No. 23-7415

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in finding that petitioner's conviction for using or carrying a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(c), rests on the predicate offense of second-degree murder as part of a pattern of racketeering activity.

2. Whether the district court erred in instructing the jury that it could find petitioner guilty of a substantive murder offense, and of the Section 924(c) offense predicated on that murder, based on coconspirator liability under Pinkerton v. United States, 328 U.S. 640 (1946).

3. Whether the coconspirator liability recognized in Pinkerton should be overruled.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Gomez v. United States, No. 03-cv-1076 (Mar. 10, 2003) (denying first motion to vacate under 28 U.S.C. 2255)

Gomez v. United States, No. 11-cv-6738 (Sept. 28, 2011) (transferring second or successive Section 2255 motion to court of appeals)

United States Court of Appeals (2d Cir.):

United States v. Brown, No. 00-1089 (Nov. 3, 2000) (appeal of co-defendant)

United States v. Feliciano et al., Nos. 00-1525 & 00-1811 (Nov. 21, 2001) (direct appeal)

United States v. Gomez, No. 02-1386 (Apr. 2, 2004) (appeal of co-defendant)

Gomez v. United States, No. 03-2304 (Nov. 3, 2003) (dismissing appeal from denial of first Section 2255 motion)

Gomez v. United States, No. 05-910 (Mar. 31, 2005) (denying motion for leave to file second or successive Section 2255 motion)

Gomez v. United States, No. 06-147 (Feb. 15, 2006) (denying motion for leave to file second or successive Section 2255 motion)

Gomez v. United States, No. 11-3930 (Nov. 28, 2011) (denying motion for leave to file second or successive Section 2255 motion)

Gomez v. United States, No. 19-4145 (Apr. 5, 2021) (granting motion for leave to file second or successive Section 2255 motion)

Supreme Court of the United States:

Brown v. United States, No. 00-8406 (Mar. 5, 2001) (certiorari petition of co-defendant)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 87 F.4th 100. The order of the district court (Pet. App. A18-A25) is not published in the Federal Supplement but is available at 2021 WL 3617206.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 2023. A petition for rehearing was denied on February 6, 2024 (Pet. App. A26). The petition for a writ of certiorari was filed on May 6, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d); one count of using or carrying a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(c); and one count of conspiring to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 846. 26 Fed. Appx. 55, 57; C.A. Supp. App. 61; Gov't C.A. Add. 1-21, 32-34.[1] The district court sentenced petitioner to life plus 60 months of imprisonment, to be followed by five years of supervised release. C.A. Supp. App. at 62-63. The court of appeals affirmed. 26 Fed. Appx. at 57-58. The district court denied petitioner's subsequent motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, and declined to issue a certificate of appealability. Pet. App. A7. The court of appeals likewise denied a certificate of appealability. 03-2304 C.A. Order (Nov. 3, 2003).

Approximately 17 years later, petitioner applied to the court of appeals for authorization to file a successive Section 2255 motion to challenge his Section 924(c) conviction, 19-4145 C.A. Doc. 8 (Jan. 10, 2020), which the court of appeals granted, 19-4145 C.A. Doc. 37 (Apr. 5, 2021). The district court then denied

[1] Unless otherwise specified, all citations to court of appeals documents are to those in No. 21-2632.

petitioner's authorized Section 2255 motion, Pet. App. A18-A25, but granted a certificate of appealability, C.A. App. 32. The court of appeals affirmed. Pet. App. A1-A17.

1. In the 1980s, petitioner founded the Westchester Avenue Crew, a racketeering enterprise that distributed heroin and cocaine in the Bronx. Pet. App. A18; Presentence Investigation Report (PSR) ¶¶ 70-71. The enterprise distributed 25 to 40 bricks of heroin, seven days a week, which amounted to approximately one kilogram of heroin every two weeks, or 192 kilograms over the life of the conspiracy. PSR ¶ 73. Petitioner ran the enterprise through the 1990s and received all of the profits from its daytime drug sales, as well as a portion of the profits from the nighttime drug sales. Pet. App. A18; PSR ¶¶ 72-73.

