NO._____

In The
Supreme Court of the United States

CARLOS GOMEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Sarah Kunstler, Esq.
Law Offices of Sarah Kunstler
315 Flatbush Avenue #103
Brooklyn, NY 11217
sarah@kunstlerlaw.net
718-783-3682 (office)
347-402-2014 (fax)
917-450-0053 (mobile)

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
1108 East Main Street Suite 1201 Richmond Virginia 23219 (804) 644-0477

QUESTIONS PRESENTED

1. Whether, following this Court's decision in *United States v. Davis*, 588 U.S. 445 (2019), a jury instruction permitting a finding of guilt on an 18 U.S.C. § 924(c) charge based on either an invalid or valid predicate prejudiced the Petitioner, resulting in a general verdict, requires reversal under *Hedgpeth v Pulido*, 555 U.S. 57 (2008).

2. Whether the District Court's *Pinkerton* instruction makes it likely that the jury found Petitioner guilty of murder without finding that he committed the substantive offense of murder, making murder an invalid predicate for an 18 U.S.C. § 924(c) charge pursuant this Court's holding in *United States v. Davis*, 588 U.S. 445 (2019).

3. Whether, to sustain a conviction for § 924(c) under a *Pinkerton* theory of liability, a defendant must have participated in the predicate offense with advance knowledge that a confederate would use or carry a gun during the crime's commission in order to be consistent with this Court's holding in *Rosemond v. United States*, 572 U.S. 65 (2014).

4. Whether this Court should 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).

PARTIES TO THE PROCEEDING

1. Carlos Gomez, Petitioner, was the defendant-appellant in the court below.
2. United States of America, Respondent, was the appellee in the court below.

RELATED CASES

· United States v Gomez, No. 97-CR-696, United States District Court for the Southern District of New York. Judgment entered August 16, 2021.

· Gomez v United States, No. 21-2632, U.S. Court of Appeals for the Second Circuit. Judgment entered November 21, 2023.

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Carlos Gomez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (A1-A17) is reported at 87 F.4th 100. The District Court's opinion (A18-A25) has not been published, but is reported at 2021 WL 3617206.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 21, 2023. (A1-A17). A petition for rehearing was denied on February 6, 2024. (A26). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fifth Amendment:

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

Petitioner files this Petition for a writ of certiorari following the Second Circuit's affirmance of the District Court's denial of his § 2255 motion challenging his conviction for possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). Petitioner's § 2255 motion argued that his conviction was invalid following this Court's decision in *United States v. Davis*, 588 U.S. 445 (2019), as it was based on either an invalid conspiracy predicate, or an invalid substantive predicate grounded in vicarious liability under this Court's decision in *Pinkerton v. United States*, 328 U.S. 640 (1946).

On September 2, 1999, notwithstanding his acquittal for both the conspiracy to murder and the substantive murder of Jose Gonzalez Santiago, Carlos Gomez was found guilty by a jury of "Using or Carrying a Firearm in Relation to the Conspiracy to Murder and Murder of Jose Gonzalez Santiago" (SA-70-SA-71). In finding Mr. Gomez guilty of this offense, the jury had no ability to separate the legal predicate (murder) from the illegal predicate (conspiracy). To make matters even more confusing, the District Court instructed the jury that it could find Mr. Gomez guilty of substantive murder even if it found that he did not commit the murder, under this Court's decision in *Pinkerton*.

This case presents a worthy vehicle for further review of (1) whether a jury instruction permitting a finding of guilt on a 18 U.S.C. § 924(c) charge based on either an invalid or valid predicate prejudiced the Petitioner, resulting in a general verdict, requires reversal under *Hedgpeth v Pulido*, 555 US 57 (2008); (2) whether a

jury instruction permitting a finding of guilt on substantive crimes on the basis of *Pinkerton* liability creates an additional invalid 924(c) predicate under *United States v. Davis*, 588 U.S. 445 (2019); (3) whether this Court's holding in *Rosemond v. United States*, 572 U.S. 65 (2014) has implications for *Pinkerton* liability in the § 924(c) context; and (4) whether *Pinkerton* itself should be overruled.

A. Factual Background and Procedural History

In November of 1997, Carlos Gomez was charged with numerous co-defendants in a superseding[1] multi-count indictment, alleging, among other crimes, his participation in a racketeering enterprise known as the Westchester Avenue Crew (hereinafter, "WAC") (A5).[2] As the case progressed, the indictment was repeatedly superseded, and numerous defendants elected to plead guilty. Ultimately, Mr. Gomez and co-defendants Jose Mario Perez and Jose Negron proceeded to trial in July of 1999. Mr. Gomez was tried on fifteen offenses, including

- Racketeering, in violation of 18 U.S.C. § 1962(d) (Count One);
- Racketeering conspiracy, in violation of 18 U.S.C. § 1962(d) (Count Two);
- Conspiring to murder Jose Gonzalez Santiago, in violation of New York Penal Law and 18 U.S.C. § 1959(a)(5) (Count Three);
- Murdering Jose Gonzalez Santiago, in violation of New York Penal Law and 18 U.S.C. §§ 1959(a)(1) and 2 (Count Four);

[1] This is the first indictment in which Mr. Gomez appears to have been charged.
[2] Citations to Petitioner's Initial Pro-Se Appendix are to "A-#," to Respondent's Addendum are to "Add-#," to Petitioner's Counseled Supplemental Appendix are to "SA-#", to the Trial Transcript are "Tr.", to the District Court Docket are "Dist. Dkt. #" and to the Circuit Court Docket are "Cir. Dkt. #".

