No. _____

In the

Supreme Court of the United States

January Term, 2021

EDDY PENA,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Should the Court grant certiorari in order to determine whether under 21 U.S.C. § 846 (conspiracy to distribute controlled substances) it is proper to base a defendant's sentence on the weight of all controlled substances possessed by all members of a conspiracy, so long as such possession was "reasonably foreseeable" to the defendant; and whether the Court should strike down this engrafting of the judicially-created *Pinkerton* doctrine of reasonable foreseeability onto the legislatively-enacted controlled substance statutes?

List of Parties

There were no corporate parties below. Eddy Pena's co-defendants in the district court were Michael Luciano, Mario Recinos, Elizabeth Morales, Maycol Campos, Selena Mena, Roberto Roman, aka Indigo, William Gonzalez-Nieves, Jose Quinones, Hector Quinones, Marcus Antonio, Ricardo Acevedo, Nehamiah Carroll, aka El Prieto, Dennis Gonzalez, aka Carnito, Luis Gonzalez, John Jiminez, Wilfredo Lebron, aka Tony, Javier Mateo, Jose Medina, Alberto Mojica-Ortiz, aka Beto , and Robert Torres.

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Petitioner Eddy Pena respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated February 22, 2021.

Opinions Below

The decision of the Court of Appeals is an unpublished summary affirmance and is set forth in the Appendix at A 1, *infra*.[1] There is no written decision by the district court and the relevant portions of the district court's jury charge are set

[1]In this petition, "A" followed by a page number refers to the Appendix to this Petition for Certiorari. "App." refers to that Appendix filed in the Court of Appeals.

forth in full in the text of this petition

Jurisdiction

The judgment of the Court of Appeals entered on February 22, 2021. A1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The basis for subject matter jurisdiction in district court was 18 U.S.C. §3231 (jurisdiction over offenses against the United States). The basis for the jurisdiction of the court of appeals was 28 U.S.C. § 1291 (appeals from final judgments of district courts), Rule 4(b), Fed. R. App. Proc. (appeals from criminal convictions), 18 U.S.C.§ 3557 and 18 U.S.C. § 3742 (appeals from sentences).

Constitutional and Statutory Provisions Involved

21 U.S.C. § 846 (attempt and conspiracy)

> Any person who . . . 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 . . . conspiracy.

21 U.S.C. § 841 (a)(1)

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally- (1) to . . .distribute, or . . . or possess with intent to distribute . . . a controlled substance . . .

21 U.S.C. § 841 (Prohibited acts)

> A(1) (A) In the case of a violation of subsection (a) of this section involving-
>
> * * * *
>
> (I) 1 kilogram or more of a mixture or substance containing a

> detectable amount of heroin . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life.

Statement of the Case

Defendant-Appellant Eddy Pena appealed to the Court of Appeals for the Second Circuit from his judgment of conviction, entered in the District of Connecticut, after Pena pleaded guilty to two counts of possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), and went to trial ln the charge of conspiring to distribute, and to possess with intent to distribute, a kilogram or more of heroin, in violation of 21 U.S.C. § 846. A2. After a jury convicted him on that count, he appealed, arguing that the district court neglected to provide several required jury instructions and that the indictment was constructively amended when the government's evidence at trial focussed mainly on co-conspirators who were not named in theindictment or in any bill of particulars. A2-3. Among other arguments, Pena argued that in order to support a finding of guilt for conspiring to possess with intent to distribute more than a kilogram of heroin, the government was required to show a single agreement to possess with intent to distribute that amount on a single occasion. In Pena's case, various amounts of heroin that had been possessed at various times by various co-conspirators over a five-year period. Pena argued that those amounts could not be amalgamated in order to establish a conspiracy exceeding the statutory threshhold amount. A-7 n.1.

The Court of Appeals found no error with respect to this claim as well as

the other claims made on appeal and affirmed the judgment below. A-3.

Statement of Facts

The crucial question at Eddy Pena's trial was not whether he had distributed narcotics. He had pleaded guilty to the two counts of the indictment that averred that he had. The crucial question was whether he had participated in a conspiracy to distribute more than a kilogram of heroin.