In December 1992, petitioner ordered the murder of Jose Gonzalez Santiago. Pet. App. A18; PSR ¶ 86. Petitioner believed that Santiago had murdered one of petitioner's relatives the previous month, in a failed attempt to kill petitioner himself. Pet. App. A18; PSR ¶ 86. Petitioner gave a .38-caliber gun to a Westchester Avenue Crew subordinate to use in committing the murder, and the subordinate shot and killed Santiago in an alley. Pet. App. A18-A19; PSR ¶ 86; see PSR ¶ 76. After the murder, petitioner paid the subordinate several thousand dollars for his participation in the murder. Pet. App. A19; PSR ¶ 86.

2. a. In 1999, a grand jury in the Southern District of New York charged petitioner with one count of racketeering, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d); seven counts of various violent crimes in aid of racketeering (VICAR), in violation of 18 U.S.C. 1959(a); five counts of using and carrying a firearm during and in connection with a "crime of violence," in violation of 18 U.S.C. 924(c); and one count of conspiring to distribute and possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. 846. Gov't C.A. Add. 1-21. The racketeering count of the operative indictment alleged both that petitioner had conspired to murder Santiago and that petitioner had also murdered him in violation of New York law. Id. at 4. The count identified those acts as "Act of Racketeering One" and specified that "either one * * * alone constitutes the commission of Racketeering Act One." Ibid. (emphasis omitted); see Pet. App. A4. Two of the VICAR counts (Counts 3 and 4) also charged petitioner with conspiring to murder Santiago and with the murder of Santiago, Gov't C.A. Add. 8-10; Pet. App. A4 n.1, with the VICAR overlay including an additional element that the relevant act be for the purpose of consideration paid (or to be paid) by the enterprise or joining, maintaining, or improving standing in that enterprise, see 18 U.S.C. 1959(a).

Section 924(c) specifies a mandatory consecutive sentence for using or carrying a firearm during and in connection with a "crime of violence," or possessing a firearm in furtherance of a "crime of violence." 18 U.S.C. 924(c)(1)(A); see 18 U.S.C. 924(c)(1)(D)(ii). Section 924(c)(3) defines a crime of violence in two ways. First, the "elements clause" encompasses any federal felony 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). Second, the "residual clause" includes any federal felony 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." 18 U.S.C. 924(c)(3)(B). With respect to the Section 924(c) charge in Count 10 of the indictment, the indictment identified the predicate crime of violence as "the conspiracy to murder and murder of Jose Gonzalez Santiago . . . charged as Racketeering Act One in Count One [the substantive racketeering count], and in Counts Three and Four [two of the VICAR counts], of this Indictment." Pet. App. A4 (quoting Gov't C.A. Add. 14).

b. Petitioner proceeded to trial, where the government presented evidence that he personally ordered Santiago's murder, provided the .38-caliber firearm used in the crime, and paid several thousand dollars to the subordinate who carried out the killing. Pet. App. A4; see PSR ¶ 86.

In instructing the jury on the racketeering offense charged in Count 1, the district court explained that "Racketeering act 1(a)" charged petitioner with conspiring to murder Santiago and that "Racketeering act 1(b)" charged that petitioner "murdered and aided and abetted the murder of [Santiago]," in violation of New York law. C.A. Supp. App. 42. The court instructed that, under New York law, "a person is guilty of murder when with intent to cause the death of another person he causes the death of such person or of a third person." Pet. App. A5 (quoting C.A. Supp. App. 42).

The district court also instructed the jury that the Section 924(c) offenses required the government to prove that petitioner either used or carried a firearm, or aided and abetted others in doing so, and that he did so during and in relation to the commission of a crime of violence for which he might be prosecuted in federal court. C.A. Supp. Add. 48. The court further explained that, for purposes of the Section 924(c) offense charged in Count 10, the indictment alleged that the predicate crime of violence was "the conspiracy to murder and murder of [Santiago] charged in racketeering act 1 and count 1 and in counts 3 and 4 of this indictment." Ibid.; see Pet. App. A5. The court told the jury that, to find petitioner guilty on Count 10, it "must find the government has proven beyond a reasonable doubt his involvement in

either the conspiracy to murder [Santiago] or the murder of [Santiago], but not both." C.A. Supp. App. 49; see Pet. App. A5.

