No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAMION SLEUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a defendant be found guilty of a substantive offense based on *Pinkerton* liability where that offense was not an object of the alleged conspiracy?
2. Should this Court limit to its facts or overrule *Pinkerton v. United States*, 328 U.S. 640 (1946), as judge-made federal criminal law in derogation of *United States v. Hudson*, 11 U.S. 32 (1812)?

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The Ninth Circuit's decision can be found at *United States v. Sleugh,* 827 Fed. App'x 645 (9th Cir. 2020).

JURISDICTION

The court of appeals filed its decision on September 10, 2020, and denied rehearing and rehearing *en banc* on January 12, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Government filed a six-count Indictment on March 27, 2014, charging Petitioner and co-defendant Shawndale Boyd with conspiracy to distribute and possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(D), 846 (Count One); attempted possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(D), 846 (Count Two);

robbery affecting interstate commerce in violation of 18 U.S.C. § 1951(a) (Count Three); using/carrying a firearm during or in furtherance of a drug trafficking crime and crime of violence in violation of 18 U.S.C. §§ 2 & 924(c) (Count Four); and use of a firearm during a drug trafficking crime and crime of violence causing murder in violation of 18 U.S.C. §§ 2 & 924(j)(1) (Count Five). ER 584-87.[1] Petitioner alone was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count Six). ER 586. Count Six was unrelated to the other counts, and Sleugh conceded his guilt to it during trial. ER 70, 586.

Shortly before trial, Boyd pleaded guilty to Counts One through Four in a cooperation plea agreement, and then testified for the Government at trial. CR 180, 183.

Following an 11-day jury trial that commenced July 6, 2015, the jury convicted on all counts, found Petitioner responsible for brandishing and discharging a firearm on Count Four, and responsible for first-degree murder with respect to Count Five. ER 64-67; CR 129.

The district court sentenced Petitioner to a term of life plus 120 months. ER 1-4.

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[1] As used herein, "ER" refers to Appellants' Excerpts of Record, filed in the court of appeals as part of docket entry 37, "AOB" to Appellant's Opening Brief and "GAB" to the Government's Answering Brief, filed in the court of appeals at docket entries 39 and 47, respectively, "Pet. Appx." to Petitioner's Appendix, and "CR" to the docket entries on the district court Clerk's Record.

STATEMENT OF FACTS

In December 2013, Boyd set up a deal whereby his friend, Petitioner, would purchase five pounds of marijuana from his other friend, Vincent Muzac. Petitioner brought the necessary $11,000 to the meet up to make the buy. On their way to meet up, Boyd declared he wanted a second car to come because, as he told the jury, he was on probation and didn't want to ride with the marijuana following the buy. Boyd directed Petitioner to drive to an intersection in Oakland where he could find his buddy "Slim," aka "Q" to participate. Petitioner agreed, they found Slim, who signed up to help purchase the marijuana; the three then drove to meet Muzac.[2] In sum, all four men entered into the following conspiracy: to traffic marijuana by having Muzac sell it to Petitioner, and to have Petitioner distribute it further, as he chose.[3] That was the conspiracy's object.

None of these men planned robbery or murder. At oral argument before the court of appeals, the Government essentially conceded that no such evidence existed because it could not identify any evidence of any such plan. And,

[2] Although Boyd cooperated, and the Government had video of Slim's car, and knew his telephone and his Oakland hangout spot, Boyd's plea agreement did not even mention Slim, and the Government's trial presentation failed to identify him or otherwise explain why the Government failed to identify him.

[3] For a more robust presentation of facts, please see AOB at 6-12.

obviously, robbing and murdering Muzac conflicted with the object of the conspiracy: to have Muzac sell Petitioner five pounds of marijuana.

But, as Boyd told the jury as the Government's star witness, the deal went sideways, and then it went bad. As Boyd recounted, after Muzac and Petitioner argued about the quality of Muzac's weed, Muzac set upon Petitioner, punching him in the face. ER 365-66. In response, Petitioner "pulled out a gun and shot [Muzac] in his arm."[4] Boyd described the event with Petitioner "in a defensive role like he [Petitioner] was the victim[.]" ER 367. Boyd added that in this telling, Petitioner "was the victim, like [Muzac] initiated the struggle, and he just shot hisself [sic] in defense." ER 370. With Muzac injured, Petitioner pushed Muzac from the car, and drove away; Petitioner's cash and most of Muzac's marijuana remained in the car during Petitioner's flight. *Id*.