The evidence at trial, viewed in a light most favorable to the government, established that over the course of five years or more, Eddy Pena had engaged in narcotics distribution with a variety of different people in a variety of different venues. In March, 2012, he had been the driver of a van in Rhode Island from which Brian Castillo Nunez had emerged carrying a bag of heroin. From the summer of 2012 until he and Pena moved to Florida in 2013, according to Jacob Mena, he had regularly transported bundles of heroin to Fall River, Massachusetts, with Mena and distributed them there. After moving to Florida, Eddy Pena, Mena claimed, directed his sister's heroin sales back in Rhode Island. During a search of her residence, officers had found 89 bundles of heroin; during a search of her store, they found half a kilogram of heroin. Mena testified that after Eddy Pena. After Pena returned from Florida in 1984, he began regularly distributing heroin in Connecticut with Michael Luciano. according to Mena. In November, 2016, Eddy Pena was present in a Connecticut apartment where officers seized 8 grams of heroin. In December, 2016, he and Luciano were outside another Connecticut

apartment searched by the police. Eddy Pena was carrying 30 grams and Luciano was carrying 20 grams of heroin. The government introduced evidence of miscellaneous 8-to-10-gram distributions of heroin made by Luciano in 2017 – heroin it contended had been supplied by Pena.

The question for the jury was whether it could amalgamate all the heroin possessed by all these people in all the different venues that had occurred over the course of all the years in order to determine whether Eddy Pena had entered into a single conspiracy to possess with intent to distribute more than a kilogram of heroin, or whether it was required to consider each of his agreements with the various participants and each episode individually, and acquit him of conspiracy to distribute more than a kilogram of heroin if no single discrete agreement involved more than a kilogram.

The indictment alleged that Eddy Pena had entered into a conspiracy to possess with intent to distribute and to distribute heroin. With respect to the amount involved, it alleged that Pena "reasonably should have foreseen from [his] own conduct and that of the other members of the narcotics conspiracy charged in Count One that the conspiracy involved 100 grams or more of . . . heroin. . . ." Indictment at 2.

The trial court instructed the jury:

> For Count 1, if you find that the defendant is guilty of conspiracy to possess with intent to distribute and to distribute heroin, you must then determine the quantity or weight of heroin that the Government has proven, beyond a reasonable doubt, can be attributed to the defendant's involvement in the charged conspiracy. I have prepared a verdict form, which contains questions that will assist you in this

process.

> The Government need not prove the exact amount of heroin attributable to the defendant's involvement in a charged conspiracy. Rather, it must prove that any such amount equaled or exceeded one of the threshold amounts set by law. The threshold amount for the heroin conspiracy in Count 1 is one kilogram or more of heroin.
>
> * * * *
>
> Quantities of narcotics are attributable to a defendant if that defendant took actions in furtherance of the conspiracy with respect to the narcotic or if it was reasonably foreseeable to that defendant that a co-conspirator would do so.
>
> The mere fact that a defendant is aware of the scope of the overall conspiracy is not enough to hold him accountable for the weight or quantity of all of the substances containing a detectable amount of narcotics that can be attributed to the whole conspiracy. Rather, with respect to the acts of others, the weight or amount of substances containing a detectable amount of narcotics is attributable to a defendant only if there is proof beyond a reasonable doubt that he knew, or should have known, about the details of the conspiratorial acts of others concerning those substances.

V Tr. 707-08, App. 176-77.

The prosecutor argued that jury should amalgamate many transactions conducted by various members of that conspiracy over the course of half a decade in order to reach the one-kilogram amount necessary for conviction.