The district court also delivered an instruction premised on Pinkerton v. United States, 328 U.S. 640 (1946). Pet. App. A5-A6. That instruction explained that if the jury found that petitioner "was a member of the conspiracy charged in the indictment, for example, the conspiracy to murder [Santiago]," then the jury "may also, but [is] not required to, find him guilty of the corresponding substantive crime charged, in this example, the murder of [Santiago] and the use and carrying of a firearm during and in relation to the conspiracy to murder and murder of [Santiago]." Ibid. (quoting C.A. Supp. App. 49) (brackets in original). The court explained that the jury could find petitioner guilty on that theory only if it found that the substantive offense was committed by members of the conspiracy pursuant to a common plan or understanding and that petitioner "could have reasonably foreseen the substantive crime might be committed by [his] co-conspirators." C.A. Supp. App. 50; see id. at 49-50; see also Pet. App. A6.

c. The jury found petitioner guilty on the substantive racketeering count, the racketeering-conspiracy count, the drug-conspiracy count, and the Section 924(c) charge in Count 10, and acquitted him on the additional counts. Pet. App. A6; see Gov't C.A. Add. 32-34. With respect to the substantive racketeering

offense charged in Count 1, the jury found that the government had proved both the conspiracy to murder Santiago (Racketeering Act 1(a)) and the murder of Santiago (Racketeering Act 1(b)). Pet. App. A6; Gov't C.A. Add. 32. The district court sentenced petitioner to life imprisonment, followed by a consecutive 60-month term of imprisonment on the Section 924(c) count. Pet. App. A6-A7; C.A. Supp. App. 62. The court of appeals affirmed. 26 Fed. Appx. at 57-58.

3. In 2003, the district court denied petitioner's first motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence and declined to issue a certificate of appealability. Pet. App. A7. The court of appeals likewise denied a certificate of appealability. 03-2304 C.A. Order (Nov. 3, 2003). Petitioner subsequently filed several motions in the court of appeals for leave to file a second or successive Section 2255 motion, and the court denied each motion. 05-910 C.A. Order (Mar. 31, 2005); 97-cr-696 Docket Entry No. 336 (May 12, 2006) (mandate in C.A. No. 06-147); 11-3930 C.A. Doc. 15 (Nov. 28, 2011).

In 2020, petitioner applied to the court of appeals for authorization to file a successive Section 2255 motion challenging his Section 924(c) conviction under United States v. Davis, 588 U.S. 445 (2019), which held that Section 924(c)(3)'s residual clause is unconstitutionally vague, id. at 470; see 19-4145 C.A. Doc. 8, at 6, 11-13. The court of appeals granted the motion, 19-

4145 C.A. Doc. 37, at 1-2, and petitioner filed the authorized Section 2255 motion in district court, C.A. Supp. App. 73-97.

The district court denied the motion on the merits. Pet. App. A18-A25. The court explained that petitioner's Section 924(c) conviction rested on two predicate crimes of violence: the conspiracy to murder Santiago and the substantive murder of Santiago. Id. at A20. The court accepted the government's concession that the conspiracy offense no longer qualified as a predicate crime of violence under Section 924(c)(3)'s elements clause, but the court had "no doubt" that petitioner's Section 924(c) conviction also rested on the valid predicate offense of substantive murder under New York law, which remained a crime of violence under the elements clause. Id. at A21. The court observed that, in the verdict on the racketeering count, the jury had found that the government had proved, beyond a reasonable doubt, that petitioner had both committed the conspiracy to murder and also committed the substantive murder of Santiago. Ibid. The court further observed that the trial evidence showed that petitioner provided a subordinate with a firearm, directed him to murder Santiago, and paid him after the murder. Ibid. In light of the jury's finding that petitioner had committed Santiago's substantive murder, the court saw no reasonable possibility that petitioner's Section 924(c) conviction rested "only on a

conspiracy to murder but not on his role in committing the same murder." Ibid. (brackets and citation omitted).