Boyd emphasized the lack of intent to kill Muzac by recounting Petitioner's statements that Muzac should be "all right," and contrasting the shot in the arm with a headshot or chest-shot, which would necessarily kill someone.

Rather than try this drug-deal-gone-bad case, the Government upped the ante, and contended that Petitioner, all alone, intended to murder and rob Muzac.

[4] Muzac was shot on the outside of his left shoulder, just above his bicep. *See* ER 481.

The evidence to support this theory was thin, to put it mildly.[5] The jury nonetheless returned a guilty verdict on murder and robbery; that verdict arose from several critical trial court errors, *see generally* AOB, including the lower court's expansive use of a *Pinkerton* instruction, in derogation of *Pinkerton* itself, the Constitution, and the common law.

The court of appeals resolved Petitioner's challenge to the impropriety of the *Pinkerton* instruction by talking past it, but ultimately showing the problem with the lower courts' unconstitutional expansion of the *Pinkerton* doctrine: it found that under *Pinkerton*, "a reasonable jury could have found that Petitioner played a major role in the conspiracy [to consummate a marijuana sale] and that robbery, use of a firearm, and murder were reasonably foreseeable during a large-scale drug transaction." Pet. Appx. 6.

As shall be shown below, the Ninth Circuit's settled rule misconstrues *Pinkerton* and conflicts with *United States v. Hudson*, 11 U.S. 32 (1812). In

[5] At oral argument, despite repeated probing by the panel, the Government was never able to articulate the evidence that supported an intentional robbery as opposed to the defendant fleeing from the scene after he had shot Muzac in his upper arm in response to Muzac's attack. Instead, the Government relied solely on its witness's interpretation of a jail call, much of which was unintelligible and riddled with ellipses in the transcript to reflect its partial assessment. The evidence from this witness was suspect to say the least: the panel essentially agreed that his testimony constituted plain and obvious error that affected Petitioner's right to a fair trial before declining to provide relief under the fourth prong of the *Olano* test. *See* Pet. Appx. 2-5.

addition, Petitioner demonstrates why this Court should grant this petition to reconsider *Pinkerton* itself as judge-made law conjured in violation of the Constitution and in derogation of *Hudson*.

ARGUMENT

A. The lower courts violated Petitioner's Fifth Amendment due process rights by giving a *Pinkerton* instruction for substantive offenses—Counts Three, Four and Five—that were not objects of the charged conspiracy.

The district court gave a *Pinkerton* instruction for Counts Three through Five, *i.e.*, the robbery count, the section 924(c) count, and use of a firearm in furtherance of a drug-trafficking offense or a crime of violence, resulting in murder. ER 31. Under those instructions, the jury was permitted to convict Petitioner of each of those crimes if those offenses were committed by a co-conspirator and "could reasonably have been foreseen to be a necessary and natural consequence of the unlawful agreement." *Id*. While Petitioner argued that the instruction was erroneous under, *inter alia*, the Fifth Amendment, the court of appeals determined that this use of *Pinkerton* is wholly proper under settled circuit precedent because Petitioner's murder and robbery convictions could properly rest on his co-conspirator's *mens rea*. Pet. Appx. 5-6 (citing *United States v. Castaneda*, 9 F.3d 761, 768 (9th Cir. 1993) (holding that conspirators in a drug distribution network could be convicted for using a firearm under a *Pinkerton* theory), *overruled in part on other grounds by United States v. Nordby*, 225 F.3d

1053 (9th Cir. 2000).[6] The court then went further, and found that because Petitioner agreed to purchase marijuana—the charged conspiracy—the murder and robbery of the seller "were reasonably foreseeable" results falling within the object of the conspiracy. *Id.* These twin holdings are manifestly incorrect, and extend liability in a manner that violates *Pinkerton*.

In *Pinkerton*, 328 U.S. at 641-42, the defendants were charged with one conspiratorial and several substantive tax fraud counts. This Court held that, even though there was no evidence that one of the defendants participated directly in the substantive offenses, he could still be held liable for them because he had entered into the conspiracy to commit that substantive offense. As the Court explained: "The unlawful agreement contemplated precisely what was done." *Id.* at 647. But the Court cautioned that a "different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-48.