- Using and carrying a firearm during and in relation to the crimes charged as Racketeering Act One in Count One, and in Counts Three and Four (the conspiracy to murder and murder of Jose Gonzalez Santiago), in violation of 18 U.S.C. §§ 924(c) and 2 (Count Ten); and
- Narcotics conspiracy, in violation of 21 U.S.C. § 846 (Count Fifteen)

(Add-1 to Add-22).

The government's theory with respect to Mr. Gomez's involvement in the murder of Mr. Gonzalez Santiago was that Mr. Gomez "ordered and authorized members of the [WAC] organization to kill Puma" [3] (Tr. 3614) in retaliation for the murder of one of Mr. Gomez' relatives, and that he provided the shooter with a .38 caliber gun and offered him thousands of dollars to commit the murder. (Tr. 3657-3660).

With respect to the substantive charges in the indictment, the District Court instructed the jury that it could find him guilty of these charges, provided it found the following five elements proven beyond a reasonable doubt:

> First, that the crime charged in the substantive count was committed;
>
> Second, that the person or persons you find actually committed the crime were members of the conspiracy you found existed;
>
> Third, that the substantive crime was committed pursuant to the common plan and understanding you found to exist among the conspirators;
>
> Fourth, that the defendant was a member of that conspiracy at the time the substantive crime was committed; and
>
> Fifth, that the defendant could have reasonably foreseen that the substantive crime be committed by his co-conspirators

[3] "Puma" was a nickname for Mr. Gonzalez Santiago.

(SA-49-50).

The trial court further explained:

> If you find all of these elements to exist beyond a reasonable doubt, then you may find the defendant you are considering guilty of the substantive crime charged against him, even though he did not personally participate in the acts constituting the crime or did not have actual knowledge of it

(SA-50).

With respect to Count Ten, the 924(c) count for the use and carrying of firearm during and in relation to the crimes charged as Racketeering Act One in Count One, and in Counts Three and Four (the conspiracy to murder and murder of Gonzalez Santiago), the trial court instructed the jury that in order to find Mr. Gomez guilty, it "must find the government has proven beyond a reasonable doubt his involvement in either the conspiracy to murder Puma or the murder of Puma, but not both." (SA-49). Notwithstanding the District Court's instruction, the verdict sheet asked the jury to decide whether Mr. Gomez was guilty of "using or carrying a firearm in relation to the conspiracy to murder *and* murder of Jose Gonzalez Santiago", without the option to choose between the two (SA-70-71).

On September 2, 1999, Carlos Gomez was found guilty of four offenses: racketeering and racketeering conspiracy, in violation of 18 U.S.C. § 1962(d) (Counts One and Two); using a firearm in furtherance of the conspiracy to murder and the murder of Jose Gonzalez Santiago, in violation of 18 U.S.C. § 924(c) (Count Ten); and a narcotics conspiracy, in violation of 21 U.S.C. § 846 (Count Fifteen). He

was acquitted of eleven counts, including the conspiracy to murder and substantive murder of Mr. Gonzalez Santiago (Counts Three and Four). (Tr. 4137-4145; SA-69-71).

On July 17, 2000, the District Court sentenced Mr. Gomez to concurrent terms of life imprisonment on Counts One, Two, and Fifteen, based on the Sentencing Guidelines, which mandated this term. He was given a mandatory consecutive term of 60 months' imprisonment on Count Ten. (SA-61-68).

On April 26, 2021, following two prior, unsuccessful motions under 28 U.S.C. § 2255, Mr. Gomez filed a successive *pro se* § 2255 motion to vacate his conviction under 18 U.S.C. § 924(c) on the grounds that it was likely based on a now-invalid predicate. (SA-22.) The District Court denied the motion, ruling that Mr. Gomez's § 924(c) conviction rested on the valid predicate of substantive murder, and that the *Pinkerton* instruction did not undermine the validity of that predicate as a crime of violence. *See United States v. Gomez*, No. 97-CR-696, 2021 WL 3617206 (S.D.N.Y. Aug. 16, 2021). Following Mr. Gomez' application, the court issued a certificate of appealability, finding that he had "made a substantial showing of the denial of a constitutional right regarding the issue of whether the Court's jury instruction on *Pinkerton* liability affects the validity of an 18 U.S.C § 924(c) predicate." (SA-24).

On March 24, 2022, Mr. Gomez filed a *pro se* brief in the Second Circuit Court of Appeals appealing the District Court's denial of his § 2255 motion. (Cir. Dkt. # 51).The government filed a brief in opposition, and Mr. Gomez filed a *pro se* reply. (Cir. Dkt. ## 65 & 69).