The district court also rejected petitioner's contention that his acquittal on the two VICAR counts relating to Santiago's murder cast doubt on the validity of his Section 924(c) conviction. Pet. App. A21-A22. The court noted that the offense of VICAR murder, in violation of 18 U.S.C. 1959(a), requires proof of an additional element -- namely, that "the murder be 'as consideration for . . . anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity.'" Pet. App. A21 (quoting 18 U.S.C. 1959(a)). And because petitioner "was alleged to have ordered Santiago's murder in retribution for an apparent attempt on his own life," the court saw "no inconsistency or confusion in the jury's finding that [petitioner] was liable for the murder, but that [his] motivation was neither pecuniary gain nor establishment of position within the enterprise." Id. at A21-A22. The court thus found it "'overwhelmingly likely'" that any reasonable jury would have found petitioner guilty "on the basis of the valid murder predicate alone." Id. at A22 (citation omitted).

The district court additionally rejected petitioner's contention that the jury instruction on Pinkerton liability affected the validity of the substantive murder as a predicate for

the Section 924(c) conviction. Pet. App. A22-A24. But the court granted a certificate of appealability on that issue, on the theory that petitioner had at least made a substantial showing of a denial of a constitutional right. D. Ct. Doc. 359, at 1 (Oct. 27, 2021).

Finally, the district court rejected petitioner's argument that the substantive murder predicate does not qualify as a crime of violence because murder under New York law may be committed by an act of omission. Pet. App. A24. The court recognized that binding circuit precedent foreclosed that argument by holding that "an 'omission' is in fact viewed as an 'action sufficient to support criminal culpability.'" Id. at A25 (quoting United States v. Scott, 990 F.3d 94, 114 (2d Cir. 2021) (en banc)). The court declined to grant petitioner a certificate of appealability on that issue. See D. Ct. Doc. 359, at 1.

4. The court of appeals affirmed. Pet. App. A1-A17. The court found "no risk" that that the jury had concluded that petitioner was guilty of the Section 924(c) offense based solely on the conspiracy to murder Santiago, given the jury's finding that petitioner had committed the substantive murder as well as the conspiracy offense. Id. at A11; see id. at A13. The court also rejected petitioner's contention that the jury instruction on Pinkerton liability rendered his Section 924(c) conviction invalid. Id. at A13-A16. The court explained that because Pinkerton recognizes a defendant's liability for the acts of his

coconspirators, the defendant "has committed a crime of violence if the substantive offense is a crime of violence." Id. at A14. The court also observed that "every circuit to address the issue has held that Pinkerton liability for a crime of violence can support a § 924(c) conviction," and the court agreed with those other circuits. Ibid.; see id. at A14-A15. The court thus determined that, even if the jury found petitioner guilty of Santiago's murder based on Pinkerton, petitioner's Section 924(c) conviction remains valid because the jury necessarily found that petitioner committed each element of the substantive murder offense, a crime of violence under Section 924(c). Id. at A16.

ARGUMENT

Petitioner contends (Pet. 11-13) that the court of appeals erred in determining that his conviction under 18 U.S.C. 924(c) rests on the predicate offense of substantive murder. Petitioner further contends (Pet. 13-18) that the district court erred in instructing the jury that it could look to principles of coconspirator liability in finding him guilty of that Section 924(c) offense. The court of appeals correctly rejected those contentions and its decision does not conflict with the decision of any other court of appeals. Petitioner additionally contends (Pet. 18-27) that this Court should overrule Pinkerton v. United States, 328 U.S. 640 (1946), but he provides no sound reason for

this Court to revisit that decision. The petition for a writ of certiorari should be denied.

