you would do for your brother." The government later recovered several incriminating letters and documents in petitioner's home, office, boat, and car. Gov't C.A. Br. 7-8; Pet. App. 5-6.

2. Before trial, petitioner moved to exclude certain pieces of evidence, including evidence that he assisted his brother while he was a fugitive. The district court admitted the evidence under Federal Rule of Evidence 404(b). C.A. App. 150-151. During trial, petitioner also objected to the introduction of a recorded conversation between Bill Prince and Sherpinkas in which Bill Prince used the word "niggers." *Id.* at 989-991. The district

court overruled the objection, *id.* at 996-997, but gave the jury the following cautionary instruction:

> [S]ome of the language that you hear on this tape may be offensive to you. You must not be biased or prejudiced in this case because of the language someone might use when they do not know they are being taped. And I know you can't put a line down your mind, but you really need to be conscientious about not being influenced by the form of the words used.

Id. at 1041.

Petitioner also objected to the introduction of a letter from Bill Prince to his (Bill's) wife while he was in prison. Bill Prince stated in the letter that "everything is my fault. I will never be able to forgive myself for the problems that I have caused everybody. But if it would be any consolation, I would have done the same for Don." C.A. App. 1148. The district court ruled that the letter was admissible only against Bill Prince, but the court denied petitioner's motion to sever, ruling that a limiting instruction would be sufficient. *Id.* at 1140-1143.

During deliberations, the jury submitted the following question to the court: "In relation to Counts One and Two regarding the alleged conspiracy, can we render a guilty verdict for one defendant and/or a not guilty verdict for the other defendant?" C.A. App. 1741. In response, the district court instructed the jury as follows:

> I would say the answer to that question is no. The reason for that answer is as follows: You will recall I told you in my jury instructions, a conspiracy is a kind of criminal partnership[,] a combination or a[n] agreement of two or more persons to join together

> to accomplish some unlawful purpose. I also told you that of the four elements necessary for the government to prove beyond a reasonable doubt to establish a conspiracy, the first of those elements is that the two defendants entered into the unlawful agreement charged in the indictment between on or about October First, 1995, and December 14th, 1995. Thus, because the essence of an agreement is a situation involv[ing] two people, the answer to the question you have asked me is no.

Id. at 1742.

3. The court of appeals affirmed. Pet. App. 1-15. The court of appeals agreed with petitioner that the district court should have redacted Bill Prince's use of the word "niggers" in the recorded conversation between Bill Prince and Sherpinskas. *Id.* at 6. The court of appeals held that the error was harmless, however, because the district court gave a "careful jury instruction" that "was sufficient to eliminate the relatively modest prejudicial effect that this isolated epithet might otherwise have had on the jury." *Id.* at 6-7.

The court of appeals further held that the district court's refusal to grant a severance in connection with Bill Prince's letter to his wife did not violate the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968), that bars the admission of a confession of a non-testifying co-defendant that is "powerfully incriminating" of the defendant. Pet. App. 7-9. The court of appeals observed that petitioner did not request the district court to redact the one sentence of the letter that referred to petitioner—"But if it would be any consolation, I would have done the same for Don." *Id.* at 7. The court of appeals also explained that the vague language of the letter was open to different interpretations, including

one that was consistent "with [petitioner]'s defense that he extensively assisted his brother but never participated in any murder-for-hire plot." *Id.* at 9. As such, the court of appeals held that the letter "simply does not powerfully incriminate [petitioner]." *Ibid.*

The court of appeals further ruled that the district court erred in admitting Rule 404(b) evidence that petitioner assisted his brother when he was a fugitive, reasoning that such evidence "was not part of the same criminal episode as the conspiracy to murder the witnesses." Pet. App. 11. The court of appeals stated, however, that it had "no difficulty finding" the error harmless, "[i]n light of the voluminous properly admitted evidence * * * against [petitioner]." *Id.* at 12.

The court of appeals did not specifically address petitioner's challenge to the district court's jury instruction in which the court told the jury that it could not find one defendant guilty of conspiracy but not the other. But the court of appeals stated that it had "carefully reviewed [petitioner's] other arguments," and found them "all meritless." Pet. App. 13.

ARGUMENT

1. Petitioner argues (Pet. 6-8) that the district court erred in instructing the jury that it could not find one defendant guilty of conspiracy and the other defendant not guilty. That is incorrect. The indictment in this case charged that petitioner and his brother conspired to commit murder-for-hire. C.A. App. 16-17.[1] Similarly, the government's theory at trial was that petitioner and his brother—and no one else—conspired to commit the murder-for-hire scheme. The jury likewise was

[1] The indictment therefore did not allege, as some indictments do, that the defendants conspired "with others known and unknown to the grand jury."

instructed that the government had to prove an unlawful agreement between petitioner and his brother, "the two defendants." See Transcript of Jury instructions, at 191-196. Under those circumstances, the trial court properly instructed the jury that it could not convict one defendant of conspiracy and acquit the other. See *United States* v. *Williams*, 341 U.S. 70, 86 (1951) (Black, J., concurring) ("[O]ne person obviously cannot conspire with himself."); *United States* v. *Davis*, 183 F.3d 231, 244 (3d Cir. 1999) ("[A] person cannot conspire with himself[.]"); *United States* v. *Campbell*, 64 F.3d 967, 978 (5th Cir. 1995) ("[A] single defendant cannot conspire with himself.").