On December 1, 2022, the Second Circuit filed an order directing the appointment of counsel to address, among any other issues:

> (1) whether the district court's instruction on liability under *Pinkerton v. United States*, 328 U.S. 640 (1946), affected the validity of Petitioner's 18 U.S.C. § 924(c) conviction, and if so, whether any such error was harmless; (2) whether Petitioner's claim is subject to the concurrent sentence doctrine, *see Al-'Owhali v. United States*, 36 F.4th 461, 463 (2d Cir. 2022); and (3) whether Petitioner's claim is procedurally defaulted.

(Cir. Dkt. # 92).

Present counsel was appointed on December 9, 2022. (Cir. Dkt. # 99). On February 24, 2023, Petitioner filed a counseled supplemental brief arguing: (1) that Mr. Gomez's § 924(c) conviction was erroneously predicated on a conspiracy offense, as the jury was permitted to convict him of Count Ten if it found that he used or carried a firearm during and in relation to the conspiracy to murder or murder of Jose Gonzalez Santiago, and it was impossible to tell which theory formed the basis for his conviction; (2) that the trial court's *Pinkerton* charge made it possible for the jury to convict Mr. Gomez of the substantive murder charge if it found he had been a member of a conspiracy, compounding this error; (3) that Mr. Gomez's claim was not subject to the concurrent sentence doctrine; and (4), that the government had waived any argument of procedural default. (Cir. Dkt. # 103). The government submitted a supplemental brief in response (Cir. Dkt. # 116) and Mr. Gomez submitted a reply. (Cir. Dkt. # 129.) While oral argument was requested by Petitioner, no oral argument was held.

On November 21, 2023, the Second Circuit issued its opinion. With respect to the concurrent sentencing doctrine, the Circuit Court "decline[d] to avoid the merits of Gomez's challenge based on the concurrent sentence doctrine" because it could not conclude that his challenge, if successful, would have no effect on the time he must remain in custody. (A9.) With respect to the argument that Mr. Gomez's challenge was procedurally defaulted, the Circuit Court found that the government had waived or forfeited this argument by failing to raise it before the District Court. (A10.) The Circuit further held that it could not conclude, if the District Court erred, that such error was harmless. (*Id.*)

With respect to Mr. Gomez's arguments concerning the validity of his § 924(c) conviction, the Circuit Court found that "because the jury found that Gomez committed both substantive murder and murder conspiracy, there is no risk that the § 924(c) conviction was based on an impermissible predicate." (A10.) The Circuit Court found that the District Court's *Pinkerton* instruction did not alter this conclusion, holding that "[e]ven if the jury relied on a *Pinkerton* theory to find that Gomez committed substantive murder, it still would qualify as a permissible predicate crime of violence." (*Id.*)

In reaching this conclusion, the Second Circuit disregarded Mr. Gomez's argument that there was no way to know from the jury's verdict whether it found him guilty of the § 924(c) count based on the substantive murder racketeering act or the now-invalid conspiracy predicate, finding that it was sufficient that the jury returned a verdict based on both, even though the verdict sheet left the jury with no mechanism to choose between the two. (A13.) Despite the fact that the jury's only option was to find Mr. Gomez guilty or not guilty of "using or carrying a firearm in

relation to the conspiracy to murder *and* murder of Jose Gonzalez Santiago", the Circuit erroneously found that there was no "reasonable probability" that the jury based the § 924(c) conviction on the conspiracy predicate alone. (*Id.*)

The Second Circuit also disagreed with Gomez's argument that the District Court's *Pinkerton* instruction changed the analysis, despite the fact that this instruction made it possible that the jury found Gomez guilty of substantive murder on the basis of his participation in a conspiracy, which this Court found unconstitutional in *United States v. Davis*, 588 U.S. 445 (2019). (A13-A14.) Citing a number of other circuit courts that had reached similar conclusions, the Circuit Court explained:

> Because under a *Pinkerton* theory the defendant is convicted of the substantive offense—not of conspiring to commit the offense—he has committed a crime of violence if the substantive offense is a crime of violence.

(A14-A15.)

The Circuit Court saw "no reason for a different conclusion here":

> Even if the jury found Gomez guilty of murder based on a *Pinkerton* theory, Gomez's § 924(c) conviction would remain valid because the acts of his co-conspirators are imputed to him. That means the jury necessarily found that Gomez committed each element of the substantive offense of intentional murder under New York law.

(A16; internal citation omitted.)

Petitioner filed a petition for rehearing/rehearing *en banc* which was denied. (Cir. Dkt # 153.)