> If Mr. Pena had other people act on his behalf at his direction and with an understanding with those individuals that they would distribute heroin while working with him and also for his benefit and their benefit, that is the essence of conspiracy to distribute heroin. And that would encompass all of those events that we've talked about in this case: the March 2012 incident involving Brian Castillo Nunez, the search warrants in March of 2014 in Providence, the raid at 156 Garfield Avenue in November of 2016, the incident on December 10th, 2016, where Mr. Luciano and Mr. Pena had a combined 50 grams of heroin, and it would take you forward into 2017, the controlled buy on March 29th, 2017, from Michael Luciano where he

> references El Viejo and having to talk to El Viejo about the requested quantity. And we know that was Mr. Pena's nickname or one of the nicknames that he used. And all the way to November of 2017, when a search warrant was executed at 12 Linda Avenue in Montville, Connecticut, where a quantity of cutting agent, a sifter, the toothbrush, and two plastic bags containing heroin residue were found.
>
> Mr. Pena, in this case, is responsible for all of those episodes, and all of those episodes encompass the conspiracy that the Government has charged in this case.

V Tr. 714-15, A 195-96.

During deliberations, the jury asked the court for further instructions concerning this element of the offense:

> The kilo referenced in the charge; does that have to be in one sale or is it an accumulation of all grams bought and sold over the course of Jan 2012 through November 2017?

V Tr. 782, A 189.

After consulting with counsel, the trial court instructed the jurors, without objection by the defense:

> The answer is the latter portion of the note, that is, an accumulation of any grams you find to have been proved, that is to say, you find that were bought and sold over the period charged, that is to say, January 2012 through November 2017. It does not have to be in one sale.
>
> Now, keep in mind the other instructions that I gave you, and don't single this one out. Quantities of narcotics are attributable to a defendant if that defendant took actions in furtherance of the conspiracy with respect to the narcotic or if it was reasonably foreseeable to that defendant that a co-conspirator would do so.
>
> As with every issue in this case, you must hold the Government to its burden of proof beyond a reasonable doubt, so -- and then take that instruction in light of all of my instructions together. Don't single out any one instruction as being more important than the others. Okay?

V Tr. 785, App. 192.

The verdict form presented to the jury said:

> Count 1: As to the charge in Count 1 of conspiracy to distribute and to possess with intent to distribute heroin, we, the jury, unanimously find the defendant Eddy Pena guilty / not guilty. [The jury marked "guilty."]
>
> Number two: Does the jury unanimously find that it was reasonably foreseeable to Eddy Pena that the conspiracy charged in Count 1 involved the possession with the intent to distribute or the distribution of one kilogram or more of a mixture and substance containing a detectable amount of heroin? Yes / no [The jury marked "yes."]

VI Tr. 792.

Reason for Granting the Writ

The Court should grant certiorari in order to determine whether under 21 U.S.C. § 846, a defendant's sentence can be based on the weight of all controlled substances possessed by all members of a conspiracy, so long as such possession was "reasonably foreseeable" to him; and to determine whether the Court should strike down this engrafting of the judicially-created *Pinkerton* doctrine of reasonable foreseeability onto the legislatively-enacted controlled substance statutes.

It is a crime to conspire to possess with the intent to distribute heroin, and if the weight of heroin that is the object of the conspiracy is more than a kilogram, the crime is punishable by a ten-year mandatory minimum sentence. To be more specific:

> 21 U.S.C. § 846 (Attempt and conspiracy) provides:
>
> Any person who . . . 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 . . . conspiracy.

The object of this conspiracy, according to the Second Superseding Indictment, was "that [the] defendants . . . would distribute and possess with intent to distribute a controlled substance, namely, heroin, in violation of Title 21, United States Code, Section 841(a)(1)."

Section 841 (a)(1) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally- (1) to . . .distribute, or . . . or possess with intent to distribute . . . a controlled substance . . .

With respect to quantity, 21 U.S.C. § 841 Prohibited acts A(1) (A), provides:

> In the case of a violation of subsection (a) of this section involving- (I) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life.

The indictment did not allege that Eddy Pena entered into an agreement to possess any specific amount of heroin. It did allege that he reasonably should have foreseen from his own conduct and that of the other conspirators that the conspiracy involved 100 grams or more of heroin. The jury instructions and the verdict form echoed this language.

The problem in Eddy Pena's case, and in many mandatory minimum conspiracy cases, lies in the vagueness of the statutory term "involving." That term presents few interpretative problems in substantive possession or distribution cases: the amount involved is generally the amount actually possessed or distributed. Determining the amount involved in inchoate conspiracy cases, however, is troublesome because the case law, as exemplified by the jury

instructions here, allows a defendant to be held liable for successive amounts of controlled substances possessed by other conspirators, amounts as to which he never entered into any agreement.