Petitioner further errs in relying (Pet. 7-8) on *United States* v. *Powell*, 469 U.S. 57, 64-69 (1984), which rejected the notion that a rationally irreconcilable verdict entitles a criminal defendant to reversal of his conviction. Nothing in that decision suggests that a criminal defendant is entitled to an instruction expressly authorizing the jury to render inconsistent verdicts. Although the Court in *Powell* recognized the unreviewable power juries have to nullify the law and evidence, the Court also described that power as one "which [the jury has] no right to exercise." *Id.* at 66 (quoting *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)); see also *United States* v. *Thomas*, 116 F.3d 606, 616 n.9 (2d Cir. 1997) ("[C]riminal defendants have no right to a jury instruction alerting jurors to this power to act in contravention of their duty.").[2] Accordingly,

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[2] The Court in *Powell* also explained that criminal defendants are protected from any prejudicial "jury irrationality" by "sufficiency-of-the-evidence review." 469 U.S. at 67. Here, petitioner does not challenge the sufficiency of the evidence to support his conviction on two counts of conspiracy. Moreover, petitioner's suggestion (Pet. 8) that the jury may have convicted

Powell provides no support for petitioner's contention that he was entitled to have the jury instructed that it could reach inconsistent verdicts.

2. Petitioner argues (Pet. 8-10) that the district court's admission of evidence that petitioner helped his brother remain a fugitive was reversible error. Even assuming that the evidence was inadmissible,[3] the court of appeals properly held that any such error was harmless "[i]n light of the voluminous properly admitted evidence" against petitioner. Pet. App. 12. That fact-bound conclusion does not merit further review. See *United States* v. *Hasting*, 461 U.S. 499, 510 (1983) (noting that this Court undertakes harmless error review "sparingly").

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him of consiracy solely to support the conspiracy conviction of his brother is belied by the jury's conviction of petitioner on the subsantive count of murder-for-hire.

[3] The evidence of petitioner's assistance to his brother while he was a fugitive was, in fact, highly probative in illustrating the nature of the relationship the conspirators enjoyed before hatching the murder-for-hire plot. The evidence not only showed the relationship of trust between petitioner and his brother and how petitioner's sense of loyalty motivated his actions, but it also illustrated the substantial level of involvement petitioner had in fighting his brother's murder conviction. When the brothers failed to obtain Bill Prince's release from prison, they decided to take revenge on the men who they believed were responsible for Bill Prince's predicament. The evidence therefore was "inextricably intertwined" with the conspiracies charged and was necessary to tell the complete story. See *United States* v. *Chin*, 83 F.3d 83, 87-88 (4th Cir. 1996). And the probative value of this evidence was not substantially outweighed by its prejudicial effect. Petitioner's assistance to his brother when he was a fugitive helped put into context his subsequent participation in the murder plots, and a reasonable jury would not conclude from that evidence alone that petitioner would participate in a murder-for-hire scheme.

3. Petitioner also challenges (Pet. 10-11) the court of appeals' harmless error finding with respect to the district court's failure to redact the word "niggers" from the recorded statement of Bill Prince. The court of appeals concluded, however, that jurors are presumed to follow the trial court's instructions, Pet. App. 7, and the court's "careful jury instruction," *id.* at 6, directing the jury not to be swayed by an emotional reaction to the word "was sufficient to eliminate [its] relatively modest prejudicial effect." *Id.* at 7. That conclusion was correct and too fact-bound to warrant this Court's review.

4. Finally, petitioner contends (Pet. 11-14) that the admission of a letter from Bill Prince to his (Bill's) wife violated his Confrontation Clause rights because it incriminated him, and the district court refused to grant him a severance. That claim also lacks merit.

The court of appeals correctly upheld the district court's refusal to sever petitioner's case, because the letter did not "powerfully incriminate[]" petitioner and this did not trigger the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968). Pet. App. 8. In *Bruton*, the Court held that the admission at a joint trial of a non-testifying co-defendant's confession that powerfully incriminated the defendant violated the Confrontation Clause. The Court explained that, even if the jury receives limiting instructions to disregard the co-defendant's confessions when considering the defendant's case, they are not adequate to protect against misuse of the co-defendant's confession. See *Gray* v. *Maryland*, 523 U.S. 185, 190 (1998).

That analysis does not apply here. The statements in the letter did not refer specifically to any crimes; instead, Bill Prince commented that "everything" was his fault; that he would not be able to forgive himself for

the "problems" he caused; and that he would have "done the same" for petitioner. Similarly, while the letter mentioned petitioner by name, it did not identify anything petitioner had done. As such, the statement did not directly incriminate petitioner; rather it would incriminate him only if the jury drew inferences from other evidence adduced at trial. Pet. App. 9; see also *United States* v. *Lage*, 183 F.3d 374, 387-388 (5th Cir. 1999) (statement mentioning defendant by name, but which was "harmful to defense only if jury made several inferential jumps," did not powerfully incriminate defendant such that there was risk jurors would disobey limiting instructions.), cert. denied, 120 S. Ct. 1180 (2000); cf. *Richardson* v. *Marsh*, 481 U.S. 200, 208 (1987) ("the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place."). Petitioner moreover rejected a limiting instruction, Pet. App. 8, see Fed. R. Evid. 105, and never asked the district court to redact the one sentence in the letter that mentioned him, Pet. App. 8; cf. *Richardson*, 481 U.S. at 209.

Moreover, as the court of appeals explained, even if the jury sought to infer the letter's meaning by reference to the evidence presented, it is not clear that the jury would have assigned the incriminating meaning petitioner suggests. Indeed, "[t]he statement in Bill's letter is not in any way inconsistent with [petitioner's] defense that he extensively assisted his brother but never participated in any murder-for-hire plot." Pet. App. 9. As such, it was not "powerfully incriminat[ing]." *Ibid.* And, in any event, its admission at trial would be, at most, harmless error. See *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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