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT COURT INCORRECTLY FOUND THAT THERE WAS NO "REASONABLE PROBABILITY" THAT THE JURY BASED THE § 924(C) CONVICTION ONLY ON THE CONSPIRACY

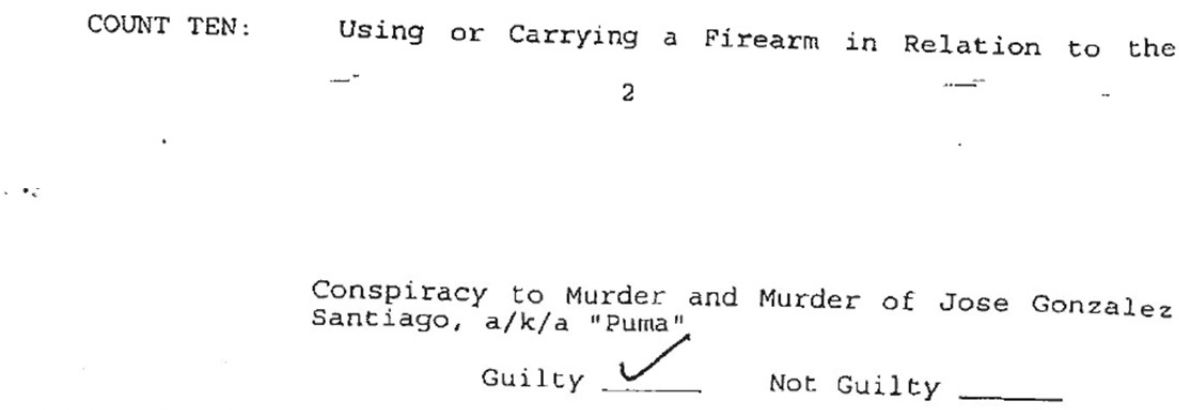
This Court has held that a conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one. *Stromberg v. California*, 283 U.S. 359 (1931); *Yates v. United States*, 354 U.S. 298 (1957) (overruled on other grounds by *Burks v. United States*, 437 U.S. 1, 8-10 (1978). Where the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict", the verdict must be overturned. *Hedgpeth v Pulido*, 555 U.S. 57, 58 (2008); *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

In *Stromberg*, the Court considered the validity of a general verdict that followed a jury instruction stating that the petitioner could be found guilty for displaying a red flag as " 'a sign, symbol, or emblem of opposition to organized government, or [a]s an invitation or stimulus to anarchistic action, or [a]s [a]n aid to propaganda that is of a seditious character.' " 283 U.S. at 363. After ruling that the first clause of the instruction proscribed constitutionally protected conduct, this Court concluded that the petitioner's conviction must be reversed because "it [wa]s impossible to say under which clause of the [instruction] the conviction was obtained." *Id*., at 368. In *Yates*, this Court extended this reasoning to a conviction

resting on multiple theories of guilt when one of those theories is not unconstitutional but is otherwise legally flawed.

Given that the District Court's instruction permitted the jury to convict on either an impermissible theory or a permissible one, while the verdict sheet did not permit the jury to select between the two theories, under *Yates*, *Stromberg*, *Hedgpeth, and Brecht,* the Second Circuit was required to determine whether the flaw in the instructions given to them had "substantial and injurious effect." Instead of making this determination, the Circuit Court found that there was no "reasonable probability" that the jury based the § 924(c) conviction only on the conspiracy when it determined that the murder had also been proved. (A13.)

But, here, the District Court's erroneous instruction made it reasonably likely that the jury convicted Mr. Gomez on an impermissible theory of guilt. The verdict sheet for Count Ten read as follows:



COUNT TEN: Using or Carrying a Firearm in Relation to the

2

Conspiracy to Murder and Murder of Jose Gonzalez Santiago, a/k/a "Puma"

Guilty ✓ Not Guilty _____

While the District Court's instruction used the conjunction "or", which permitted the jury to find Mr. Gomez guilty of using a firearm in connection with either substantive murder, a valid theory of guilt, or conspiracy, an impermissible

one under *United States v. Davis*, 588 U.S. 445 (2019), the verdict sheet used the conjunction "and", asking the jury to decide whether Mr. Gomez was guilty of "using or carrying a firearm in relation to the conspiracy to murder *and* murder of Jose Gonzalez Santiago." In finding Mr. Gomez guilty of Count Ten, the jury had no mechanism by which to separately consider the predicates of murder and conspiracy to murder – the only choice available to it was "guilty" and "not guilty."

Simply put, there was no way for the jury to separate the lawful predicate from the unlawful predicate, and no way for the District Court to have any confidence that a properly instructed jury would have convicted Mr. Gomez of Count Ten based on the lawful one.

Where, as here, it is "impossible to tell" from the verdict which theory formed the basis for conviction, an impossibility that is reinforced by the District Court's erroneous instruction, it is reasonably likely that the jury convicted Mr. Gomez on an impermissible theory of guilt. The Second Circuit erred in holding otherwise and the jury's guilty verdict must be overturned under this Court's precedent. *See Yates,* 354 U.S. at 312; *Brecht,* 507 U.S. at 623.

II. THE CIRCUIT COURT ERRED IN HOLDING THAT A MURDER CONVICTION BASED UPON *PINKERTON* IS A CATEGORICAL CRIME OF VIOLENCE FOR A § 924(C) CONVICTION.

