No. _____

In the
Supreme Court of the United States

DEON REESE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For most of our Nation's history, it has been bedrock law that "it is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820) (Marshall, C.J.). But for nearly a century, *Pinkerton v. United States*, 328 U.S. 640 (1946), has marked a stark departure from that foundational rule. Under *Pinkerton*, an individual may be convicted of crimes he did not commit—or even participate in—so long as they are the foreseeable result of a conspiracy he joined. That is not because Congress, or even the common law, embraced that dubious form of vicarious liability. It is because this Court invented it out of whole cloth in *Pinkerton*. Yet *Pinkerton* continues to be the law today—and federal prosecutors continue to take full advantage of it. This is a case in point. The government charged and tried petitioner on the theory that he used a firearm to commit a robbery and shoot the victim. Yet *Pinkerton* enabled the government to convict him of those crimes even though the jury plainly rejected that theory and concluded that it was an alleged co-conspirator, not petitioner, who committed the crimes. In other words, petitioner has been deprived of his liberty not for engaging in conduct that violates a statute in the U.S. Code, but via a guilt-by-association theory manufactured by this Court.

The question presented is:

Whether this Court should overrule *Pinkerton v. United States*, 328 U.S. 640 (1946).

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 14.1(b)(i), petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

Petitioner Deon Reese was the defendant in the district court and appellant below.

Respondent United States of America was the plaintiff in the district court and appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the U.S. District Court for the Western District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit:

United States v. Deon Reese, No. 2:08-cr-00016-NR-1 (W.D. Pa.) (July 12, 2023);

United States v. Deon Reese, No. 2:19-cr-00257-NR-1 (W.D. Pa.) (July 12, 2023);

United States v. Deon Reese, No. 23-2291 (3d Cir.) (Jan. 28, 2025);

United States v. Deon Reese, No. 23-2292 (3d Cir.) (Jan. 28, 2025).

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PETITION FOR WRIT OF CERTIORARI

From early in our Nation's history, this Court has made clear that an individual cannot be convicted of a federal crime that is not found in any of the statutes duly enacted by Congress. Indeed, the Court foreclosed the notion of federal common-law crimes all the way back in *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). As it explained, before a party can be subject to punishment, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Id.* at 34. That rule follows from both separation-of-powers and due-process principles. Courts are not vested with freewheeling authority to dictate what conduct is criminal. That is the responsibility of duly elected representatives who can be held accountable by the electoral process. The judiciary impermissibly trespasses on the authority of the co-equal legislative branch when it defines crimes of its own and deprives individuals of their liberty for running afoul of those statutorily unmoored prohibitions. And judge-made crimes not only stymie the public's ability to check legislative excesses, but deprive the people of fair notice of the legal rules around which they must order their lives. Courts have thus long refused to don the mantle of the legislature and instead have simply enforced the criminal prohibitions Congress enacted.

That was the rule governing federal criminal law in this country for more than a century and a half. And one would have thought that a foundational principle with such a storied historical pedigree would be unassailable. Yet the Court inexplicably broke

sharply from that bedrock rule in *Pinkerton v. United States*, 328 U.S. 640 (1946), where it arrogated to itself the power to create a new theory of criminal liability. According to *Pinkerton*, anyone who enters into a conspiracy can be held liable not just for the distinct crime of conspiracy, but for any foreseeable crime committed by a co-conspirator—even if the defendant was not involved in that underlying crime at all. That novel theory of secondary liability found no support in any statute at the time, or even in the common law. To the contrary, both Congress and the common law have always reserved secondary liability for those who actively encourage and facilitate the crimes of others by aiding and abetting them. Indeed, to this day, one could canvas the U.S. Code in search of a source for *Pinkerton*'s rule and never find it. *Pinkerton* simply crafted a form of vicarious liability out of whole cloth.

Pinkerton was egregiously wrong the day it was decided, as the dissenting Justices—and Justice Jackson, as soon as he returned from Nuremberg—recognized. And it has not gotten any better with age. Not only does *Pinkerton* foster deprivations of liberty for a crime that the legislature has never recognized, let alone provided clear notice of; its continued existence distorts limits on the crimes Congress *has* recognized by paving a path for the government to circumvent them and get two bites at the apple. That result is all the more untenable when recent decisions from this Court have universally reaffirmed the importance of the rule that Congress must both define crimes and define them with requisite clarity. Indeed, those principles have repeatedly led this Court to reject theories of liability that at least purport to be

grounded in a federal statute—something that cannot be said for *Pinkerton* liability.

It is high time for the Court to revisit *Pinkerton*, and this is an excellent vehicle to do so. Petitioner preserved his objections to *Pinkerton* both in the district court and on appeal, and the jury's verdict and the proceedings and evidence surrounding it leave no doubt that *Pinkerton* was the basis for his substantive convictions. The Court should take this opportunity to retire this indefensible, extra-statutory theory of liability and reaffirm what the founding generation thought "ha[d] been long … settled in public opinion": Congress alone has the power to define criminal liability and ascribe the corresponding punishment. *Hudson*, 11 U.S. (7 Cranch) at 32.

OPINIONS BELOW

The Third Circuit's opinion is reported at 2025 WL 314103 and reproduced at App.1-5. The district court's decision denying Reese's objection to the proposed *Pinkerton* instruction is not reported but is reproduced at App.18-20.

JURISDICTION

The Third Circuit issued its opinion on January 28, 2025. Justice Alito extended the deadline to file a petition for writ of certiorari to and including June 27, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, §1 and Article III, §§1-2 of the United States Constitution are reproduced at App.48. The Fifth Amendment to the United States Constitution is

reproduced at App.49. 18 U.S.C. §§2, 371, 922(g)(1), 924(c), 1951 are reproduced at App.49-55.

STATEMENT OF THE CASE

A. Legal Background

1. In its seminal decision in *United v. Hudson*, this Court made clear that "all exercise of criminal jurisdiction in common law cases" is beyond the scope of the federal courts under the Constitution. 11 U.S. (7 Cranch) at 34. There, the Court was called on to decide whether federal courts have common-law authority to adjudicate criminal charges untethered to any statutory enactment. *Id.* at 32. The Court emphatically and unanimously said no.

As the Court explained, the issue "ha[d] been long since settled in public opinion," and "[i]n no other case for many years ha[d] th[at] jurisdiction been asserted." *Id.* The reason for that universally accepted practice was "simple, obvious, and admit[ted] of but little illustration." *Id.* at 33. In an early exposition of federalism and separation-of-powers principles, the Court explained that the federal government's powers are limited by the Constitution, and that the power to exercise criminal jurisdiction in common law cases is not among the powers assigned to the judiciary. *Id.* With the exception of a narrow universe of "implied powers [that] must necessarily result to our courts of justice from the nature of their institution," federal courts "possess no jurisdiction but what is given them by the power that creates them"—*i.e.*, Congress. *Id.* at 33-34. And in the criminal context, that means that "[t]he legislative authority of the Union must first make an act a crime, affix a

punishment to it, and declare the Court that shall have jurisdiction of the offence." *Id.* at 34.

Hudson remained the governing rule for the next 130 years. *E.g.*, *United States v. Hall*, 98 U.S. 343 (1878); *United States v. Coolidge*, 14 U.S. (1 Wheat) 415 (1816). The Court repeatedly reaffirmed its reasoning, even in cases involving the interpretation of statutes Congress had in fact enacted. *See United States v. Britton*, 108 U.S. 199, 205-06 (1883). As the Court made clear, it naturally followed from the fact that the judiciary lacks freewheeling authority to define crimes that the judiciary likewise lacks authority to revise Congress' handiwork by forcing upon statutes constructions that they do not admit. To do so "would be [to] make a new law, not to enforce an old one," which "is no part of [the judicial] duty." *United States v. Reese*, 92 U.S. 214, 221 (1875). In short, "it is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820) (Marshall, C.J.). That principle continues to drive major decisions in federal criminal law to this day, as the Court has repeatedly rejected government efforts to exact punishments under vague laws that would otherwise impermissibly empower courts to usurp the legislature's role to craft the criminal code. *See, e.g.*, *United States v. Davis*, 588 U.S. 445 (2019).

2. While that bedrock principle has carried the day for most of the Court's history, *Pinkerton* stands as one of the rare exceptions. *Pinkerton* arose out of the conviction of two brothers—known scofflaws who had previously violated several liquor laws—for tax evasion in connection with their liquor business. 328

U.S. at 641; *id.* at 648 (Rutledge, J., dissenting in part); *see Pinkerton v. United States*, 151 F.2d 499, 500 (5th Cir. 1945). Both had been convicted of and sentenced for tax-evasion violations, as well as a single conspiracy count for conspiring to have committed those offenses. *Pinkerton*, 328 U.S. at 641. Yet the government had adduced "no evidence to show that Daniel [Pinkerton] participated directly in the commission of the substantive offenses on which his conviction ha[d] been sustained." *Id.* at 645. And "Daniel in fact was in the penitentiary, under sentence for other crimes, when some of Walter's crimes were done." *Id.* at 648 (Rutledge, J., dissenting in part). The lower court had instead sustained Daniel's *underlying substantive* convictions based solely on his participation in the conspiracy—even though there was no evidence that he participated in the underlying substantive crimes.

That should have posed an insurmountable obstacle to affirming the tax-evasion violations, for Congress at the time had "separately defined the three classes of crime": the substantive offense, aiding and abetting an offense, and conspiracy to do the same. *Id.* at 649 (Rutledge, J., dissenting in part) (citing provisions later moved to 18 U.S.C. §§2, 371). And while Congress expressly rendered those who aid and abet a crime liable as if they were the principal, it conspicuously did not take that approach toward the distinct crime of conspiracy. *See id.* To hold Daniel liable for *both* conspiracy *and* the substantive offenses based solely on his participation in the conspiracy thus would "violate[] both the letter and the spirit of what Congress did." *Id.* Yet that is precisely what the Court proceeded to do, holding that "evidence of direct

participation in the commission of the substantive offense" is unnecessary because "the overt act of one partner in crime is attributable to all." *Id.* at 646-47 (majority opinion).