Because Pena's case is so factually complex, it is easier to illustrate the problem by means of a simple imaginary hypothetical.

A street dealer enters into a conspiratorial agreement: he pays his local supplier to obtain from a regional trafficker a gram of heroin that the dealer intends to sell on the street. These facts establish a conspiracy to possess with intent to distribute a gram of heroin. If the local supplier is arrested before he can obtain the gram, the street dealer is nevertheless guilty of a one-gram conspiracy, because that was his agreement, even though he never obtained possession of the gram.

Suppose that the regional trafficker suggests that he front the local supplier fifty grams of heroin on credit, from which the supplier can provide the gram to the street dealer. The street dealer did not agree that the supplier should possess fifty grams of heroin. Yet, according to the jury instructions in this and in many other cases, the street dealer is guilty of a fifty-gram conspiracy, if the jury should find that it was reasonably foreseeable that the supplier would obtain from the trafficker more heroin than had been agreed upon in the dealer/supplier agreement.

A variation on this simple scenario illustrates another aspect of the problem. A street dealer agrees to buy 20 grams of heroine from a local supplier, intending to sell it on the street. A year later, he purchases another 20 grams. He makes a

similar yearly purchase over the next three years. Over the course of five years, he purchases 100 grams of heroin from the same supplier. Even though none of the agreements into which he enters involves more than twenty grams, he is guilty of entering into a conspiracy involving one hundred grams, if it was reasonably foreseeable when he made the first agreement that he might make purchases in the future.

The defendant in this hypothetical would be guilty of five substantive counts of possessing 20 grams of heroin, but it is clear that he cannot be found guilty of a single count of possessing 100 grams. In *United States v. Rowe*, 919 F.3d 752 (3d Cir. 2019), a jury found that a defendant was guilty of distributing more than a thousand grams of heroin. To reach the thousand gram threshhold, the jury had to amalgamate several transactions, none of which involved a thousand grams. The Court of Appeals for the Third Circuit reversed the conviction and dismissed: in order to satisfy the amount-element of the offense, the government was required to prove that the defendant possessed or distributed one thousand grams in a single unit and could not accumulate multiple smaller possessions during the indictment period in order to reach the one-kilogram threshhold. *Accord United States v. Harrison*, 241 F.3d 289, 291 (2d Cir. 2001).

There is no similar rule where a defendant has been found guilty of the inchoate crime of conspiracy. *United States v. Pressley*, 469 F.3d 63, 66 (2d Cir. 2006) (per curiam) (each defendant in a 21 U.S.C. § 846 conspiracy is responsible for "the aggregate quantity of all the subsidiary transactions attributable to that

particular member."); *United States v. Gori*, 324 F.3d 234, 237 (3d Cir. 2003) (holding that § 841(b) allows the aggregation of drug transactions occurring throughout a conspiracy); *United States v. Walker*, 160 F.3d 1078, 1093 (6th Cir. 1998) (same); *United States v. Santos*, 195 F.3d 549, 551 n.5 (10th Cir. 1999) (same), *abrogated on other grounds* by *United States v. Jones*, 235 F.3d 1231 (10th Cir. 2000); *United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989) (holding that aggregation of narcotics amounts across multiple transactions is permissible so long as the transactions form part of "single continuing scheme").

In Pena's case, the government's evidence tended to demonstrate that Pena had over the course of many years entered into a variety of agreements with a significant number of different people in various locations in different states. The jury was instructed that it should amalgamate all the heroin involved in all these agreements so long as the amounts were reasonably foreseeable to Pena.

The statute, however, establishes liability for the amount "involved." The words "reasonably foreseeable" appear nowhere in the statute. Nevertheless, the Pena jury and many others have been told that the amount involved in a narcotics conspiracy is the amount "reasonably foreseesable" to a defendant, rather than the amount that was actually negotiated in the conspiratorial agreement. Whence does this reasonable foreseeability element originate?