1. The lower courts correctly determined that petitioner's Section 924(c) conviction rests on the valid predicate offense of substantive murder. The jury instructions allowed the jury to find petitioner guilty of that Section 924(c) offense based on either of two predicate crimes of violence: a conspiracy to murder Santiago and the substantive murder of Santiago. Pet. App. A5. The jury's verdict on the racketeering offense then indicated that it found petitioner guilty of both predicates. And although the conspiracy offense no longer qualifies as a predicate crime of violence following this Court's decision in United States v. Davis, 588 U.S. 445 (2019), petitioner does not dispute that the substantive murder offense is a "lawful predicate" for purposes of Section 924(c). Pet. 13. Petitioner's Section 924(c) conviction therefore remains valid.

Petitioner errs in suggesting (Pet. 11-13) that it is reasonably likely the jury based the Section 924(c) conviction only on the conspiracy offense. Because the jury instructions permitted conviction on alternative theories of guilt, one of which is legally invalid, the error is subject to harmless-error review. Skilling v. United States, 561 U.S. 358, 414 (2010); Hedgpeth v. Pulido, 555 U.S. 57, 60-62 (2008) (per curiam); see Fed. R. Crim. P. 52(a). Here, the court of appeals correctly found "no risk"

that the jury found petitioner guilty on the Section 924(c) count based only on the invalid conspiracy offense, and not on the substantive murder offense. Pet. App. A11; see id. at A13.[2] As the court explained, the jury's verdict on the racketeering count "indicat[ed] that it found that both the murder of and the conspiracy to murder Santiago had been proven beyond a reasonable doubt." Id. at A13. And as the district court observed, in light of the jury's finding that petitioner was guilty of Santiago's substantive murder, "the notion that [his] conviction under section 924(c) was predicated only on a conspiracy to murder but not on his role in committing the same murder is absurd." Id. at A21 (brackets and citation omitted).

In any event, petitioner's factbound challenge to the uniform determination of the lower courts would not warrant this Court's review, see Sup. Ct. R. 10. This Court "do[es] not grant a

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[2] Petitioner suggests (Pet. 12) that the court of appeals applied the wrong legal standard in stating that "there is no 'reasonable probability' that the jury based the § 924(c) conviction only on the conspiracy," Pet. App. A13, rather than determining whether the flaw in the instructions had a "substantial and injurious effect," Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (citation omitted). But even if there is a meaningful distinction between those standards, the court of appeals here found "no risk that the § 924(c) conviction was based on an impermissible predicate," Pet App. A11, and stated that it was "'confident that the jury would have convicted' even if it had been instructed that the § 924(c) conviction could be based only on the murder," id. at A13 (citation omitted). Those conclusions plainly indicate that the court saw no "substantial and injurious effect" based on the jury instructions. Brecht, 507 U.S. at 623 (citation omitted).

certiorari to review evidence and discuss specific facts," United States v. Johnston, 268 U.S. 220, 227 (1925), particularly "when [the] district court and court of appeals are in agreement as to what conclusion the record requires." Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

2. The court of appeals also correctly rejected petitioner's contention (Pet. 13-17) that his Section 924(c) conviction is infirm because the district court's instructions allowed the jury to apply the principles described in Pinkerton.

a. In Pinkerton, the Court held that in a criminal conspiracy, "acts in furtherance of the conspiracy" are "attributable" to coconspirators "for the purpose of holding them responsible for the substantive offense." 328 U.S. at 647; see ibid. ("[W]hen the substantive offense is committed by one of the conspirators in furtherance of the unlawful project," "all members are responsible."). The district court's instructions here faithfully applied Pinkerton. The court instructed the jury that, if it found that petitioner was a member of the conspiracy to murder Santiago, petitioner could be liable for the substantive murder and the related Section 924(c) offense based on a coconspirator theory of liability, if a member of the conspiracy committed the substantive crime "pursuant to the common plan and understanding found to exist among the conspirators" and if

petitioner "could have reasonably foreseen" that a coconspirator might have committed the substantive crime. C.A. Supp. App. 50; see id. at 49-50.