The Court's new in-for-a-penny theory of criminal lability prompted a vigorous dissent from Justice Rutledge, joined in relevant part by Justice Frankfurter. As they explained, as a matter of both statutory law and the common law, each category of criminal law had long been treated as distinct. "The gist of conspiracy is the agreement; that of aiding, abetting or counseling is in consciously advising or assisting another to commit particular offenses, and thus becoming a party to them; that of substanti[v]e crime, going a step beyond mere aiding, abetting, counseling to completion of the offense." *Id.* at 649 (Rutledge, J., dissenting in part). Since, "[a]s to Daniel," there "was only evidence of conspiracy, not of substantive crime," he could not be held liable for the substantive offenses committed by his brother. *Id.* at 651. The dissent found the Court's contrary holding a "dangerous" innovation at odds with the principle that "[g]uilt" in the "criminal field … remains personal, not vicarious." *Id.*

Justice Frankfurter echoed those criticisms in another case three short years later, where he reaffirmed that "[c]larity as to the ground on which a criminal conviction is sustained is indispensable to Anglo-American notions of criminal justice," and lamented *Pinkerton*'s use of conspiracy as "a device to establish guilt, not on the basis of personal responsibility, but by association." *Nye & Nissen v. United States*, 336 U.S. 613, 625-26 (1949)

(Frankfurter, J., dissenting). Justice Jackson, who did not participate in *Pinkerton* due to his role in the Nuremberg trials, similarly denounced the decision as employing a "novel and dubious theory" of criminal law. *Krulewitch v. United States*, 336 U.S. 440, 451 (1949) (Jackson, J., concurring). As he aptly observed, *Pinkerton* amounted to a kind of "implied crime[]"—i.e., the Court having "either add[ed] a new crime or extend[ed] an old one"—that contravened the "well and wisely settled [rule] that there can be no judge-made offenses against the United States and that every federal prosecution must be sustained by statutory authority." *Id.* at 456-57.

Nevertheless, *Pinkerton* has persisted as a standalone theory of substantive liability to this day. The upshot is that the government has *carte blanche* to convict a defendant of foreseeable criminal offenses committed by co-conspirators even if the defendant "did no more than join the conspiracy," *Nye & Nissen*, 336 U.S. at 618—even though neither Congress nor the common law ever recognized that form of, what is effectively, vicarious criminal liability.

B. Factual Background

As this case vividly illustrates, the government continues to take full advantage of the judge-made form of vicarious liability that *Pinkerton* created.

1. On March 23, 2017, two unidentified men in ski masks, one armed with a gun, robbed the home of a Pittsburgh drug dealer named Jaymein Fossett-Washington. CA3.Appx.380-81, 482-83. The gunman, who directed the operation, demanded that Washington identify where he kept his stash of cocaine, personally "removed the cocaine," and

proceeded to shoot Washington after they got into an argument over whether there was more contraband in the home. CA3.Appx.482-85. During the ensuing struggle, Washington purportedly bit the gunman and saw a tattoo on his hand, CA3.Appx.485-86—a detail that Washington added to his narrative for the first time months after the shooting, CA3.Appx.710-14.[1] Washington also reported that the shooter's mask had fallen off during the struggle—an assertion he initially walked back, but then more or less reaffirmed while testifying at trial. CA3.Appx.28, 510-11. After the robbers departed, the police arrived and, finding Washington lying outside his home, rushed him to the hospital, where he survived. CA3.Appx.381, 385-86. Inside the apartment, the police collected a fired bullet, shell casings, and a black ski mask consistent with the one that Washington believed had fallen off the shooter. CA3.Appx.398. Forensic testing later revealed that the mask that the police recovered contained DNA of an unidentified male who was not Reese. CA3.Appx.635-36.

While Washington recuperated, he claims he was visited by a woman, Zaire Mauro, who had stayed with him the night before the robbery and was there when the robbers arrived but left after the gunman directed her to do so. CA3.Appx.477-78, 482-84, 493. Mauro purportedly told Washington that she conspired with Reese to take Washington's drugs. CA3.Appx.493-95. Washington claimed that she showed him Reese's photo, and that Washington identified him as the

[1] Other aspects of Washington's story also changed over time—*e.g.*, the stolen drugs did not appear until two years after the shooting. CA3.Appx.700-07; *cf.* CA3.Appx.28.

shooter because Reese's tattoos supposedly matched Washington's (late-breaking) recollection of the shooter's. CA3.Appx.493-94. Mauro later went to Washington's apartment and collected several belongings in a bag that she gave to Washington's aunt. CA3.Appx.462-63. When he eventually looked through those effects, Washington discovered a cellphone that was later traced to Reese. CA3.Appx.491-92, 536-39. On the phone, police found several text exchanges between Mauro and the phone's user—who the government claimed, based on other evidence, must have been Reese, CA3.Appx.660-64. *See* CA3.Appx.411-16. Those texts revealed that Mauro had orchestrated the robbery and had given the robbers access to the home. CA3.Appx.412-14.

2. In light of the messages on the cellphone and Washington's identification of Reese as the shooter after Mauro's visit to the hospital, CA3.Appx.28, the police homed in on Reese as the suspected shooter. CA3.Appx.28, 644-45. Reese was initially charged by state authorities, *see* CA3.Appx.28, but a federal grand jury indicted him on charges of Hobbs Act robbery in violation of 18 U.S.C. §1951 (Count 1); conspiracy to commit Hobbs Act robbery (Count 2); discharge of a firearm in relation to a crime of violence in violation of 18 U.S.C. §924(c)(1)(A)(iii) (Count 3); and possession of ammunition after having been convicted of a felony in violation of 18 U.S.C. §922(g)(1) (Count 4). App.6-10.

Reese's case proceeded to trial. At a pre-trial conference, the government asked the district court to instruct the jury on *Pinkerton* liability as an alternate basis for finding Reese guilty of the §924(c) count, even

if he was not the gunman. CA3.Appx.70-72. Reese objected, arguing that to do so would violate the separation of powers and his due process rights. CA3.Appx.73-74. But the court overruled his objection as foreclosed by precedent. App.18-20. Accordingly, the court instructed the jurors that they could convict Reese under §924(c) either if they concluded that he was the gunman (as the government argued in closing, *see* CA3.Appx.879) or if they concluded that he had merely conspired with the gunman. App.21-23.

Several hours into deliberations, the jury posed three questions to the court regarding the Hobbs Act robbery charge. App.24-25. Relevant here, the jury asked: "If a co-conspirator took the drugs, is Reese also liable for the conspirators' actions? (Hobbs Act Robbery)." App.25. The court convened with the parties to discuss how the respond, and the government argued that the court should inform the jury that Reese could be convicted based on a co-conspirator's actions under *Pinkerton*. App.38-41.[2] Reese pressed his objections to *Pinkerton* liability once again, but acknowledged that they were foreclosed by precedent. App.31-32. Relying on *Pinkerton*, the court ultimately responded to the question by instructing the jury that it could indeed hold Reese liable for the Hobbs Act charge based solely on his co-conspirator's actions. App.27.

3. The jury convicted Reese on three of the four counts, finding him guilty of both the substantive and

[2] The government also urged the court to inform the jury that it could convict Reese under aiding-and-abetting liability—even though it had never before raised that argument. App.30-31. The court (correctly) rejected that late-breaking request. App.41-42.

conspiracy counts related to Hobbs Act robbery, as well as the §924(c) count for use of a firearm during a crime of violence. App.43-44. But the jury notably acquitted Reese of the §922(g)(1) charge of being a felon in possession of ammunition. App.45. That result makes sense only if the jury concluded that Reese was not the shooter—a point that the district court echoed at sentencing, CA3.Appx.1068. The government likewise acknowledged in its briefing below that the §922(g) count was "the only count that required a finding that Reese himself possessed the gun, rather than a co-conspirator." CA3.Gov't.Resp.Br.12-13. And since the undisputed evidence was that *the shooter* was the one who took the drugs from Washington and then shot him, CA3.Appx.484-85, the jury's verdict made eminently clear that it found Reese guilty of the Hobbs Act charge and the §924(c) charge based solely on his co-conspirator's actions under *Pinkerton*.

The district court sentenced Reese to a total term of 271 months of imprisonment and five years of supervised release. CA3.Appx.8-9.[3] Reese appealed, D.Dkt.272, raising several grounds for reversal—including that his conviction on a *Pinkerton* theory of liability was unconstitutional, *see* CA3.Op.Br.3. The Third Circuit affirmed in a short, unpublished decision in which it rejected Reese's *Pinkerton* challenge as foreclosed by precedent, but made clear

[3] Reese was serving a term of supervised release at the time of the underlying offenses. The court's revocation of that term resulted in a separate 24-month sentence of imprisonment to run consecutive to his sentence for the robbery-related counts of conviction. CA3.Appx.3, 1072.

that he had "preserved the[] argument[] for further review." App.5.n.2.

REASONS FOR GRANTING THE PETITION

Pinkerton was egregiously wrong when it was decided, and it remains egregiously wrong today. The Court should take this opportunity to overrule it and finally put an end to the decades upon decades of unconstitutional convictions that it has blessed.

For most of our Nation's history, it has been a bedrock rule of our judicial system that Congress, not the courts, defines the criminal law. But for nearly 80 years, *Pinkerton* has stood as a marked departure from that rule. Like all federal crimes and theories of criminal liability, one would expect the guilt-by-association strand of conspiracy liability that *Pinkerton* embraced to be found in a clearly worded statute, or at least grounded in a long-settled common-law tradition. Yet one would search both the U.S. Code and the common law in vain for any support for the form of criminal liability that *Pinkerton* recognized. In fact, it is worse than that: While Congress *has* chosen to treat accomplices the same as principals when they affirmatively aid and abet the commission of a crime, it has conspicuously declined to take that approach with conspirators—a dichotomy that tracks the common law. *Pinkerton* thus not only has no grounding in federal statutory or common law, but is affirmatively refuted by both, compounding its separation-of-powers and due-process problems.

It is little surprise, then, that *Pinkerton* has been condemned by jurists and academics alike from the start. Yet to this day, it continues to empower the government to convict individuals of substantive

crimes in which they did not participate, based on little more than their agreement to participate in a conspiracy that those crimes furthered. This is a case in point. The government rested the bulk of its case on the theory that Reese himself used a firearm to commit robbery and shoot the victim. But *Pinkerton* enabled the government to convict him of those crimes even though the jury plainly rejected that theory. Perhaps that result would be permissible if it were one Congress selected (although, even then, it would come dangerously close to impermissible vicarious criminal liability). But it is owing to this Court alone that federal prosecutors may wield that extraordinary power. That state of affairs cannot be reconciled with the foundational principles of our judicial system.

The time has come for this Court to overrule *Pinkerton*, and this is a perfect vehicle to do so. Reese preserved his objection to *Pinkerton* from the start, and the doctrine played a central role in his conviction. Indeed, the trial record and the jury's verdict make eminently clear that the government could not have secured convictions for either of the substantive counts without the *Pinkerton* instruction it procured over Reese's objection. In short, the question whether *Pinkerton* should remain on the books is both clearly and cleanly presented here, and an answer is sorely needed, so that the people do not have to continue to live under the threat of an unwritten law that empowers the government to convict individuals of crimes in which they did not participate. The Court should grant certiorari and overrule *Pinkerton*.