The reasonably-foreseeable instruction grafts onto the legislatively established controlled substance statute the judicially created *Pinkerton* doctrine.

In 1946, this Court announced the *Pinkerton* doctrine, a rule allowing a

conspirator to be convicted of substantive offenses committed by his co-conspirators if those offenses were reasonably foreseeable and were committed in furtherance of the conspiracy, even if the conspirator had not himself agreed that the offense should be committed and had done nothing to further the offense. *Pinkerton v. United States,* 328 U.S. 640, 647 (1946).

This basis for criminal liability was not authorized by statute in 1948, federally at least, and Congress has not codified the rule in the nearly sixty years since it was announced. Despite various criticisms,[2] the Pinkerton rule has become widely accepted and is frequently and successfully employed by federal prosecutors in all of the circuits.[3] It was, however, rejected by drafters of the

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[2] Antkowiak, Bruce, The Pinkerton Problem, 115 PENN. ST. L. REV. 607 (2011); Ingram, Andrew, Pinkerton Short-Circuits the Model Penal Code 64 VILLANOVA LAW REVIEW 71 (2019); Kreit, Alex, Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton, 57 AM. U. L. REV. 585, 597-98 (2008); Noferi, Mark, Towards Attenuation: A "New" Due Process Limit on Pinkerton Conspiracy Liability, 33 AM. J. CRIM. L. 91, 113-16 (2006).

[3] *See, e.g.*:

First circuit: United States v. Hernandez-Roman, 18-2133 (12/1/2020)

*Second circui*t: United States v. Miley, 513 F.2d 1191, 1208 (2d Cir.1975)

Third circuit: United States v. Fattah, 914 F.3d 112, 169 (3rd Cir. 2019)

Fourth circuit: United States v. Denton, 944 F.3d 170, (4th Cir. 2019)

Fifth circuit: United States v. Dean, 59 F.3d 1479, 1490 (5th Cir. 1995)

Sixth circuit: United States v. Hamm, 952 F.3d 728 (6th Cir. 2020)

Seventh circuit: United States v. Jones, 900 F.3d 440, 446 (7th Cir. 2018)

Model Penal Code[4] and enjoys a mixed reaction among the states.

The Pinkerton rule is probably most often used today to convict drug conspirators of substantive drug[5] and gun[6] charges, even though the particular conspirator may not have possessed the drugs or guns in question. The rule is not infrequently used to convict defendants of a wide variety of other substantive offenses that they themselves did not themselves commit, including crimes as serious as murder[7] or attempted arson. Generally speaking, federal prosecutors may use the Pinkerton doctrine to convict a defendant of any substantive offense, even though he did not himself commit it, as long as the defendant was a member of the conspiracy and the substantive offense was reasonably foreseeable and was committed by a coconspirator in furtherance of the conspiracy -- although some courts have suggested that there are due process limitations on the application of

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Eighth circuit: United States v. Jenkins-Watts, 574 F.3d 950, 959 (8th Cir. 2009)

Ninth circuit: United States v. Bingham, 653 F.3d 983, 997 (9th Cir. 2011)

Tenth circuit: United States v. Rosalez, 711 F.3d 1194, 1206 (10th Cir. 2013)

Eleventh circuit: United States v. Silvestri, 409 F.3d 1311, 1335-36 (11th Cir. 2005)

D.C. Circuit: United States v. McGill, 815 F.3d 846, 917 (D.C. Cir. 2016)

[4]MODEL PENAL CODE § 2.06 commentary at 311 (1985).

[5]*See, e.g.*, United States v. Navarrete-Barron, 192 F.3d 786 (8th Cir. 1999).

[6] *See, e.g.,* United States v. Alvarez-Valenzuela, 231 F.3d 1198 (9th Cir. 2000).

[7] *See, e.g.,* United States v. Curtis, 324 F.3d 501 (7th Cir. 2003).

the Pinkerton rule to minor participants in extensive conspiracies.[8]

The Pinkerton doctrine is a judicially created rule. It creates criminal liability where Congress has not done so by statute. In the context of Eddy Pena's case, Congress has established that Eddy Pena may be punished by reference to the amount *involved* in the conspiratorial agreement that he entered, not by amounts outside the terms of that agreement that may have been reasonably foreseeable to him.