The text of 18 U.S.C. § 924(c) contains two definitions of a crime of violence: the force (or elements) clause and the residual clause. The force clause looks to whether a crime "has as an element the use, attempted use, or threatened use of physical force," 18 U.S.C. § 924(c)(3)(A), whereas the residual clause sought to

determine whether the crime involved a "substantial risk" that physical force would be used, 18 U.S.C. § 924(c)(3)(B). In *United States v. Davis*, 588 U.S. 445 (2019), this Court found the residual clause definition unconstitutionally vague, leaving only the force clause.

Here, the Second Circuit incorrectly found that a murder conviction based upon a jury's application of the *Pinkerton* theory "is a categorical crime of violence that can support a § 924(c) conviction." (A3.)

A. The Pinkerton Case

Walter and Daniel Pinkerton were brothers indicted for violations of the Internal Revenue Code. Each was indicted on one count of conspiracy and ten substantive counts. The Pinkertons were tried before a jury and found guilty. Walter was convicted of conspiracy and nine of the substantive counts. Daniel was convicted of conspiracy and six of the substantive counts. While Walter "was the direct actor in some of the substantive offenses", *Pinkerton* 328 U.S. at 645 & n.5 (majority opinion), there was no evidence to show that Daniel participated in the commission of any of the substantive offenses for which he was convicted, *Id*. at 645, and no evidence indicated that Daniel aided or abetted Walter in committing these offenses or that he even knew Walter committed them. *Id.* at 648 (Rutledge, J., dissenting). In fact, Daniel was incarcerated at the time Walter committed some of the substantive offenses. *Id*.

A majority of this Court concluded that because Daniel was a member of the conspiracy, he could be convicted of substantive offenses even when there was no

evidence that he participated in their commission, if the evidence showed that Walter committed them in furtherance of the conspiracy. *Id.* at 645.

Justice Rutledge disagreed with the majority that Daniel could be convicted for Walter's substantive crimes and argued that such a holding "violates both the letter and spirit" of Congress' separate classification of the following crimes: "(1) completed substantive offenses; (2) aiding, abetting, or counseling another to commit them; and (3) conspiracy to commit them." *Pinkerton*, 328 U.S. at 649 (Rutledge, J., dissenting).

Justice Rutledge argued that allowing a conspirator to be convicted of a co-conspirator's crimes "either convicts one man for another's crime or punishes the man convicted twice for another's crime or punishes the man convicted twice for the same offense." *Id.* He believed that the differences between the three classes of crimes are easily disregarded, and when such a disregard occurs, a person may be convicted of one offense based on proof of another, or multiple punishments may be imposed. *Id.* at 649-650.

B. The Second Circuit's Decision Is Flawed Because Pinkerton Liability Does Not Require a Jury Finding that Mr. Gomez Himself Used and Carried a Firearm During and in Relation to the Murder

In ruling that 18 U.S.C. § 924(c)(3)(B) (the residual clause), which defined a crime of violence as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" was unconstitutionally vague, this Court, in *United States v. Davis*, 588 U.S. 445 (2019), limited liability under § 924(c) to cases in which a defendant commits a crime that "has as an element the use, attempted use, or threatened use of physical force

against the person or property of another" 18 U.S.C. § 924(c)(3)(A) (the force clause). Following *Davis*, a conviction, under 18 U.S.C. § 924(c), requires that the crime of violence upon which the 924(c) conviction is predicated be a *substantive* crime, which knocks out the conspiracy to murder Mr. Gonzalez Santiago as a permissible predicate. Therefore, in order to convict Mr. Gomez of a 924(c) offense, the jury was required to find that he used, carried, or possessed a firearm in connection with the murder of Mr. Gonzalez Santiago, which is a finding that he physically used, carried or possessed a firearm in connection a murder that he committed.

Yet in deciding against Mr. Gomez, the Second Circuit held that if a defendant is convicted of a substantive crime of violence under a *Pinkerton* theory, which permits a jury to find a defendant liable for the actions of another, that the offense is a proper predicate crime of violence under § 924(c). The Circuit reasoned:

> Under a *Pinkerton* theory the defendant is convicted of the substantive offense – not of conspiring to commit the offense – so he has committed a crime of violence if the substantive offense is a crime of violence. Because Pinkerton does not transform a substantive offense into a conspiracy offense, it does not implicate *Davis*.

(A3.)

The Second Circuit's analysis is flawed. Imputing a co-conspirator's acts to Mr. Gomez may establish *Pinkerton* liability for Mr. Gomez, but it is not the equivalent of the jury finding, as required after *Davis*, that Mr. Gomez committed a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." What the *Pinkerton* rule does in practice, and what it permitted in Mr. Gomez's case, was for the jury to convict Mr. Gomez even if he did not himself use or carry a firearm or commit a murder. In

doing so, the Second Circuit acted as if the residual clause was still constitutional, in contravention of this Court's decision in *Davis*.