I. The Court Should Overrule *Pinkerton*.

Pinkerton was wrong the day it was decided, and the case for overruling it has only gained strength since. Indeed, all the considerations that inform whether to revisit precedent—the nature of the error, the quality of the reasoning, consistency with subsequent decisions, workability, and reliance interests, *see, e.g.*, *Ramos v. Louisiana*, 590 U.S. 83, 106 (2020)—counsel strongly in favor of overruling it. "Few instruments of injustice can equal that of implied or presumed or constructive crimes." *Krulewitch v. United States*, 336 U.S. 440, 457-58 (1949) (Jackson, J., concurring). And the Court has a special responsibility to correct errors that involve overstepping its own constitutionally valid role—especially when it comes to rules that deprive criminal defendants of fair notice of the crimes with which they are charged.

A. *Pinkerton* Was Egregiously Wrong the Day It Was Decided.

Pinkerton was fatally flawed from the moment it was handed down. As two Justices observed in real time (and another observed shortly thereafter), the decision makes no pretense of being grounded in any federal statute, it contravenes bedrock constitutional principles, and it mangled the common-law principles on which it purported to rely. *Pinkerton*, 328 U.S. at 649-52 (Rutledge, J., dissenting in part); *accord Krulewitch*, 336 U.S. at 456-58.

1. *Pinkerton*'s most glaring defect is its disregard for Congress' statutory handiwork. When *Pinkerton* was decided, it had been common ground since the dawn of the Nation that the people's elected

representatives in Congress have sole responsibility for crafting the elements of federal criminal offenses. *Hudson*, 11 U.S. (7 Cranch) at 32. That "conclusion is simple, obvious, and admits of but little illustration," *id.*, as "hand[ing] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges[] erod[es] the people's ability to oversee the creation of the laws they are expected to abide," *Davis*, 588 U.S. at 451.

That should have made *Pinkerton* an easy case, as Congress has hardly been reticent when it came to secondary criminal liability. By the time *Pinkerton* was decided, Congress had enacted several provisions expressly delineating whether and what kind of criminal liability one person can face for the conduct of another—provisions that remain on the books today. *See supra* pp.6-8, 13. And not one of those provisions empowers the government to hold someone liable for a crime committed by someone else based on the claim that the crime was a foreseeable potential consequence of a conspiracy into which they entered. To be sure, that conduct may render someone liable for the distinct crime of entering into a conspiracy to commit a crime against the United States. But under the U.S. Code, it has never sufficed to render someone criminally liable for *other* criminal offenses committed by a co-conspirator.

Two provisions in particular (both of which predate *Pinkerton*) make that plain. First, 18 U.S.C. §2 provides that "[w]hoever ... aids, abets, counsels, commands, induces or procures" the "commission" of "an offense against the United States," or "willfully causes an act to be done which if directly performed by

him or another would be an offense against the United States," "is punishable as a principal." In other words, someone who aids and abets a crime may be held liable for the crime itself.[4] But Congress did not take the same approach toward conspirators. It instead made the act of entering into a conspiracy its *own* crime, punishable on its own terms. *See* 18 U.S.C. §371 (providing that when "two or more persons conspire … to commit any offense against the United States, … and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined … or imprisoned not more than five years"). And Congress has never enacted any provision stating that conspirators may be held liable for any crime that their co-conspirator(s) may commit in furtherance of the conspiracy. In short, when it comes to criminal conspiracy, Congress has established liability for the illicit agreement itself, but nothing more.[5]

It is little surprise, then, that *Pinkerton* did not purport to be grounded in any federal statute, let alone any statutory text. Indeed, the Court mentioned 18 U.S.C. §2's predecessor just to note that it was *not* the basis for Daniel's conviction, and it mentioned §371's predecessor just to note that it contains the same

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[4] As noted, *see supra* p.11 n.2, aiding-and-abetting liability is not on the table here, because the government did not pursue it as a theory of liability, and the district court rejected its post-evidence attempt to inject that theory into the case by instructing the jury on it.

[5] Even the conspiracy provisions Congress has enacted that carry the same penalties as the underlying substantive offenses that are the object of the illicit compact still criminalize just the conspiratorial agreement. *See* 18 U.S.C. §1956(h); 21 U.S.C. §846.

"overt act" element as the common-law "crime of conspiracy." *Pinkerton*, 328 U.S. at 645 n.6, 647. The Court never bothered to grapple with the fact that those provisions defined—expressly—all of the contours of secondary liability for federal criminal law. Instead, the Court simply fabricated its own additional theory, positing that if the "overt act" element necessary to prove conspiracy "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 purposes of holding them responsible for the substantive offense." *Id.* at 647.

Of course, the reason the latter does not follow from the former should have been obvious: The overt-act element can be supplied by a co-conspirator *because that is what Congress said in the statutory text*: When "two or more persons conspire … to commit any offense against the United States," *both* may be punished for entering into that conspiracy if "*one or more of such persons do any act to effect the object of the conspiracy*." 18 U.S.C. §371 (emphasis added). But Congress has never provided that the overt acts of one co-conspirator can be used to hold another liable for any *other* law(s) that those acts may violate—even though it *has* expressly established that one who aids and abets a crime "is punishable as a principal." 18 U.S.C. §2. *Pinkerton* thus "violates both the letter and the spirit of what Congress did when it separately defined the three classes of crime." *Pinkerton*, 328 U.S. at 649 (Ruthledge, J., dissenting). And in doing so, it likewise violates the bedrock rule that "[i]t is the legislature, not the Court, which is to define a crime,

and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat) at 95.

2. One might, perhaps, understand (though not excuse) *Pinkerton*'s unprecedented departure from that bedrock rule if the Court had at least grounded its decision in common-law principles of conspiracy. But *Pinkerton* did not even do that.

As Justice Rutledge explained in his dissent in *Pinkerton*, the common law largely tracked the same "three classes of crimes" that Congress has recognized: "The gist of conspiracy is the agreement; that of aiding, abetting or counseling is in consciously advising or assisting another to commit particular offenses, and thus becoming a party to them; that of substanti[v]e crime, going a step beyond aiding, abetting, counseling to completion of the offense." 328 U.S. at 649 (Rutledge, J., dissenting in part). Given the active and conscious involvement of an aider and abettor in bringing about the ultimate criminal act, the common law treated him the same as the principal for liability purposes—a historical practice that Congress embraced in 18 U.S.C. §2. *See* Wayne R. LaFave & Jens David Ohlin, *Criminal Law* §13.1, p.863-64, 866-67 (7th ed. 2023) [hereinafter "LaFave"].

Conspiracy, by contrast, was not concerned at common law with holding one party liable for the actions of another. Just like the approach Congress took in 18 U.SC. §371, it instead criminalized something entirely distinct: the agreement to engage in criminal activity. LaFave §12.1(a), pp.799-801. This Court itself recognized as much just a few years before *Pinkerton*, when it noted that "[a] conspiracy is not the commission of the crime which it

contemplates" but "th[e] agreement" to engage in that proscribed activity. *Braverman v. United States*, 317 U.S. 49, 53-54 (1942). In effect, then, *Pinkerton* blended two distinct common-law crimes together to construct a new one, under which conspirators can face the same substantive liability as aiders and abettors without the government having to prove that they aided and abetted the underlying crime. *See* Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 Am. U.L. Rev. 585, 587, 605-06 (2008). At absolute best, that might work as a theory of *civil* conspiracy liability. But borrowing from tort law to construct a criminal theory of liability is anathema to historical tradition. *See United States v. Peoni*, 100 F.2d 401, 402-03 (2d Cir. 1938) (Hand, J.); Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 694 (1930); *id.* at 700-01 (discussing *Rex v. Huggins*, 92 Eng. Rep. 518 (KB 1730), which represented "a clear-cut repudiation by the criminal law of the doctrine of *respondeat superior* then developing in the law of torts"); *accord United States v. Brown*, 973 F.3d 667, 700-01 (7th Cir. 2020).

Pinkerton never grappled with these principles, let alone with its divergence from the common law's express rejection of vicarious liability. Instead, its sole defense for its (mis)reading of the common law was to highlight the entrenched rule that "the overt act of one partner in crime is attributable to all" for the purposes of proving that all co-conspirators were engaged in a conspiratorial agreement. 328 U.S. at 647. But setting aside the fact that Congress expressly codified that element in 18 U.S.C. §371, the overt-act requirement is not a trigger for all manner of

substantive liability for any foreseeable end of the conspiratorial agreement. It is simply an element designed to determine whether the *actus reus* of the crime of conspiracy has occurred—i.e., that the parties moved beyond mere words. *Hyde v. United States*, 225 U.S. 347, 358-59 (1912). By converting that element into a tool for imposing distinct, extra-statutory forms of substantive liability, *Pinkerton* committed a category error. Worse still, it eroded the dividing line between civil and criminal law that Congress has consistently respected to safeguard individual liberty.

In sum, there is precious little in law, logic, history, or even the Court's opinion to support *Pinkerton*'s unprecedented expansion of conspiratorial liability—which explains why the decision has earned pervasive condemnation. *See, e.g.*, Kreit, *supra*, at 597; LaFave §13.3, p.895.

B. *Pinkerton*'s Shaky Foundations Have Been Further Eroded by Subsequent Legal Developments.

While *Pinkerton*'s uncharted detour into judge-made criminal law was indefensible from the start, subsequent developments in the Court's jurisprudence have accentuated its defects. Of course, a long and theretofore-unbroken line of precedent following *Hudson* had already made plain that it is for the legislature, not the courts, to decide what is and is not a criminal offense. *See, e.g.*, *United States v. Eaton*, 144 U.S. 677, 687 (1892); *Britton*, 108 U.S. at 205-06; *Hall*, 98 U.S. 343; *Reese*, 92 U.S. at 221; *Coolidge*, 14 U.S. (1 Wheat) 415. And *Pinkerton* had harsh critics from day one. *See, e.g.*, *Pinkerton*, 328 U.S. at 648 (Rutledge, J., dissenting in part); *Krulewitch*, 336 U.S.

at 451 (Jackson, J., concurring). But *Hudson*'s lesson that Congress alone may proscribe activity and define its punishment has taken on a particularly prominent role in recent years, as the Court has utilized that principle to overturn even those convictions that *do* purport to be grounded in a statute if the statutory text is not sufficiently clear to put the public on notice that it will be read so expansively. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 604-05, 612 (1994); *Davis*, 588 U.S. at 451; *McDonnell v. United* States, 579 U.S. 550, 576 (2016); *Marinello v. United States*, 584 U.S. 1, 6-7, 9-10 (2018). And in doing so, the Court has employed reasoning and reached results that are irreconcilable with *Pinkerton*.