Petitioner errs in contending (Pet. 15-17) that the district court's Pinkerton instruction calls his Section 924(c) conviction into question. That contention incorrectly conflates the concept of a crime that is itself a conspiracy offense with the concept of a substantive crime established through Pinkerton. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." Iannelli v. United States, 420 U.S. 770, 777 (1975). A conspiracy offense is distinct from the substantive offense that is the object of the agreement and may therefore "be punished whether or not the substantive crime ensues." Salinas v. United States, 522 U.S. 52, 65 (1997); see Pinkerton, 328 U.S. at 643 ("It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."). Coconspirator liability under Pinkerton, in contrast, is a means of holding defendants "responsible for [a] substantive offense" committed by their coconspirators in furtherance of a conspiracy. Pinkerton, 328 U.S. at 647 (emphasis added); see id. at 645 (explaining that whether a defendant is liable for a conspiracy and whether he is liable for "the commission of * * * substantive offenses" that

occur in the course of that conspiracy are distinct questions); Nye & Nissen v. United States, 336 U.S. 613, 618 (1949) (same).

Following Davis, a conspiracy offense itself -- to the extent that it requires only an agreement -- generally would not qualify as a crime of violence, because its commission would not necessarily require the use, attempted use, or threatened use of physical force within the meaning of Section 924(c)(3)(A). See, e.g., United States v. Barrett, 937 F.3d 126, 129-130 (2d Cir. 2019) (concluding that conspiracy to commit Hobbs Act robbery is not a crime of violence following Davis). But a substantive offense committed in furtherance of a conspiracy, whether or not premised on Pinkerton liability, has its own set of elements, which may satisfy Section 924(c)(3)(A)'s elements clause even if a conspiracy offense does not. Accordingly, every court of appeals to consider the question -- before and after Davis -- has determined that ordinary principles of accomplice liability, including coconspirator liability under Pinkerton, apply to Section 924(c) offenses.[3] Petitioner identifies no court that has adopted his contrary view.

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[3] See, e.g., United States v. Stevens, 70 F.4th 653, 661-663 (3d Cir. 2023); United States v. Khatallah, 41 F.4th 608, 635 (D.C. Cir. 2022) (per curiam), cert. denied, 143 S. Ct. 2667 (2023); United States v. Gillespie, 27 F.4th 934, 941-944 (4th Cir.), cert. denied 143 S. Ct. 164 (2022); United States v. Woods, 14 F.4th 544, 552-554 (6th Cir. 2021), cert. denied 142 S. Ct. 910 (2022); United States v. Henry, 984 F.3d 1343, 1355-1356 (9th Cir.), cert. denied, 142 S. Ct. 376 (2021); United States v. Hernández-Román, 981 F.3d 138, 145 (1st Cir. 2020); United States

Petitioner briefly asserts (Pet. i, 17-18) that this Court's decision in Rosemond v. United States, 572 U.S. 65 (2014), supports the conclusion that coconspirator liability under Pinkerton does not apply to Section 924(c) offenses. That is incorrect. "Rosemond dealt with the aiding and abetting theory of liability for Section 924(c), not with the Pinkerton co-conspirator theory of liability." United States v. Edmond, 815 F.3d 1032, 1047 (6th Cir. 2016), cert. denied, 580 U.S. 1047 (2017), vacated on other grounds, 137 S. Ct. 1577 (2017). And in so doing, Rosemond neither addressed nor altered the Pinkerton framework. "The two theories are distinct," Edmond, 815 F.3d at 1047, such that either may independently support a conviction for violating Section 924(c). See, e.g., United States v. Hare, 820 F.3d 93, 104-105 (4th Cir. 2016); United States v. Adams, 789 F.3d 713, 714-715 (7th Cir. 2015). And to the extent that petitioner attempts (Pet. 17-18) to portray Pinkerton as an end-around to the principles of accomplice liability discussed in Rosemond, he disregards Pinkerton's threshold requirements of proof of a deliberate agreement to engage in criminal activity, and the foreseeable commission of an offense