In this case, the District Court specifically instructed the jury that it could convict Gomez of the substantive crime, "even if [it] did not find that the government ha[d] satisfied its burden of proof with respect to each element of the substantive crime." (SA-49-50). As the district court instructed the jury, in order to be found guilty of possessing a gun in connection with a murder, Mr. Gomez must have "unlawfully, willfully and knowingly used and carried a firearm" (SA-48) in connection with murder, which must be committed "intentionally" and "knowingly". (SA-41).

Contrary to the Second Circuit's conclusion, if the jury found Mr. Gomez guilty of the 924(c) count on the basis of *Pinkerton* liability, it does not "necessarily" follow that the jury found that Mr. Gomez committed the substantive offense. The court's express instructions left the jury free to find Mr. Gomez guilty of Gonzalez Santiago's murder even absent such a finding, which is improper under 18 U.S.C. § 924(c)(3)(A).

III. THE CIRCUIT COURT IGNORED PETITIONER'S ARGUMENT THAT THAT VICARIOUS LIABILITY BASED ON REASONABLE FORESEEABILITY DOES NOT CREATE A SUFFICIENT PREDICATE UNDER *ROSEMOND V. UNITED STATES*

The Second Circuit erred in failing to consider that vicarious liability based on reasonable foreseeability does not create a sufficient predicate for a § 924(c) under this Court's precedent in *Rosemond v. United States*, 572 U.S. 65 (2014).

In *Rosemond*, this Court held that, to be convicted under § 924(c) as an aider or abettor, a defendant must have participated in the predicate offense with "advance knowledge that a confederate would use or carry a gun during the crime's commission." *Id.* at 67.

As Judge Watford from the Ninth Circuit Court of Appeals reasoned in his concurrence in *United States v. Walton*, "No principled basis exists for permitting vicarious liability for § 924(c) offenses under a less rigorous rule merely because a conspiracy is involved." 18-50262, 2021 WL 3615426, at *4 (9th Cir Aug. 16, 2021), *cert denied sub nom. LaForest v United States*, 142 S. Ct. 2876 (2022). Judge Watford posited that "*Rosemond's* analysis of the mens rea required for vicarious liability in the aiding-and-abetting context" might lead this Court "to reassess application of the *Pinkerton* rule to § 924(c) offenses in the conspiracy context—and eventually to reconsider *Pinkerton* itself." *Id.*

The Second Circuit's decision is silent as to the implications of *Rosemond*. It does not address how (or even whether) the case impacted its reasoning, or why it was not bound to follow it. Because the Circuit's decision is incompatible with this Court's precedent, this Court should grant this petition for certiorari.

IV. THIS COURT SHOULD OVERRULE *PINKERTON* BECAUSE THE CASE WRONGLY USURPED CONGRESS'S POWER TO CREATE CRIMINAL LIABILITY

In 1946, this Court decided *Pinkerton,* fundamentally altering federal conspiracy law. The Court created what is now known as the *Pinkerton* theory of liability, which allows a jury to convict a defendant of substantive offenses

committed by a co-conspirator that were committed pursuant to a common plan or understanding that were reasonably foreseeable to the defendant.

In so doing, impermissibly created criminal liability when Congress had not done so, violating the prohibition on federal common law crimes. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that federal courts lack jurisdiction to punish crimes not defined by statute); *United States v. New Bedford Bridge*, 27 F. Cas. 91, 103 (D. Mass. 1847) (No. 15,827) (Woodbridge, J., in chambers) (stating "it is considered that no acts done against [the government] can usually be punished as crimes without specific legislation" for in those cases the court does not "have jurisdiction of the offence") (cleaned up); *United States v. Hall*, 98 U.S. 343, 345 (1878) ("[C]ourts possess no jurisdiction over crimes and offences committed against the authority of the United States, except what is given to them by the power that created them."); *Pettibone v. United States*, 148 U.S. 197, 203 (1893) ("The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States."); *In re Bonner*, 151 U.S. 242, 257 (1894) ("It is plain that [a trial] court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction.").

But the federal courts have no authority to create liability where Congress has not done so. In a footnote to his concurring opinion in *Ruan v United States*, 597 US 450 (2022), Justice Alito noted:

> Why we have held that the mens rea canon allows courts to ignore obvious textual evidence of congressional intent

> is not obvious. In our constitutional system, it is Congress that has the power to define the elements of criminal offenses, not the federal courts. Only the people's elected representatives in the legislature are authorized to 'make an act a crime. The *mens rea* canon is legitimate when it is used to determine what elements Congress intended to include in the definition of an offense. But applying that canon to override the intentions of Congress would be inconsistent with the Constitution's separation of powers. Federal courts have no constitutional authority to re-write the statutes Congress has passed based on judicial views about what constitutes "sound" or "just" criminal law.

Ruan, 597 US at 472, n. 2 (internal citations omitted).