Take *Davis*, for example. There, the Court held that §924(c)'s residual clause, which criminalizes the use of a firearm in connection with a crime that poses a "substantial risk" that physical force may be used, is unconstitutionally vague because it compels "courts 'to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk.'" *Davis*, 588 U.S. at 452-53. In other words, the provision violated the Due Process Clause because it put courts in the driver's seat, allowing them to dictate which conduct fell on the lawful side of the line and which did not. *Pinkerton* likewise forces courts to make ad hoc judgments about what furthers the goals of an illicit compact and was reasonably foreseeable when the defendant struck the unlawful bargain—all without requiring proof that the defendant did anything beyond agree to join the conspiracy. *See* Bruce A. Antkowiak, *The Pinkerton Problem*, 115 Penn St. L. Rev. 607, 625 (2011). If the

Court had grave doubts about the constitutionality of that kind of after-the-fact judicial innovation even when it had statutory text to work with in *Davis*, then *Pinkerton*'s textually unmoored imputation of liability should flunk due process *a fortiori*.

Rosemond v. United States, 572 U.S. 65 (2014), likewise illustrates the careful lines Congress has drawn when it comes to secondary criminal liability and how *Pinkerton* undermines them. That case addressed what the government needs to prove to convict a party of using a firearm during a drug crime in violation of 18 U.S.C. §924(c) under the federal aiding-and-abetting statute, *id.* §2. The government argued that it was enough that the defendant participated in a drug crime with knowledge that the principal was carrying a firearm. The Court disagreed, concluding that the defendant instead must have had "advance knowledge that a confederate would use or carry a gun during the crime's commission." 572 U.S. at 67. As the Court explained, to hold otherwise "would diminish too far the requirement that a defendant in a §924(c) prosecution must intend to further an armed drug deal," which "preserves the distinction between assisting the predicate drug trafficking crime and assisting the broader §924(c) offense." *Id.* at 76, 80 (emphasis omitted). And yet, under *Pinkerton*, the government can skirt the entire issue—and the statutory scheme Congress carefully crafted—by simply establishing a conspiracy to commit the drug crime and then arguing that it was foreseeable that a gun might end up being used. *See United States v. Walton*, 2021 WL 3615426, at *4 (9th Cir. Aug. 16, 2021) (Watford, J., concurring). For *Pinkerton*, foreseeability—not participation, or

even subjective knowledge—is the touchstone. *Id.*; *Davis v. United States*, 2024 WL 980637, at *3 (2d Cir. Mar. 7, 2024) (Rakoff, J., concurring).

In short, *Pinkerton* not only lacked any sound doctrinal foundation from the start, but continues to distort criminal law to this day, giving the government a path to skirt the limits Congress imposes on the crimes it *has* recognized by resorting to one it has not. And it compounds that separation-of-powers violation by sanctioning a court-made theory of criminal liability that would be hard to reconcile with principles of fair notice even if it *were* part of the U.S. Code. "The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence," *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring), and the combination of proof "of an evil-meaning mind [and] an evil-doing hand" is essential to protect the "intense individualism [that] took deep and early root in American soil," *Morissette v. United States*, 342 U.S. 246, 251-52 (1952). By departing from those bedrock principles without even a statute purporting to sanction that departure, *Pinkerton* erodes the very foundations of our justice system.

C. No Other Stare Decisis Factor Supports Maintaining This Extra-Statutory Theory of Liability.

As the foregoing illustrates, *Pinkerton* cannot be defended as a statutory or historical matter. Its creation of a theory of criminal liability unmoored from any statute departs from a proper understanding of the judiciary's role. And its divergence from historical practice is at odds with foundational principles undergirding our Nation's criminal law.

Even at common law, to be held criminally for the acts of another, one "must in some sense *promote* the[] [unlawful] venture himself, make it his own, have a stake in its outcome." *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940) (Hand, J.) (emphasis added); *accord Ruan v. United States*, 597 U.S. 450, 457 (2022). *Pinkerton*'s guilt-by-association approach has no place among these venerable principles. That likely explains why this Court has unanimously declined to expand *Pinkerton*-esque vicarious liability to the *civil* forfeiture context as divorced from both text and history. *Honeycutt v. United States*, 581 U.S. 443, 453 (2017). If the doctrine cannot withstand scrutiny in the civil context, it blinks reality to permit it to be used to deprive an individual of his liberty.

There can be little doubt, then, that the "quality of [*Pinkerton*'s] reasoning" counsels in favor of overruling it. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024). As the chorus of academic and judicial voices have made clear, *Pinkerton* has been subject to vociferous criticism for its indefensible expansion of criminal liability from the start. *See* Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 Pierce L. Rev. 1, 4 & nn.11-12 (2005); *accord Model Penal Code and Commentaries* §2.06, cmt.6, pp.307, 312 & n.42 (Am. L. Inst. 1985). And "[d]evelopments since" *Pinkerton* have further "'eroded' the decision's 'underpinnings,'" leaving "it an outlier" in federal criminal law. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 924 (2018). That much is apparent from this Court's resurgent interest in safeguarding the separation of powers against unwarranted judicially constructed doctrines that flout both statutory text and the constitutionally

defined roles for each branch of government—both in the criminal context, *see Davis*, 588 U.S. at 451, and beyond, *Loper Bright*, 603 U.S. at 411.

Pinkerton's (un)workability also weighs in favor of overruling it. It is nigh impossible to erect meaningful guardrails that protect defendants' due-process rights without any clear textual boundaries defining the scope of criminal liability. Lived experience bears this out. This Court refused to apply *Pinkerton* three years after it was decided, *Nye & Nissen*, 336 U.S. at 619-20, even though the government and lower court had believed that the doctrine supplied the sole basis for defending the jury's verdict, *id.* at 621 (Frankfurter, J., dissenting), and even though the dissenters had attempted to place meaningful limits on its scope, *id.*; *id.* at 628 (Murphy, J., dissenting). And, as noted, the Court refused to extend *Pinkerton* even to the civil forfeiture context. *See Honeycutt*, 581 U.S. at 453-54.

All the while, lower courts remain bound by that anomalous decision—even as some have endeavored to constrain it. For example, several courts have adopted a *de minimis* exception to the doctrine. *See* Kreit, *supra*, at 587; *cf.* LaFave §13.3(a), p.895 (noting that some state statutes require "more than mere membership in a conspiracy" for liability to attach). But exactly how much involvement is too little to satisfy due process is anyone's guess—meaning that this exception still leaves application of *Pinkerton* to the whim of prosecutors and judges who have no business making ad hoc and post hoc determinations as to what conduct constitutes a federal crime. *Davis*, 588 U.S. at 451; *see United States v. Williams*, 553 U.S. 285, 304 (2008). As one critic has aptly put,

"courts have nervously and clumsily layered additional limits," confirming "the courts seem to sense that there is a bigger problem but just cannot figure out … how to deal with it." Antkowiak, *supra*, at 617. In reality, the solution is clear: As *Pinkerton* is this Court's mistake, it falls to this Court to fix it.

Doing so would not interfere with any substantial—let alone, *valid*—reliance interests. *See Ramos*, 590 U.S. at 107-08. The government has no legitimate interest in continuing to deprive individuals of their liberty based on a decision that defies both the Constitution and the common law. *See United States v. Gaudin*, 515 U.S. 506, 521 (1995). In fact, "[r]ather than safeguarding reliance interests, [*Pinkerton*] affirmatively destroys them," as it introduces "an eternal fog of uncertainty" over whether certain actions will trigger criminal liability. *Loper Bright*, 603 U.S. at 410-11. And sans objective, textual guidance about the line dividing legality from illegality, the public has no serious hope of being able to order their lives accordingly. The overwhelming weight of the *stare decisis* factors thus make clear that *Pinkerton*'s days should be numbered.

* * *

In short, there is little to commend *Pinkerton* save its age. And there is no "adverse possession" when it comes to constitutional violations. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 779 (2007) (Thomas, J., concurring). It is high time for the Court to join the chorus of voices who have long recognized *Pinkerton*'s dearth of statutory, historical, or constitutional moorings and close the books on this unfortunate chapter in the Court's history for good.

II. The Question Presented Is Exceptionally Important, And This Is An Ideal Vehicle To Address It.

For all the reasons already discussed, whether to overrule *Pinkerton* is a question of exceptional importance. As Chief Justice Marshall put it more than two centuries ago, "the tenderness of the law for the rights of individuals" and "the plain principle that the power of punishment is vested in the legislative, not in the judicial department" compel the conclusion that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat) at 95. And because undefined, unenacted rules buried in judicial decision-making deprive people of the "clarity as to the ground on which a criminal conviction is sustained [that] is indispensable to Anglo-American notions of criminal justice," *Nye & Nissen*, 336 U.S. at 625 (Frankfurter, J., dissenting), "[f]ew instruments of injustice can equal that of implied or presumed or constructive crimes," *Krulewitch*, 336 U.S. at 457-58 (Jackson, J., concurring). Yet as this case confirms, *Pinkerton* continues to be used to this day to deprive individuals of their liberty in violation of the Constitution.

This is an ideal vehicle in which to bring the perpetuation of that injustice to an end. The case is on direct appeal, and the issue was both plainly preserved and plainly dispositive in the proceedings below. From the moment that the government proposed instructing the jury that he could be found guilty of the substantive counts under *Pinkerton*, Reese objected that he could not be held criminally liable for the actions of his alleged co-conspirator

consistent with the Constitution. App.18-20. The Third Circuit thus made a point of noting that Reese had clearly preserved his challenge to *Pinkerton* for this Court's review. App.5.n.2.

It is equally clear that the *Pinkerton* instruction was anything but harmless, as the jury almost certainly convicted Reese of the substantive charges based on the actions of a co-conspirator. As explained, both the charges in the indictment and the government's case centered on the theory that Reese was the gunman, which, per Washington's testimony, also would have made him the person who took the drugs. CA3.Appx.482-85. But the jury did not buy that theory.[6] The jury specifically asked the court whether it could find Reese guilty of the Hobbs Act charge even if a co-conspirator committed the robbery—an inquiry that makes sense only if the jurors were skeptical that Reese was the shooter. App.25. The jury proceeded to convict Reese on everything but the §922(g)(1) count—which, as the government admitted below, was "the only count that required a finding that Reese himself possessed the gun, rather than a co-conspirator." CA3.Gov't.Resp.Br.12-13. And the sole theory on which the jury could have convicted Reese of the substantive offenses is *Pinkerton* liability, as this is the relatively rare conspiracy case in which the jury was not instructed on aiding-and-abetting liability (because the government did not pursue an aiding-and-abetting theory until far too late in the day).

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[6] Nor did the district court judge. *See* CA3.Appx.1068.

While that alone suffices to refute any suggestion that the *Pinkerton* instruction (and reinstruction) was harmless error, the jury's skepticism is unsurprising given the evidence. The DNA evidence adduced at trial showed that the ski mask found at the crime scene did not have Reese's DNA on it, CA3.Appx.635-36—even though Washington, the sole eyewitness the government proffered, initially reported (and appeared to maintain at trial) that it was the *shooter*'s mask that fell off during the struggle, CA3.Appx.28, 510-11. The jury therefore had every reason to doubt that Reese was the shooter and, by implication, the individual who actually committed the robbery, as the evidence simply did not support that theory.