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v. Portillo, 969 F.3d 144, 166 (5th Cir. 2020), cert. denied, 141 S. Ct. 1275 (2021); United States v. McGill, 815 F.3d 846, 944 (D.C. Cir. 2016) (per curiam), cert. denied, 583 U.S. 829 (2017), United States v. Fonseca-Caro, 114 F.3d 906, 907-908 (9th Cir. 1997) (per curiam), cert. denied, 522 U.S. 1097 (1998); United States v. Myers, 102 F.3d 227, 237-238 (6th Cir. 1996), cert. denied, 520 U.S. 1223 (1997); United States v. Masotto, 73 F.3d 1233, 1239-1240 (2d Cir.), cert. denied, 519 U.S. 810 (1996).

in furtherance of that unlawful agreement. See Pinkerton, 328 U.S. at 646-648.

b. Nor is certiorari warranted to review petitioner's contention (Pet. 18-27) that this Court should overrule Pinkerton.

Petitioner contends (Pet. 19-20) that Pinkerton conflicts with this Court's decision in United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812), and other cases establishing that "the federal courts have no authority to create liability where Congress has not done so." Pet. 19; see, e.g., Hudson & Goodwin, 11 U.S. (7 Cranch) at 34 (holding that only Congress can "make an act a crime[and] affix a punishment to it"). But courts do not "create" criminal offenses under Pinkerton; instead, Pinkerton recognized that, pursuant to traditional principles of vicarious liability, a defendant can be liable for a substantive offense committed by a coconspirator in furtherance of the conspiracy. See Pinkerton, 328 U.S. at 645-648; see also, e.g., Gillespie, 27 F.4th at 941 ("The principle underlying the Pinkerton doctrine is that conspirators are each other's agents; and a principal is bound by the acts of his agents within the scope of the agency.") (citations omitted); United States v. Carter, 19 F.4th 520, 523 (1st Cir. 2021) (describing Pinkerton as a "vicarious liability theor[y]"); United States v. Newman, 755 F.3d 543, 545 (7th Cir.) ("Agency is what supports mutual culpability" under Pinkerton.), cert. denied, 574 U.S. 967 (2014); United States v. Cherry, 217

F.3d 811, 819 (10th Cir. 2000) ("Under a Pinkerton theory, agency is inferred if an act is within the scope of the conspiracy, thereby resulting in the co-conspirator's individual liability under the substantive criminal law.").

Furthermore, petitioner provides no special justification for revisiting Pinkerton. Indeed, petitioner "fail[s] to discuss the doctrine of stare decisis or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision," Randall v. Sorrell, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment) (emphasis omitted). "Such an incomplete presentation is reason enough to refuse [petitioner's] invitation to reexamine [Pinkerton]." Ibid.

3. In the district court, petitioner had challenged the validity of the substantive murder offense as a crime of violence because it can be committed by an act of omission. See Pet. App. A24. The court rejected that claim and did not grant a certificate of appealability on that issue. See id. at A25; D. Ct. Doc. 359, at 1. Petitioner has not challenged the denial of the certificate of appealability or otherwise asserted that the substantive murder offense is not a crime of violence. See Pet. 13-14.

This Court recently granted a writ of certiorari in Delligatti v. United States, No. 23-825 (June 3, 2024), to consider whether a VICAR attempted murder charge that was premised on the commission

of attempted second-degree murder, in violation of New York law, qualifies as a crime of violence under Section 924(c)(3) when the elements of that offense can, in theory, be satisfied by an act of omission. Nevertheless, the Court need not hold this petition for Delligatti. In addition to petitioner's failure to raise the issue, petitioner is foreclosed from asserting a claim premised on the Delligatti theory in his successive Section 2255 motion because such a theory rests on a statutory claim -- the interpretation of Section 924(c)(3)'s elements clause -- and not any constitutional argument. See Jones v. Hendrix, 599 U.S. 465, 477-478 (2023) (holding that second or successive Section 2255 motions may not be based on new rules of nonconstitutional law).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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