The extent to which courts may impose criminal liability where there has been no jury finding that a legislatively established element of an offense has been proven (or where a defendant has not admitted that element in a guilty plea) has changed significantly since the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013). As explained in *Alleyne*, the Sixth Amendment "provides that those accused of a crime have the right to a trial by an impartial jury," and "[t]his right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." 570 U.S. at 104. To ensure this right, it is necessary to make a "proper designation of the facts that are elements of the crime." *Id*. at 104-05. In

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[8] *See* United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991) ("The foreseeability concept underlying Pinkerton is also the main concern underlying a possible due process violation."); United States v. Carman, 910 F.2d 102, 112 (4th Cir. 1990) (finding that convictions were not "so attenuated as to run afoul of possible due process limitations on the Pinkerton doctrine"); United States v. Johnson, 886 F.2d 1120, 1123 (9th Cir. 1989) ("We recognize the potential due process limitations on the Pinkerton doctrine in cases involving attenuated relationships between the conspirator and the substantive crime."). Kreit, supra note 2 , at 604 n.106 (collecting cases).

this context, *Apprendi* 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" constitutes an element of the crime that "must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. *Alleyne* expanded on *Apprendi,* and held that any fact which increases a mandatory minimum also "constitutes an 'element' or 'ingredient' of the charged offense" and must be submitted to the jury. 570 U.S. at 107-08. It is not enough that these elements or ingredients be found by a judicial authority. A natural consequence of these decisions is that it is not enough if these elements or ingredients, even if presented to a jury, have been *established* by a judicial authority.

In 1812, this Court declared that there can be no federal common law crimes. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). As the Court stated in *Hudson*:

> If [the adoption of a constitution] may communicate certain implied powers to the general Government, it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.

United States. v. Hudson & Goodwin, 11 U.S. at 34.

The *Pinkerton* rule, as illustrated by the jury instructions in Eddy Pena's case, increased the punishment to which Eddy Pena was subjected without any legislative authority that established that Pena could be punished not only for the conspiratorial agreement alleged in the indictment, but also for his co-defendant

acts that were reasonably foreseeable to him. Such liability violates the Fifth and Sixth Amendment requirements that punishment may be imposed only upon a jury finding (or an admission in a guilty plea) that the legislatively established elements or ingredients of a crime have been proven, and in violation of the prohibition against judge-made common-law crimes. This Court should grant certiorari in order to abrogate the *Pinkerton* rule, in light of the developing Fifth and Sixth Amendment jurisprudence of this Court, exemplified by *Apprendi* and *Alleyne.*

While the rule of *Pressley* may be applicable to conspiracies involving organizations, formal or informal, involving the same people performing similar acts of possession and distribution over a discrete period of time, it works less well in a case such as this, in which a variety of different people engaged in a varied series of acts in different districts over an extended period of time and the only common denominator is the defendant. To state the matter more concretely, aggregating the 560 glassine packets of heroin that Pena and Brian Castillo Nunez allegedly agreed to sell to Jeffrey Richard in Rhode Island in 2012 and the 14 grams of heroin that Roberto Roman sold to Nahamiah Carroll in Connecticut five years later stretches to the breaking point the concept that a conspiracy is a single violation encompassing an array of substantive illegal acts carried out in furtherance of the overall scheme -- the view of conspiracy described in *Pressley*, 469 F.3d at 66, and numerous other decisions such as *United States v. Broce*, 488 U.S. 563, 570-71 (1989). The dangers of engrafting the *Pinkerton* doctrine into controlled substance statutory conspiracies is well illustrated by the prosecutor's

argument to the jury:

> [I]t doesn't matter whether Eddy Pena was involved in this conspiracy from its start date in January 2012 all the way to the ending date that's charged in November 2017. It's sufficient as long as he participated in the conspiracy for some point of time during the period that we have charge.

And he is responsible for all the heroin distributed by all the conspirators during that period, so long as the amounts were reasonably foreseeable to him.

Conclusion

For the reasons set forth above, the petitioner, Eddy Pena, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

/s/

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