Given the verdict, the interactions that preceded, and the evidence underlying it, this Court would be hard pressed to find a better vehicle for revisiting *Pinkerton*. The Court should grant certiorari, overrule *Pinkerton*, and finally put an end to an atextual and ahistorical theory of criminal conspiracy that is "fundamentally and irreconcilably at war with our presumption of innocence." *Krulewitch*, 336 U.S. at 457 (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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June 27, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 23-2291 & 23-2292

UNITED STATES OF AMERICA,

Appellee,

v.

DEON REESE, aka Dion Reese, aka Devon Lining,
aka Robert Washington,

Appellant.

Submitted: Jan. 21, 2025
Filed: Jan. 28, 2025

Before: Hardiman, McKee, and Ambro,
Circuit Judges.

OPINION*

HARDIMAN, *Circuit Judge*.

Deon Reese appeals his judgment of conviction and sentence after a jury convicted him of robbery and firearm offenses. He also appeals the District Court's

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

judgment revoking his supervised release based on those convictions. We will affirm.

I.

While on supervised release for a firearm conviction, Reese was charged with four counts: (I) Hobbs Act robbery, 18 U.S.C. § 1951; (II) conspiracy to commit Hobbs Act robbery, *id.* § 1951; (III) possessing and discharging a firearm in furtherance of a crime of violence, *id.* § 924(c)(1)(A)(iii); and (IV) possession of ammunition as a felon, *id.* § 922(g)(1).

Before trial, the District Court explained to the parties how it would conduct voir dire. Prospective jurors would complete a written questionnaire and answer preliminary questions posed by the Court as a group in the courtroom. Those who answered "yes" to any question or who had information on their questionnaire that "warrant[ed] some additional explanation" would be asked to go to a conference room for individual follow-up questioning by the Court and counsel. App. 57. Neither party objected to the jury selection process.

The case was tried over four days, and after more than three hours of deliberation, the jury sent the Court three notes asking about the elements of Hobbs Act robbery. The Court responded by issuing written supplemental instructions to the jury. The Court did so after Reese's counsel said that he was "certainly fine with" that approach. App. 979.

The jury convicted Reese of Counts I, II, and III but acquitted him on Count IV. The District Court sentenced him to 271 months' imprisonment and five years' supervised release. The District Court revoked

his supervised release on the earlier firearm conviction and sentenced him to 24 months' imprisonment to be served consecutive to the sentence for the new convictions. Reese filed these timely appeals.

II.[1]

A.

On appeal, Reese argues for the first time that the District Court's voir dire process violated his Sixth Amendment right to a public jury trial as explained in *United States v. Williams*, 974 F.3d 320 (3d Cir. 2020). We review his forfeited arguments for plain error. *Id.* at 340. He takes issue with the Court's decision to question prospective jurors in a private conference room after their initial responses required more examination. We perceive no constitutional violation.

As Judge Aldisert wrote in a similar case, Reese's new arguments on appeal are "classic sandbagging of the trial judge." *United States v. Bansal*, 663 F.3d 634, 661 (3d Cir. 2011). In *Bansal*, the defendant argued for the first time on appeal that voir dire procedures like those used by the District Court in this case violated the Sixth Amendment. *Id.* Here, as in *Bansal*, no one requested access to the closed room where the trial judge conducted follow-up voir dire. *Id.* It is true that the normal—and probably best—practice is for the trial judge to conduct follow-up voir dire at sidebar in open court. Yet "we are aware of no case holding" that the method of questioning employed here

[1] The District Court had jurisdiction under 18 U.S.C. §§ 3231 and 3583(e). We have jurisdiction to review the final judgments under 28 U.S.C. § 1291.

"offend[s] the Sixth Amendment." *Id.* Because no such case exists, even if the District Court's procedure were erroneous, such error could not have been plain. *See United States v. Olano*, 507 U.S. 725, 734 (1993).

Reese contends the District Court's error was plain because of *Williams* and *Presley v. Georgia*, 558 U.S. 209 (2010). But those cases do not control this one for a few reasons. The district court in *Williams* issued an order closing jury selection to the public. 974 F.3d at 337. And the trial court in *Presley* required the criminal defendant's uncle to leave the courtroom during jury selection over the objection of the defendant's counsel. 558 U.S. at 210. Both courts erred by failing to consider alternatives to closure. *Id.* at 216; *Williams*, 974 F.3d at 340, 346. Unlike those cases, here the District Court never issued an order closing voir dire to the public. And it conducted general voir dire in open court before asking individual follow-up questions in a private room. The material differences just noted show that *Williams* and *Presley* are not on point. So Reese cannot show that any error would have been plain.

B.

Reese also argues for the first time that the District Court erred by issuing only written supplemental jury instructions. He correctly notes that, in a case involving initial jury instructions, we stated in an alternative holding that "[i]t is . . . essential that all instructions to the jury be given by the trial judge orally in the presence of counsel." *United States v. Noble*, 155 F.2d 315, 318 (3d Cir. 1946). But that case said nothing about how the court should respond to questions from the jury. So the

District Court's suboptimal choice here, if erroneous, was not plainly so. Moreover, Reese's counsel said he was "certainly fine with" the written-only response, App. 979, and raised no concerns about the delivery of the instructions while the jury was still deliberating. On these facts, we cannot say that any error would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," *Olano*, 507 U.S. at 732 (cleaned up).[2]

* * *

For these reasons, we will affirm the judgments.[3]

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[2] Reese also argues that *Pinkerton* liability is unconstitutional, the Government failed to show that stealing drugs affected interstate commerce, and complete Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3). As he concedes, these arguments are foreclosed by precedent. Reese has preserved these arguments for further review.

[3] Reese's challenges to his judgment on revocation of supervised release, at issue in Appeal No. 23-2291, required success on his appeal at No. 23-2292.

Appendix B

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 19-257

UNITED STATES OF AMERICA,

v.

DEON REESE, aka Dion Reese, aka Devon Lining, aka Robert Washington,

Defendant.

Filed: Oct. 25, 2022

SUPERSEDING INDICTMENT

COUNT ONE

The grand jury charges:

On or about March 23, 2017, in the Western District of Pennsylvania, the defendant, DEON REESE, did unlawfully obstruct, delay and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), and the movement of articles and commodities in commerce, by robbery, in that the defendant, DEON REESE, did take and obtain the personal property of an individual known to the grand jury and referred to hereinafter as "the victim", that is, controlled substances, to wit, cocaine and marijuana, against his will and by means of actual

and threatened force, violence and fear of immediate and future injury.

In violation of Title 18, United States Code, Section 1951.

COUNT TWO

The grand jury further charges:

On or about March 23, 2017, in the Western District of Pennsylvania, the defendant, DEON REESE, knowingly and willfully did conspire, combine, confederate, and agree with an individual known to the grand jury, referred to hereinafter as "ZM", and an individual unknown to the grand jury, to unlawfully obstruct, delay and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), and the movement of articles and commodities in commerce, by robbery, in that the defendant, DEON REESE, conspired, combined, confederated, and agreed with ZM and an individual unknown to the grand jury, to take and obtain the personal property of the victim, that is, United States currency and controlled substances, to wit, cocaine, against his will and by means of actual and threatened force, violence and fear of immediate and future injury.

In Violation of Title 18, United States Code, Section 1951.

COUNT THREE

The grand jury further charges:

On or about March 23, 2017, in the Western District of Pennsylvania, the defendant, DEON REESE, knowingly did use, carry, and discharge a firearm during and in relation to a crime of violence

for which he may be prosecuted in a court of the United States, that is Hobbs Act Robbery, contrary to the provisions of Title 18, United States Code, Section 1951 as charged at Count One of this Indictment.

In violation of Title 18, United States Code, Section 924(c)(1)(A)(iii).

COUNT FOUR

The grand jury further charges:

On or about March 23, 2017, in the Western District of Pennsylvania, the defendant, DEON REESE, knowing he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, on or about the dates, at the docket numbers, in the court, and of the crimes set forth below, did knowingly possess in and affecting interstate commerce ammunition, namely 9 mm PS-Grand ammunition:

Date	Docket Number	Court	Offense
Dec. 23, 1994	CC199400168	Allegheny County Court of Common Pleas	Aggravated Assault
Dec. 22, 1998	CC199812299	Allegheny County Court of Common Pleas	Receiving Stolen Property

July 12, 2000	CC200003462	Allegheny County Court of Common Pleas	Escape
Nov. 6, 2003	CC200100546	Allegheny County Court of Common Pleas	Carrying a Firearm without a License
June 24, 2002	CC200111114	Allegheny County Court of Common Pleas	Possession with Intent to Distribute a Non-Controlled Substance Resembling a Controlled Substance
June 26, 2002	CC200116625	Allegheny County Court of Common Pleas	Manufacturing, Delivery, or Possession with Intent to Manufacture or Deliver a Controlled Substance

Mar. 13, 2009	08-00016	United States District Court for the Western District of Pa.	Possession of a Firearm by a Convicted Felon

In violation of Title 18, United States Code, Section 922(g)(1).

A True Bill,

[handwritten: signature]
FOREPERSON

Appendix C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 19-257

UNITED STATES OF AMERICA,

v.

DEON REESE, aka Dion Reese, aka Devon Lining, aka Robert Washington,

Defendant.

Filed: Oct. 25, 2022

SUPERSEDING INDICTMENT MEMORANDUM

AND NOW comes the United States of America, by its attorneys, Cindy K. Chung, United States Attorney for the Western District of Pennsylvania, and Douglas C. Maloney, Assistant United States Attorney for said District, and submits this Superseding Indictment Memorandum to the Court:

I. The Superseding Indictment

A federal grand jury returned a four-count superseding indictment against the above-named defendant for alleged violations of federal law:

COUNT	OFFENSE/DATE	TITLE/SECTION
One	Hobbs Act Robbery March 23, 2017	18 U.S.C. § 1951
Two	Conspiracy to Commit Hobbs Act Robbery March 23, 2017	18 U.S.C. § 1951
Three	Using, Carrying, and Discharging a Firearm During and in Relation To a Crime of Violence March 23, 2017	18 U.S.C. § 924(c)(1)(A)(iii)
Four	Possession of Ammunition by a Convicted Felon March 23, 2017	18 U.S.C. § 922(g)(1)

II. Elements of the Offenses

A. As to Count 1:

In order for the crime of Hobbs Act Robbery, in violation of 18 U.S.C. § 1951, to be established, the government must prove all of the following essential elements beyond a reasonable doubt:

1. That defendant DEON REESE took from the victim alleged in the Superseding Indictment the property described in Count One of the Superseding Indictment;

2. That DEON REESE did so knowingly and willfully by means of Hobbs Act Robbery; and

3. That as a result of DEON REESE's actions, interstate commerce was obstructed, delayed, or affected.

Third Circuit Model Criminal Jury Instruction 6.18.1951 (modified).