In *United States v. Bass*, 404 U.S. 336 (1971), this Court underscored the importance of letting legislatures define criminal activity. In *Bass*, this Court interpreted a statute that created federal criminal liability for a felon receiving, possessing or transporting "in commerce or affecting commerce" a firearm. 18 U.S.C. § 1202(a) (1968). This Court held that Congress had not "plainly and unmistakably made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce." *Bass*, 404 U.S. at 348-49 (*citing United States v. Gradwell*, 243 U.S. 476, 485 (1917)). To support its interpretation of the statute, the Court noted that "legislatures and not courts should define criminal activity" and that the reason for this policy was that individuals should not "languish[] in prison unless the lawmaker has clearly said they should." *Id*. at 348.

No statute enacted by Congress authorizes the form of vicarious liability created by *Pinkerton*. *See Developments in the Law—Criminal Conspiracy*, 72 Harv.

L. Rev. 920, 994–95 (1959). Today, *Pinkerton* liability is used to convict defendants of substantive offenses in a wide variety of contexts. Essentially, under *Pinkerton*, a defendant may be found "guilty on a substantive count without specific evidence that he committed the act charged if it is clear that the offense had been committed, that it had been committed in the furtherance of an unlawful conspiracy, and that the defendant was a member of that conspiracy." *United States v. Miley*, 513 F.2d 1191, 1208 (2d Cir. 1975). Under *Pinkerton*, many defendants are languishing in prison even though no lawmaker has said they should.

What the *Pinkerton* rule does in practice, and what it permitted in Mr. Gomez' case, was for the jury to convict Mr. Gomez on a *mens rea* of negligence when the substantive offense – using a firearm in furtherance of a murder – requires a significantly more culpable mental state, *see* American Law Institute, *Model Penal Code and Commentaries* § 2.06, Comment, p. 312 & n.42 (1985). The drafters of the Model Penal Code were right in concluding that liability for substantive offenses committed by co-conspirators "should be controlled by the same limits that are otherwise the measure of liability for complicity." *Id*. at 310. As they observed, and contrary to *Pinkerton's* fundamental premise, "conspiracy does not present a special case for broadened liability." *Id*. at 310.

A. Extending Civil Agency Rules to Criminal Cases Improperly Expands Criminal Liability

It is fundamental to criminal law that a defendant should be punished for what he actually intended. *See, e.g., Morissette v. United States*, 342 U.S. 246, 250 (1952). This Court's *Pinkerton* decision upended that principle. In deciding

Pinkerton, Justice Douglas, writing for the Court, began with the proposition that conspiracy is a "partnership in crime" in which "the partners act for each other in carrying in forward." *Pinkerton*, 328 U.S. at 646. From this analogy to principle of civil agency law, in which the accomplice is thought to vest the principal with authority to act on his behalf, Justice Douglas, derived the conclusion that "the .. .act of one partner in crime is attributable to all." *Id*. at 347. *See also* James M. Shellow, William Theis, & Susan Brenner, *Pinkerton v. United States and Vicarious Criminal Liability*, 36 MERCER L. REV. 1079, 1080 (1985) (contending that "the Supreme Court imported the civil concept of vicarious liability into the American law of criminal conspiracy"). *See also Davis v. United States* 21-2471-pr (2d Cir. March 7, 2024) (Rakoff, J., dissenting)("*Pinkerton v. United States*, 328 U.S. 640 (1946), which erroneously applies civil agency rules to criminal cases and thereby hugely increases the individual exposure to severe sentences of even minor conspiracy participants, was in my view wrongly decided from the outset...To this day, *Pinkerton* continues to wreak havoc on the most fundamental principle of criminal law: that a defendant should only be punished for what he actually intended.")

Justice Douglas, however, found that this attribution did not offend the fundamental principles of criminal law since the "criminal intent to do the act is established by the formation of the conspiracy." *Pinkerton*, 328 U.S. at 646. Vicarious liability was proper because the conspiracy "was formed for [a] purpose" and the "act done was in execution of" that purpose. *Id*.

In his dissent, Justice Rutledge disagreed with what he viewed as the erroneous application of civil agency rules to criminal cases. *See Pinkerton* at 651 (Rutledge, J., dissenting) ("Whether or not his commitment to the penitentiary had that effect, the result is a vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a co-partner in the course of the firm's business. Such analogies from private commercial law and the law of torts are dangerous, in my judgment, for transfer to the criminal field."). Rutledge rightly pointed out that what is unremarkable in civil trials is aberrant in the criminal law: "Guilt there with us remains personal, not vicarious, for the more serious offenses." *Id.*

B. The "Discriminatory Taint" at the Heart of Agency Liability

Beyond the inherent dangers of applying analogies from civil or commercial law to criminal law, there is a another, perhaps more fundamental concern: the "discriminatory taint" surrounding the genesis of agency liability. In improperly using civil agency rules to expand criminal liability, this Court has adopted a legal theory developed to assign liability for the actions of enslaved people, who were considered property, and not legal persons, under the law. In so doing, the Court has perpetuated the stain of slavery, which persists, not just in policies that were intended to disadvantage African Americans in this country, but when new, facially neutral laws share commonalities with old, discriminatory policies. *See* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1203–04 (2022). ("The persistence

of an older policy's operative core can manifest a 'discriminatory taint' that alone should impugn an otherwise facially legitimate policy.")