Thus, at the outset, the Ninth Circuit's settled rule conflicts with *Pinkerton*. The shooting of the seller of drugs does *not* further a conspiracy to enter into a

[6] And the Government's answer (although incorrect) is clear: it contends that "*Pinkerton* does not limit those substantive crimes to the object of the conspiracy." GAB 32.

transaction for such a sale; it instead transgresses the very purpose of the conspiracy. Nor does the robbery and shooting of the seller fall within the scope of an agreement to purchase marijuana from him, or qualify as "a necessary or natural consequence of the unlawful agreement" to purchase marijuana from him. *See id.*, at 647-48. But, according to the lower court, settled circuit precedent permits such an application of *Pinkerton*.

Petitioner contends that the lower courts violated his Fifth Amendment due process rights by giving a *Pinkerton* instruction for substantive offenses—Counts Three, Four and Five—that were not objects of the charged conspiracy.

For these reasons alone, the Court should grant this petition to instruct the lower courts on the strict limits of *Pinkerton* liability.

B. The Court should grant this Petition to reconsider the correctness of *Pinkerton* itself.

Although the so-called *Pinkerton* doctrine has survived in federal common law, many states (and the Model Penal Code) have rejected it. *See, e.g.*, Model Pen. Code § 2.06, Comment; *State v. Nevarez*, 130 P.3d 1154, 1157-59 (Idaho Ct. App. 2005). Given the unfairness noted by the jurisdictions rejecting *Pinkerton*, and given the potential constitutional problems discussed below, this Court should reconsider the doctrine in full, or at least limit *Pinkerton* liability to its facts.

Specifically, the defendant in *Pinkerton* was convicted of conspiring to commit a tax fraud offense, and he was also held liable for the substantive tax

fraud offenses that were the *object* of the conspiracy. Under these facts, *Pinkerton* liability is not as controversial because it is well-established that "'the requisite intent necessary to commit the underlying substantive offense,' is an essential element of any conspiracy." *United States v. Kim*, 65 F.3d 123, 126 (9th Cir. 1995) (citations omitted); *see, e.g.*, *Ingram v. United States*, 360 U.S. 672, 678 (1959); *United States v. Freeman*, 498 F.3d 893, 907 (9th Cir. 2007). Thus, limited to this context, the Government will have proved that *the defendant* had the requisite *intent* to commit the substantive offense, and therefore he is only held accountable for the overt *acts* of his coconspirators. *See Pinkerton*, 328 U.S. at 647. As mentioned, *Pinkerton* was based on the premise that "[t]he unlawful agreement contemplated *precisely* what was done." *Id.* (emphasis added).

It is an entirely different matter for a defendant to be convicted of conspiracy to commit a particular offense, and then, as here, to be held liable for a different substantive offense that was *not* the object of the conspiracy and for which the defendant did *not* have the necessary *mens rea*. Such an expansion of *Pinkerton* liability allows the Government to convict a defendant without proving *he had* the requisite *mens rea* for the substantive offense.

The lower courts' answer—that a co-defendant had the requisite *mens rea*—does not excuse the need to establish the defendant's culpable *mens rea* before imposing severe criminal liability. Counts Three through Five each required the

Government to prove a particular *mens rea* to support conviction. *See* ER 23-24, 27. Petitioner, however, was not charged with conspiring to (1) commit Hobbs Act robbery, (2) violate section 924(c), or (3) use a firearm in furtherance of a predicate offense resulting in murder. Nor did the sole conspiracy count—conspiracy to distribute or possess with intent to distribute marijuana (Count One)—require the jury to find that Petitioner had any knowledge or intent that a firearm would be possessed or used.

But under the *Pinkerton* instruction given, the Government was only required to prove that Petitioner could reasonably foresee the robbery and the use and possession of a firearm. In other words, Petitioner did not have to know or intend that a robbery, the firearm possession, or the shooting would take place. The *Pinkerton* instruction thus reduced significantly the requisite scienter established by Congress to sustain section 1951, section 924(c), and section 924(j) convictions.

The scope of *Pinkerton* liability should also be reevaluated in light of this Court's recent decision in *Rosemond v. United States*, 134 S. Ct. 1240 (2014), which addressed the scope of accessorial liability in the context of section 924(c). The question in *Rosemond* concerned the *mens rea* necessary to sustain a section 924(c) conviction under aiding and abetting liability. This Court held that a defendant must have "advance *knowledge* that a confederate would use or carry a

gun during the [underlying drug] crime's commission." *Id.* at 1243 (emphasis added). In doing so, the Court explained the well-established rule that, for accessorial liability, the requisite "intent must go to the specific and entire crime charged[.]" *Id.* at 1248. It makes little sense to have a rule of accessorial liability prohibiting conviction under an aiding and abetting theory without the requisite intent for the substantive offense, but nonetheless allowing conviction under a *Pinkerton* theory without the requisite *mens rea* for the substantive offense.