B. As to Count 2:

In order for the crime of conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951, to be established, the government must prove all of the following essential elements beyond a reasonable doubt:

1. That two or more persons agreed to commit Hobbs Act Robbery, as charged in the Superseding Indictment;

2. That DEON REESE was a party to or member of that agreement; and

3. That DEON REESE joined the agreement or conspiracy knowing of its objective to commit Hobbs Act Robbery and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that DEON REESE and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective, to commit Hobbs Act Robbery.

Third Circuit Model Criminal Jury Instruction 6.18.371A (modified).

C. As to Count 3:

In order for the crime of discharge of a firearm in furtherance of a crime of violence, in violation of 18

U.S.C. § 924(c)(1)(A)(iii), to be established, the government must prove all of the following essential elements beyond a reasonable doubt:

1. That DEON REESE committed the crime of Hobbs Act Robbery as charged in Count One of the Superseding Indictment; and

2. That during and in relation to the commission of that crime, DEON REESE, knowingly used, carried, and discharged a firearm, as charged in the Superseding Indictment.

3. That the firearm was discharged during the course of the offense.

Third Circuit Model Criminal Jury Instructions 6.18.924A and 6.18.924B.

D. As to Count 4:

In order for the crime of felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1), to be established, the government must prove all of the following essential elements beyond a reasonable doubt:

1. That DEON REESE knowingly possessed the ammunition described in Count Four of the Superseding Indictment;

2. That at the time of the charged act, DEON REESE had been convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year;

3. That at the time of the charged act, the defendant knew that he had been convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year;

4. That the defendant's possession was in or affecting interstate or foreign commerce.

Third Circuit Model Criminal Jury Instruction 6.18.922G (modified).

III. Penalties

A. As to each of Counts 1 and 2: Hobbs Act Robbery and Conspiracy to commit Hobbs Act Robbery (18 U.S.C. § 1951):

1. A term of imprisonment of not more than 20 years (18 U.S.C. § 1951):

2. A fine not more than the greater of:

(a) $250,000.00 (18 U.S.C. § 3571(b)(3));

or

(b) an alternative fine in an amount not more than the greater of twice the gross pecuniary gain to any person or twice the pecuniary loss to any person other than the defendant, unless the imposition of this alternative fine would unduly complicate or prolong the sentencing process (18 U.S.C. § 3571(d)).

3. A term of supervised release of not more than three (3) years (18 U.S.C. § 3583).

4. Any or all of the above.

B. As to Count 3: Using, carrying, and discharging a firearm during and in relation to a crime of violence (18 U.S.C. § 924(c)(1)(A)(iii)):

1. A term of imprisonment of not less than ten (10) years, nor more than life imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence

of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed run concurrently with any other term of imprisonment, including that imposed for the crime of violence (18 U.S.C. § 924(c)(1)).

United States v. Gray, 260 F.3d 1267, 1281 (11th Cir. 2001); *United States v. Sandoval*, 241 F.3d 549, 550 (7th Cir. 2001).

2. A fine of $250,000 (18 U.S.C. § 3571(b)(3)).

3. A term of supervised release of not more than five (5) years (18 U.S.C. §§ 3583(b)(1), 3559(a)(1)).

C. As to Count 4: Possession of ammunition by a convicted felon (18 U.S.C. § 922(g)(1)):

1. A term of imprisonment of not more than ten (10) years. However, if it is determined that the defendant has three previous convictions for a violent felony or a serious drug offense, or both, then pursuant to 18 U.S.C. § 924(e), the term of imprisonment is not less than fifteen (15) years to a maximum of life imprisonment.

2. A fine of not more than $250,000 (18 U.S.C. § 3571(b)(3)).

3. A term of supervised release of three (3) years (or five (5) years if 18 U.S.C. § 924(e) applies) (18 U.S.C. § 3583).

IV. Mandatory Special Assessment

A mandatory special assessment of $100.00 must be imposed at each count upon which the defendant is convicted, pursuant to 18 U.S.C. § 3013.

V. Restitution

Restitution may be required in this case as to Counts One and Two, together with any authorized penalty, as part of the defendant's sentence pursuant to 18 U.S.C. §§ 3663, 3663A, and 3664.

VI. Forfeiture

Not applicable in this case.

Respectfully submitted,

CINDY K. CHUNG
United States Attorney

/s/ Douglas C. Maloney
DOUGLAS C. MALONEY
Assistant U.S. Attorney

Appendix D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 19-257

UNITED STATES OF AMERICA,

v.

DEON REESE, aka Dion Reese, aka Devon Lining, aka Robert Washington,

Defendant.

Filed: Jan. 31, 2023

TEXT ORDER RE: *PINKERTON* INSTRUCTION

ORDER overruling 214 Objections by DEON REESE to Pinkerton Jury Instruction. The government requests that the Court provide a jury instruction based on Third Circuit Model Jury Instruction 7.03, titled "Responsibility for Substantive Offenses Committed by Co-Conspirators (*Pinkerton* Liability)," with respect to Count 3 – discharging a firearm during and in relation to a crime of violence. ECF 212; ECF 213. *Pinkerton* liability "permits the government to prove the guilt of one defendant through the acts of another committed within the scope of and in furtherance of a conspiracy of which the defendant was a member, provided the acts are reasonably foreseeable as a necessary or natural

consequence of the conspiracy." *United States v. Lopez*, 271 F.3d 472, 480 (3d Cir. 2001) (citation omitted). Mr. Reese makes several constitutional challenges to the use of an instruction on *Pinkerton* liability in this case, including arguing that such an instruction "violates the separation of powers clause of the United States Constitution" and that it "violates the Due Process Clause of the United States Constitution." ECF 214, pp. 1-2. But the "Supreme Court having spoken, this [C]ourt cannot now hold that [a] conviction on a *Pinkerton* theory is unconstitutional[.]" *United States v. Wrobel*, 7 F. App'x 723, 726 (9th Cir. 2001). Which is why the Third Circuit has specifically authorized district courts to give the jury a *Pinkerton* instruction. *Lopez*, 271 F.3d at 480-81. In addition to those constitutional challenges, Mr. Reese raises two other objections. First, he argues the instruction is improper because he has only been charged with actually discharging a firearm during a crime of violence, not a conspiracy to do so. The Third Circuit, however, has directly rejected this argument. *Id.* at 480 (explaining that "conspiracy need not be charged in order for *Pinkerton's* doctrine to apply"). That's because the *Pinkerton* doctrine is a theory of proof, and indictments do not need to recite the government's theory of proof. *United States v. Whitted*, 734 F. App'x 90, 93 n.4 (3d Cir. 2018) (citations omitted). In any event, Mr. Reese **was** charged with a conspiracy to commit a Hobbs Act robbery, and therefore a *Pinkerton* conviction could be proper if the "[Section] 924(c) violation was a reasonably foreseeable consequence of [that] conspiracy." *Id.* The government need not charge the specific conspiracy outlined by Mr. Reese. Second, Mr. Reese argues that the government

has taken the position that he is the shooter, and cannot request the *Pinkerton* instruction as an alternative theory. Mr. Reese is once again mistaken, as the Third Circuit has explicitly authorized the use of a *Pinkerton* instruction as an alternative theory of liability. *Id.* (citations omitted); see also *United States v. Gonzalez*, 905 F.3d 165, 187-90 (3d Cir. 2018). Signed by Judge J. Nicholas Ranjan on 1/31/2023. Text-only entry; no PDF document will issue. This text-only entry constitutes the Order of the Court or Notice on the matter. (pak) (Entered: 01/31/2023)

Appendix E

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 19-257

UNITED STATES OF AMERICA,

v.

DEON REESE, aka Dion Reese, aka Devon Lining, aka Robert Washington,

Defendant.

Date: Feb. 2, 2023

EXCERPT OF TRIAL TRANSCRIPT
RE: JURY CHARGE

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* * *

[9] … THE COURT: All right. Thank you. Ladies and gentlemen of the jury, all the evidence is in. Now I will instruct you on the law.

* * *

[45] … Count 3 of the indictment charges that on or about March 23, 2017, in the Western District of Pennsylvania, Mr. Reese committed this offense by using, carrying and discharging a firearm during and in relation to a crime of violence.

The government may prove Mr. Reese guilty of Count 3 by proving that Mr. Reese personally

committed the offense; that is, he was the one that used, carried or discharged the firearm.

However, the government may alternatively prove Mr. Reese guilty of Count 3 based on the legal rule that each member of a conspiracy is responsible for the crimes and other acts committed by the other members, as long as those crimes and acts were committed to help further or achieve the objective of the conspiracy and were reasonably foreseeable to Mr. Reese as a necessary or natural consequence of the [46] agreement.

In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all of the conspirators may be convicted of a crime committed by any one or more of them, even though they did not all personally participate in that crime themselves.

In order for you to find Mr. Reese guilty of using, carrying and discharging a firearm during and in relation to a crime of violence charged in Count 3 based on this legal rule, you must find that the government proved beyond a reasonable doubt each of the following four elements or four requirements:

First, that Mr. Reese was a member of the conspiracy charged in the indictment.

Second, that while Mr. Reese was still a member of the conspiracy, one or more of the other members of the conspiracy knowingly used or carried and discharged a firearm during and in relation to the Hobbs Act robbery described in Count 3.

However, the other members of the conspiracy need not have been found guilty of or even charged

with the Hobbs Act robbery, as long as you find that the government proved beyond a reasonable doubt that the other members committed the offense.

Third, that the other members of the conspiracy [47] committed this offense within the scope of the unlawful agreement and to help further or achieve the objectives of the conspiracy.

And fourth, that this offense was reasonably foreseeable to or reasonably anticipated by Mr. Reese as a necessary or natural consequence of the unlawful agreement. The government does not have to prove that Mr. Reese specifically agreed or knew that this offense would be committed. However, the government must prove that the offense was reasonably foreseeable to Mr. Reese as a member of the conspiracy and within the scope of the agreement as Mr. Reese understood it.

* * *

Appendix F

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 19-257

UNITED STATES OF AMERICA,

v.

DEON REESE, aka Dion Reese, aka Devon Lining, aka Robert Washington,

Defendant.

Date: Feb. 2, 2023

JURY QUESTIONS AND COURT RESPONSE

DATE: [handwritten: 2/2/23]

Time: [handwritten: 4:30]

NOTE FROM JURY

[handwritten: Is intent to steal a controlled substance enough to constitute a Hobbs Act Robbery?]