Agency law was developed in England to account for the conduct of slaves, contractually hired servants, and apprentices, and was focused on the perceived practical economic necessities of its time. *See* Blackstone, William*, 1723-1780. Commentaries on the Laws of England*, at * 411-420. *See also* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 Hastings L.J. 91 (1985). In "The Common Law," by Oliver Wendell Holmes, Jr., Justice Holmes describes the concept, "eadem est persona domini et procuratoris", latin for "the person of the master and the agent is the same" as peculiar, anomalous, and limited to its historical context: "This notion of a fictitious unity of person has been pronounced a darkening of counsel in a recent useful work….as I have tried to show, there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves." O.W. Holmes, *The Common Law* 232 (1881).

When Justice Holmes referenced a "darkening of counsel," he was alluding to the Bible, specifically, the Book of Job, where "the Lord answered Job out of the whirlwind and said, who is this that darkens counsel by words without knowledge?" Job 38:1-2. While the expression is not as common as it once was, it means that when we separate ideas from their origins, we speak "without knowledge." What is

left, Justice Holmes cautioned, is a theory of liability that persists, despite a collective lack of understanding of the circumstances that brought it into being.

The concept of civil agency bears a discriminatory taint. Its genesis is rooted in slavery, in the idea that a slave is "absorbed into the family which his master represents before the law." Holmes, at 232. That this Court, in *Pinkerton*, extended a concept of fictitious personhood, created to account for the existence of a class of human beings in bondage who had no legal standing before the courts, in order to permit a jury to convict a defendant of substantive offenses committed by a co-conspirator, creates exactly the sort of problem that Justice Holmes cautioned against. What we are left with, is a "turtles all the way down"[4] approach to legal reasoning in which legal theories are imported from one historical moment to the next without consideration for the rationale underpinning those theories.

C. The Application to the Petitioner's Case

Assuming *ex arguendo* that the Circuit Court was correct in finding that there was no "reasonable probability" that the jury found Mr. Gomez guilty of Count Ten on the basis of the invalid conspiracy predicate, it remains likely that he was punished for using a firearm he did not use in connection with a murder he did not commit due to *Pinkerton v. United States*, 328 U.S. 640 (1946).

---

[4] "[A]n Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies 'Ah, after that it is turtles all the way down.' " *Rapanos v. United States*, 547 U.S. 715, 754 n. 14 (2006).

Carlos Gomez was acquitted of eleven counts, including the conspiracy to murder and substantive murder of Mr. Gonzalez Santiago (Counts Three and Four). Unlike the defendant in *Pinkerton*, Mr. Gomez was acquitted of the count charging him with participating in a conspiracy to murder Gonzalez Santiago, as well as the count charging him with Gonzalez Santiago's substantive murder. Despite his acquittal on these counts, the jury convicted him of racketeering in violation of 18 U.S.C. § 1962(d) (Count One) based on racketeering acts that included the conspiracy to murder Mr. Gonzalez Santiago (Racketeering Act 1(a)) and the substantive murder of Mr. Gonzalez Santiago (Racketeering Act 1(b)) and using a firearm in furtherance of the conspiracy to murder and the murder of Santiago, in violation of 18 U.S.C. § 924(c) (Count Ten).[5]

Because Mr. Gomez did not personally participate in Gonzalez Santiago's shooting, the *only* substantive bases for his liability for the use of a firearm during and in relation to the murder of Gonzalez Santiago was as an aider and abettor, or under a *Pinkerton* theory of liability.

The District Court sentenced Mr. Gomez to three life sentences, to be followed by a consecutive sentence on the 924(c) count. No legislature has ever stated that Mr. Gomez should be punished for a crime he did not commit. Yet assuming the jury did not find him guilty of Count Ten based on the invalid conspiracy predicate, it is likely that he was punished for using a firearm he did not use in connection with a murder he did not commit based on a legal fiction created to impose civil liability on masters for the actions of their slaves.

[5] Mr. Gomez was also convicted of racketeering conspiracy, which did not require the proof of any racketeering acts (Count Two) and a narcotics conspiracy, in violation of 21 U.S.C. § 846 (Count Fifteen).

This court-created criminal liability violates the spirit and policy behind the prohibition of federal common law crimes. Theoretically, Carlos Gomez could languish in prison with a sentence that exceeds three lifetimes based on the *Pinkerton* theory because a court, not a legislature, defined that criminal liability operated in this fictional way. It also carries a discriminatory taint, and the rationale underpinning its application to criminal law and criminal defendants deserves the renewed scrutiny of this Court.

We ask this Court to grant certiorari to consider whether it should overrule *Pinkerton* as judge made law that violates the separation of powers.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Second Circuit Court of Appeals.

Dated this 6th day of May, 2024, in Brooklyn, New York.

Respectfully submitted,

Sarah Kunstler
Law Office of Sarah Kunstler
315 Flatbush Avenue #103
Brooklyn, New York 11217

Counsel for Petitioner Carlos Gomez
CJA Appointed