At bottom, the lower courts' application of *Pinkerton* in this case and cases like it violates the Constitution by extending vicarious liability to substantive offenses that were not the objects of the charged conspiracy. Because it has long been established that the federal courts have no common law authority to create offenses, *United States v. Hudson*, 11 U.S. 32, 34 (1812), this Court starts from the basic premise that the "definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples v. United States*, 511 U.S. 600, 604 (1994); *see Liparota v. United States*, 471 U.S. 419, 424 (1985). Typically, the *mens rea* element is one of the most critical, if not *the* most critical, element of a criminal offense. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997); *Staples*, 511 U.S. at 605-06.

If *Pinkerton* liability may be expanded, like in the Ninth Circuit, to include substantive offenses that were not an object of the conspiracy charged, then the doctrine constitutes a judicial rewriting of the elements required by Congress to sustain a conviction for a particular offense. Such an expansive application of *Pinkerton* liability allows a defendant to be convicted of a substantive offense that may require a knowing or even willful scienter based on a mere reasonable foreseeability standard. Not only does such a judicial rewriting of the statutory requirements for a criminal offense violate the constitutional framework of our federal criminal justice system, it also violates the Fifth Amendment. *Cf. Bouie v. City of Columbia*, 378 U.S. 347 (1964). In other words, while *Pinkerton* liability may be well-established and constitutional for substantive offenses that are the objects of the charged conspiracy, that decision did not constitutionally authorize such liability for additional substantive offenses without a jury finding that the defendant possessed the requisite *mens rea* for those additional offenses.

C. This case presents a worthy vehicle to answer the questions presented.

This case presents a worthy vehicle for further review because the inclusion of *Pinkerton* liability was prejudicial. Although the district court instructed on both aiding and abetting and *Pinkerton* liability as to the § 924(c) counts, the jury returned a general verdict, which automatically requires reversal because the jury was instructed on a legally invalid theory. *See, e.g.*, *Griffin v. United States*, 502 U.S. 46, 58-59 (1991). As instructed, the jury could have accepted Petitioner's testimony that Slim/Q shot Muzak, and thus disrupted the conspiracy to engage in a sale/purchase of marijuana, and still convicted although Slim's acts were not part of the conspiracy or contemplated by Petitioner in any way.

Nor is further percolation needed: the majority of the circuit courts have adopted the same expansive rule as the Ninth, and impose *Pinkerton* liability for substantive offenses that are *not* objects of the charged conspiracy. *See e.g.*, *United States v. Christian*, 942 F.2d 363, 367-68 (6th Cir. 1991); *United States v. Troop*, 890 F.2d 1393, 1397 (7th Cir.1989); *United States v. Pierce*, 479 F.3d 546, 549-51 (8th Cir. 2007); *United States v. Chorman*, 910 F.2d 102, 110-12 (4th Cir. 1990); *United States v. Alvarez*, 755 F.2d 830, 847-52 (11th Cir. 1985); *United*

State v. Sanjar, 876 F.3d 725, 742-44 (5th Cir. 2017); *see also United States v. Shabani*, 513 U.S. 10, 16 (1994).[7]

Because this Court has never decided whether *Pinkerton* liability is limited to the facts of *Pinkerton*, and therefore is only applicable to a substantive offense that stands as the object of the conspiracy count, it should take the opportunity to do so now and rein in the lower courts' unconstitutional expansion of the doctrine, if not overrule it outright.

CONCLUSION

For these reasons, the Court should grant the petition and consider this case.

Respectfully submitted,

DATED: June 11, 2021

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[7] *Shabani* held that section 846—the conspiracy statute at issue in Count One—does not contain an overt act requirement. This Court focused on the overt act requirement in reaching its conclusion in *Pinkerton*. 328 U.S. at 647 ("An overt act is an essential ingredient of the crime of conspiracy. . . . If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense"). Thus, Petitioner also contends that *Pinkerton* liability should not apply to conspiracies that do not require overt acts.