[handwritten: signature]
Foreperson

ANSWER FROM JUDGE

[handwritten: See my attached response]

[handwritten: signature]
Judge

DATE: [handwritten: 2/2/23]

Time: [handwritten: 4:30]

NOTE FROM JURY

[handwritten: If no drugs were physically taken, does the Hobbs Act apply? (Not arguing intent)]

[handwritten: signature]
Foreperson

ANSWER FROM JUDGE

[handwritten: See my attached response]

[handwritten: signature]
Judge

DATE: [handwritten: 2/2/23]

Time: [handwritten: 4:30]

NOTE FROM JURY

[handwritten: If a co-conspirator took the drugs, is Reese also liable for the conspirators' actions? (Hobbs Act Robbery)]

[handwritten: signature]
Foreperson

ANSWER FROM JUDGE

[handwritten: See my attached response]

[handwritten: signature]
Judge

RESPONSE TO JURY'S QUESTIONS

In response to your three questions dated 2/2/2023 at 4:30 pm, I would like to provide you with the following clarifying instruction. This instruction only applies to Count I (Hobbs Act Robbery).

In order for the government to meet the first element for a Hobbs Act Robbery, it must prove beyond a reasonable doubt that controlled substances were actually taken. Mere intent or an attempt to take the controlled substances is not enough.

The government can meet its burden of proving the first element of a Hobbs Act Robbery if it proves beyond a reasonable doubt that Mr. Reese took the victim's controlled substances. It can meet the second element if it proves beyond a reasonable doubt that Mr. Reese knowingly and willfully by robbery took the victim's controlled substances. Alternatively, the government can meet its burden through the theory of "co-conspirator liability." This alternative theory has a number of elements and are provided below:

Substantive Offense Committed by Co-Conspirator

The government may prove Mr. Reese guilty of Hobbs Act Robbery by proving that Mr. Reese personally committed it. The government may also prove Mr. Reese guilty of Hobbs Act Robbery based on the legal rule that each member of a conspiracy is responsible for crimes and other acts committed by the other members, as long as those crimes and acts were committed to help further or achieve the objective of the conspiracy and were reasonably foreseeable to Mr. Reese as a necessary or natural consequence of the agreement.

In other words, under certain circumstances the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by any one or more of them, even

though they did not all personally participate in that crime themselves.

In order for you to find Mr. Reese guilty of Hobbs Act Robbery charged in Count 1 based on this legal rule, you must find that the government proved beyond a reasonable doubt each of the following four (4) requirements:

First: That Mr. Reese was a member of the conspiracy charged in the indictment;

Second: That while Mr. Reese was still a member of the conspiracy, one or more of the other members of the conspiracy committed the offense charged in Count 1 by committing each of the elements of that offense, as I explained those elements to you in my instructions. Specifically, in this case, that would be that the co-conspirator knowingly and willfully took the victim's controlled substances by robbery and, as a result, affected commerce. However, the other member of the conspiracy need not have been found guilty of or even charged with the offense, as long as you find that the government proved beyond a reasonable doubt that the other member committed the offense.

Third: That the other member of the conspiracy committed this offense within the scope of the unlawful agreement and to help further or achieve the objective(s) of the conspiracy; and

Fourth: That this offense was reasonably foreseeable to or reasonably anticipated by Mr. Reese as a necessary or natural consequences of the unlawful agreement.

The government does not have to prove that Mr. Reese specifically agreed or knew that this offense would be committed. However, the government must prove that the offense was reasonably foreseeable to Mr. Reese, as a member of the conspiracy, and within the scope of the agreement as Mr. Reese understood it.

[handwritten: signature] [handwritten: 2/2/23 6:47 pm
Hon. J. Nicholas Ranjan

Appendix G

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 19-257

UNITED STATES OF AMERICA,

v.

DEON REESE, aka Dion Reese, aka Devon Lining, aka Robert Washington,

Defendant.

Date: Feb. 2, 2023

EXCERPTS OF TRIAL TRANSCRIPT
RE: JURY QUESTIONS

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* * *

[137] THE COURT: … All right. We received three questions from the jury, all dated for today and at 4:30 p.m.

* * *

[138] THE COURT: Why don't I, for purposes of the record, read all three of them. We can discuss any potential responses to them.

So the first one I have before me – I don't know if they were put in any order. If they were, I might have shuffled them up anyway. But they are all dated for

the same time, but I think they all deal with similar concepts.

The first one I have before me reads: Is intent to steal a controlled substances enough to constitute a Hobbs Act robbery?

[139] The second question reads: If no drugs were physically taken, does the Hobbs Act apply, (not arguing intent).

And then the third question is: If a co-conspirator took the drugs, is Reese also liable for the conspirator's actions, Hobbs Act robbery?

* * *

[141] THE COURT: … I will tell you when I looked at these questions, my inclination would have been, again, in the order that I have them, to respond, Is intent to steal a controlled substance enough to constitute a Hobbs Act robbery, simply say "no."

The second one is: If no drugs were physically taken, does the Hobbs Act apply, not arguing intent, I'll respond "no."

[142] And then the third was: If a co-conspirator took the drugs, is Reese also liable for the conspirator's actions, Hobbs Act robbery, and I would say "yes," and then provide a Pinkerton instruction something like, Yes, a defendant may be held responsible for a substantive crime committed by a co-conspirator in furtherance of the conspiracy here, the robbery, or whatever the language that counsel agrees to with respect to Pinkerton.

MR. SWEENEY: Your Honor, could I make a request that in addition to that, with respect to the substantive charge of Hobbs Act robbery, can we

request an aiding and abetting instruction because I think one of those questions seems to indicate that they are looking at the substantive Hobbs Act charge, and they are wondering if the other person if the other robber took it, would he be liable, and I think aiding and abetting would be an appropriate instruction in response to that in addition to the Hobbs Act -- I'm sorry, in addition to the Pinkerton liability instruction.

* * *

[143] THE COURT: … I would have – I don't remember the model language for aiding and abetting. I'm sure there is some, but I have no issue with that concept in providing some clarity on Pinkerton and aiding and abetting.

* * *

[144] MR. McCABE: Judge, I think it's correct to answer the first question with "no." I don't think there's any circumstances that would, based on the question that would change that.

I mean, intent to steal is not enough. Nor is if no drugs were taken. Both of those cases under Hobbs Act, clearly there would be no Hobbs Act liability, and they are asking about Hobbs Act versus criminal conspiracy to commit Hobbs Act.

They didn't indicate they were asking about criminal conspiracy, and I don't want to assume anything here, the answer to the questions. I just want to answer the questions.

The third one, I mean, you know, I don't agree with Pinkerton, Judge. So I don't ever want to throw in the towel on that, but if you would give such a

Pinkerton charge, I would want on the record to object to it on the basis that I've always objected to it in this case.

You may conclude it's absolutely accurate and applicable and then give it, but I don't think I see a way around it based on the law that we are using in the case.

THE COURT: I mean, you may all hate this idea. What if we respond to the three questions: No. No. Yes.

I mean, the last one gets -- the question itself gets to the Pinkerton liability issue.

* * *

[146] MR. McCABE: This may be slightly unrelated. The only thing, there's a difference between the first two and the third one. And I may be wrong about that. I apologize if I am.

The first two are asking, you know, if no drugs were taken, does the Hobbs Act apply? So it's a question about the law.

The second one is the same way. Is intent to steal enough, and that's the question of the Hobbs Act.

But the third one asks whether he's liable, and if we just answer that question "yes," we are basically telling them okay, you can convict him.

I would prefer that question to be answered – like to say the co-conspirator took the drugs, Reese can be liable as opposed to Reese is liable.

I don't want the Court to tell them he's liable because that's telling them you should convict him.

They still have to decide that, although, you know, the Pinkerton [147] liability would apply.

So I understand that is the important thing, but I just want them to -- I don't want you to say "yes" he is liable.

THE COURT: I agree. I agree. You're right on that. The phrasing of that question, that's sounds like game over. I agree.

So I do think it makes sense to maybe do just a wholistic response on this and I think the response should pick up on three concepts here.

One would be, as I'm reading these questions, especially the first two, the concept of the government has to prove beyond a reasonable doubt that controlled substances were taken, because I think in here there's some – whether it's attempt or intent, I think there's a question in their minds about what the government -- at a minimum, regardless of what theory of vicarious liability the government may want to proceed under, there has to be proven beyond a reasonable doubt that controlled substances were taken.

And then we can say, that we can include after that maybe the Pinkerton, and aiding and abetting instructions to respond further to the third question that I read.

* * *

[148] MR. SWEENEY: One suggestion, Your Honor. Just so that it's clear to the jury that what you just said doesn't apply to the conspiracy count.

If you would preface what you just said with respect to the substantive count of the Hobbs Act robbery, the government must prove beyond a

reasonable doubt that controlled substances had been taken.

THE COURT: Yeah, okay, I agree with that. And as I understand their questions, they all reference Hobbs Act or Hobbs Act robbery, and I think they are driving at Count 1, but I agree it makes sense to clarify that.

So would that change, it would be some prefatory language that, you know, responding to these questions, the answers only apply to Count 1, Hobbs Act robbery, and then set forth the response or something along those lines, and then the response would be to clarify that the government must prove beyond a reasonable doubt that controlled substances were taken.

We can -- you know, we can tweak that if counsel likes, and then, furthermore, to answer their other question, instruct on the Pinkerton aiding and abetting liability.

* * *

[150] THE COURT: Okay. Why don't we do this. I know, Mr. Maloney, you offered to circulate an instruction. It might make sense just because the jury will be here right at 8:30 a.m. tomorrow, we may need a little bit of time.

What I can do is I can type something up really quickly, circulate it so I have everybody here, and we can look at it, and then make any revisions to it, and I'll use the models with respect to Pinkerton and aiding and abetting, and then we can hammer it out so the jury is not waiting around tomorrow morning.

MR. MALONEY: That works.

MR. McCABE: That's fine, Judge.

THE COURT: So just hang tight here for a second. Thank you.

(Pause noted)

THE COURT: You may be seated. Sorry to keep you all. The Third Circuit needs to shorten their mile instructions.

All right. Counsel have an opportunity to look at what I wrote up here?

* * *

[155] MR. GORZELSKY: So if I'm understanding, the instruction would read that, The government can meet its burden of proving the first element of Hobbs Act robbery if it [156] proves beyond a reasonable doubt that Mr. Reese took the controlled substances, and the government can prove the second element if it can prove that these controlled substances were taken knowingly and willfully by robbery. And then it would read that alternatively the government can meet its burden through theories of aiding and abetting. Is that the suggestion?

THE COURT: Yes, I think so.

MR. MALONEY: That would be fine with me, Your Honor.

* * *

[157] MR. McCABE: So, Judge, my gut reaction is that we've now taken a question and we made it more complicated. We have added an entirely new legal concept, aiding and betting.

And so the original Pinkerton charge, you know, we gave them -- and I just want to -- let me take a real quick look at that --

So the question is in the one that I'm -- the third question: If a co-conspirator took the drugs, is Mr. Reese liable for the conspirator's action?

So the Pinkerton rule says -- I'm reading this -- this means that all conspirators may be convicted of a crime committed by one or more of them, even though they did not all personally participate in that crime themselves.

So what we're talking about is, you know, in terms of committing a crime as opposed to committing an element of the crime.

So, you know, they are asking a question, you know, the element of the Hobbs Act is taking the property, the drugs while -- through force. Right?

And so, I don't know what they're asking here. The [158] Pinkerton charge here says -- talks in terms of a co-conspirator committing the crime -- a crime as opposed to an element of the crime. Am I reading that correctly? I think I am.

So maybe aiding and abetting is the correct answer to it, but it's just we're adding a whole new legal concept to it, and I guess what we are concerned about is that we want to make sure that if the person is aiding and abetting, that it only be if it was in the actual course of the robbery, as opposed to aiding and abetting at some later point in time.

I guess the aiding and abetting charge that we're proposing here, does that adequately explain the timing of the actions of the co-conspirator, you know.

I mean, clearly if they believe that he -- and who could it be? The only other person that could have taken the drugs would be the unknown accomplice, I would think, right?

So is that who they are thinking of? So if they believe the co-conspirator took the drugs and not Mr. Reese, is he liable still for the robbery? And then -- yeah --

MR. MALONEY: Well, Your Honor, they are not asking if somebody else took the drugs, if anyone took the drugs. They are asking if the co-conspirator took the drugs, and that's clearly what accomplice and Pinkerton deal with.

So I think their question, If the co-conspirator took the drugs, is Reese also liable for the conspirator's actions? [159] And the answer to that is "yes" under aiding and betting an accomplice and conspiracy Pinkerton. So there's two answers that are both "yes" to that question.

Your Honor, as Mr. Sweeney pointed out, if they had more questions, they can ask more questions. This is just a correct statement of law directly responsive to their questions.

THE COURT: Okay. All right. Anything further from the defense?

MR. McCABE: Judge -- no. Judge, are you anticipating changing any part of this or are you --

THE COURT: I was only going to make the one change that we talked about with respect to referring to – basically restating the second element at the beginning.

I can also -- as I looked at this before, there's a -- I saw a typo under aiding and abetting. First, I had referenced "guilty of the offenses." I would say "guilty of the offense." Probably make that change there.

MR. McCABE: Judge, this -- maybe there is nothing we can do about it, but, you know, as you pointed out, the length of these instructions are -- when you read this in response to these three simple questions, I mean, it's almost overwhelming to figure out.

I mean, I just read it, and I sort have done some work in this area, and I'm having a hard time understanding [160] this. That's what I'm concerned about.

THE COURT: Yeah, I was the one that suggested responding: No. No. Yes.

MR. McCABE: I think that's even looking much better. I would say he can be liable, yeah, he can be. Not is liable. He can be liable. That might be even the simplest thing. Tell them refer back to the Pinkerton charge and the elements of the Hobbs Act.

MR. MALONEY: Judge, again, my concern is the Pinkerton charge they currently have relates to a specific crime and they're asking for a separate crime, and I don't think we should be asking them to infer that it would be those same elements.

I think it makes more sense for them to have the written instructions. They can take them back there. They have all of your written instructions. So they're wading through these sort of messy legal concepts already. Just give them more to read.

The bottom line, it's the accurate statement of the law. It's a direct response to their question.

THE COURT: The only thing I guess I'm hesitating on now based on our discussion is giving the aiding and abetting instruction in addition to the Pinkerton instruction only because the aiding and abetting instruction is certainly broader, and I'm just thinking as to how the evidence in this [161] case came in that would lead to jury confusion, especially with respect to -- I think it's a -- if they're thinking of it as the case was presented, I think it was presented basically by both sides as a situation of two individuals robbing the victim, which strikes me as where the co-conspirator situation that aligns, and I think it addresses maybe what I think is the fundamental concern by the defense, that we need to make sure that we don't undercut the requirement under the second element of the Hobbs Act robbery, that this thing was committed in the course of the robbery.

And so my only concern on aiding and abetting, I think it applies, but does it sweep too broadly such that providing this instruction now, after all the evidence is in, all the arguments made, is unfair and also just causes jury confusion, just because we have now names, other names floating out there, we have conduct, alleged conduct of Mr. Reese before and after the robbery.

That's just my reaction. I worry now a little bit that they may be confused by it, and it may be that I'm worried because -- I can't read their minds, too. I think -- so I guess in a longwinded way of saying while I think maybe both instructions are appropriate, maybe the safer alternative would be to just provide the

Pinkerton instruction. They've already been instructed on Pinkerton in a different context and they're familiar with that concept.

[162] If they come back with an additional question that puts some -- clarifies maybe their thinking that leads to more of an aiding and betting situation, we can then supplement that with the aiding and abetting instruction. I'm just pausing on that at this juncture.

MR. MALONEY: Your Honor, I understand your concerns and defense counsel's concerns, but I think that those concerns about it sweeping too broadly are addressed by the specific elements in the aiding and abetting charge where it describes the specific intent and knowledge that Mr. Reese may have; that he knew that the offense charged was going to be committed was being committed by that other person, and that Mr. Reese knowingly did some act for the purpose of aiding the principal in committing the specific offense charged and with the intent that the other person commit that specific offense.

So I think when you have -- when you add in those -- it is sort of like a conspiracy. It's adding in the specific knowledge and intent that they must find Mr. Reese had in finding him liable under this theory.

THE COURT: Okay.

MR. GORZELSKY: I just think the response to that is that what the Pinkerton instruction does and it's tailored towards the Hobbs Act robbery, which is what we have been arguing throughout the case, as Your Honor has said.

THE COURT: Okay.

[163] MR. McCABE: Judge, just one final thing. The aiding and abetting statute introduces this whole concept now of the principal. Right? The person who is the accomplice aids and abets is the principal. So Mr. Reese has been converted from a defendant now to a principal.

I just think it's totally confusing. And I agree with you. I think the aiding and abetting charge would cause more confusion and is unfair because it's now being injected in the case after four, five hours of deliberation, and we couldn't respond to it in our closing argument.

So I would prefer the Court's choice would be to rely on the current Pinkerton charge.

THE COURT: Okay. What I will do based on the argument, counsel -- I don't disagree with you, Mr. Maloney. I do think those other elements provide some more clarification. I appreciate you pointing those out, but I still have that same concern and further concern now that Mr. McCabe pointed out that as written actually, Mr. Reese would not be the principal, the other person would be the principal, and oftentimes in these cases, I believe it's contemplated that the principal is identified if not by name, identified in some way, and given that there's some other conspirators here and not knowing what the jury is thinking, I do think there's just a little bit of concern over providing that instruction now in a vacuum, at least at this juncture.

[164] So what I will do is I'll deny without prejudice the government's request to provide an aiding and abetting instruction, unless and until it

becomes more clear what the jury is thinking, if we get another question.

I'll make the one change suggested by both Mr. Maloney and Mr. Gorzelsky to the beginning part restating the second element, delete the aiding and abetting instruction, and simply provide the Pinkerton instruction, and then I'll provide that response to the jury.

Any objections to that?

MR. MALONEY: No, Your Honor.

MR. McCABE: No, Your Honor.

* * *

Appendix H

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 19-257

UNITED STATES OF AMERICA,

v.

DEON REESE, aka Dion Reese, aka Devon Lining, aka Robert Washington,

Defendant.

Date: Feb. 3, 2023

JURY VERDICT

We, the jury in the above-captioned matter, return the following unanimous verdict.

COUNT ONE

As to Count One, charging committing Hobbs Act Robbery occurring on or about March 23, 2017, we the jury find the defendant Deon Reese:

_____ Not Guilty

✓____ Guilty

COUNT TWO

As to Count Two, charging participating in a conspiracy to commit Hobbs Act robbery on or about March 23, 2017, we the jury find Deon Reese:

_____ Not Guilty

✓_____ Guilty

COUNT THREE

As to Count Three, you should not answer this question unless you find the defendant Deon Reese guilty of Count One. If you found the defendant not guilty of Count One, please enter either "Not Guilty" or "Guilty" as to Count Three below.

As to Count Three (using and carrying a firearm during and in relation to a crime of violence, namely, during the Hobbs Act robbery charged in Count One), we the jury find the defendant Deon Reese:

_____ Not Guilty

✓_____ Guilty

_____ Not Applicable

If you find the defendant Not Guilty or Not Applicable as to Count Three, do not answer the following jury interrogatory.

Jury Interrogatory (Count Three): If you find the defendant guilty as to Count Three, please answer the following jury interrogatory:

One: Do you unanimously find that the government proved beyond a reasonable doubt that the defendant is criminally responsible for the discharge of a firearm during and in relation to a crime of violence, namely, the Hobbs Act robbery charged in Count One?

_____ No

✓_____ Yes

COUNT FOUR

Jury Interrogatory (Count Four): With regards to Count Four, please answer the following interrogatories:

One: Do you unanimously find that the government proved beyond a reasonable doubt that the defendant Deon Reese, on or about March 23, 2017, knowingly possessed PS 9mm ammunition, on or about March 23, 2017?

✓____ No

_____ Yes

Two: Do you unanimously find that the government proved beyond a reasonable doubt that the defendant Deon Reese possessed that ammunition in or affecting interstate commerce?

✓____ No

_____ Yes

SO SAY WE ALL, this [handwritten: 3rd] day of February, 2023,

* * *

Appendix I

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 19-257

UNITED STATES OF AMERICA,

v.

DEON REESE, aka Dion Reese, aka Devon Lining, aka Robert Washington,

Defendant.

Date: July 12, 2023

JUDGEMENT

THE DEFENDANT:

* * *

☑ was found guilty on count(s) 1, 2, and 3 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. 1951	Hobbs Act Robbery	3/23/2017	1s
18 U.S.C. 1951	Conspiracy to Commit Hobbs Act Robbery	3/23/2017	2s
18 U.S.C. 924(c)(1)(A)(iii)	Using, Carrying, and Discharging a Firearm During and in Relation to a Crime of Violence	3/23/2017	3s

The defendant is sentenced as provided in page 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 4 of the Superseding Indictment

* * *

7/11/2023
Date of Imposition of Judgment

s/ J. Nicholas Ranjan
Signature of Judge

United States District Judge
Name and Title of Judge

7/11/2023
Date

* * *

Appendix J

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, §1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. III, §§1-2

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between

a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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.

18 U.S.C. §2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §922(g)(1). Unlawful acts

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §924(c). Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony

punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) 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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor

piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

18 U.S.C. §1951. Interference with commerce by threats of violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody

or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.