

No. 25-2

IN THE
Supreme Court of the United States

DEON REESE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**BRIEF *AMICUS CURIAE*
THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF PETITIONER**

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September 22, 2025

QUESTION PRESENTED

Whether *Pinkerton v. United States*, 328 U.S. 640 (1946) should be overruled?

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a membership of many thousands of direct members and approximately 40,000 affiliated members. NACDL files numerous amicus briefs each year, seeking to assist courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The application of the *Pinkerton* doctrine specifically, and imposition of vicarious liability generally, are issues of substantial importance to NACDL, its membership, and to the criminal justice system as a whole.

SUMMARY OF ARGUMENT

The Court should grant the petition for *certiorari* in this case, and the *Pinkerton* doctrine overturned because it constitutes a judicially-created extension of the substantive criminal law, imposing on defendants criminal liability for substantive offenses based on conduct committed by co-conspirators.

¹ Pursuant to Supreme Court Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amici and their members made any monetary contribution toward the preparation and submission of this brief. Notice was provided to the parties; however, notice to the Solicitor General was untimely.

Far from being a mere judicial interpretation of a statute, *Pinkerton* constitutes an amendment of *every* federal criminal law, extending liability for substantive offenses without Congressional authorization in violation of the fundamental constitutional principle of separation of powers.

The extension of that liability violates substantive due process rights of a defendant by materially reducing the government's burden of proof beyond a reasonable doubt on issues of *scienter* and causation. Such a reduction denies the defendant the right to have the jury make the critical determination of his guilt based upon evaluation of the defendant's conduct, and whether that satisfies all the elements necessary for criminal liability.

In extending criminal liability, the *Pinkerton* doctrine makes any federal criminal statute to which it is applied unconstitutionally vague by eliminating the traditional requirement of criminal intent and replacing it with a standard derived from the tort criterion for negligence.

Pinkerton is also being used improperly to deny defendants their rights under the Sixth Amendment's Confrontation Clause by holding them responsible for actions of co-defendants that cause a witness to be unavailable without proof that the defendant himself engaged in or joined such intentional conduct.

ARGUMENT

I. *PINKERTON*'S DISTORTION OF THE REQUIREMENTS FOR CRIMINAL LIABILITY

*Pinkerton*² has exerted a demonstrably negative effect on the criminal justice system. It has metastasized from its initial violation of the separation of powers, and now undermines a multitude of due process principles.

As explained below, it distorts the standard of how crimes are properly defined by denying a defendant the right to have a jury decide if the government has proven all the essential elements of the crime beyond a reasonable doubt. It also permits conviction on less than proof of all the essential elements of the offense. It further fails to afford individuals fair notice of their commission of substantive offenses in which they did not participate (or agree to participate in). And it has spawned a more recent movement to allow prosecutors to use its rationale to circumvent the demands of the Confrontation Clause. For all these reasons, *Pinkerton* should be overturned.

While the facts of the *Reese* case present a compelling example of the abuse the system suffers as a result of *Pinkerton*, to illustrate the multiple ways in which this judicially constructed principle fundamentally undermines critical underpinnings of the system, a simple hypothetical is illustrative.

Suppose Athos and Porthos want to burglarize Aramis's house and steal his gold coins. They plan to meet on the front porch of Aramis's house at 9:00 p.m.

² 328 U.S. 640 (1946)

(when they know that no one is home) to force in the front door. When Athos arrives at 9:00 p.m., the front door opens and Porthos exits, explaining that he remembered that Aramis often left a back window unlocked. Porthos relates that he stole a ladder en route on the way down and climbed in the window.

He and Athos then proceeded to rifle through the house and find the gold. As Athos leaves out the front door, Porthos goes to get rid of the ladder. When Porthos exits out the back, Aramis's neighbor, D'Artagnan, confronts him. Porthos strikes Dartanian, causing serious but non-fatal injury, and runs away.

Assuming that all of these facts are gathered and proven, Porthos is guilty of conspiracy to commit burglary, and the substantive offenses of burglary, theft of the ladder, and aggravated assault.

Yet, what is Athos guilty of? While there is no question that he is guilty of conspiracy to commit burglary and burglary, Athos also faces conviction for Porthos's theft of the ladder and aggravated assault, a result possible only if *Pinkerton* is applied.

For Athos, the element of the theft statute requiring that he took the property of another *with the intent* to deprive him thereof, and the element of the assault statute requiring that he cause serious bodily harm with *the specific intention* of doing so, are replaced with a charge that requires only that his confederate acted "in furtherance" of their plan to steal gold and that Athos could "reasonably foresee" that someone might interrupt their plan, occasioning Porthos to harm them. Athos will not be convicted of the crimes the legislature actually enacted but of a substantially diluted version created by an unauthorized amendment by the Court.

Tracing the evolution of the doctrine, the *Pinkerton* opinion began as a benign reflection on whether certain counts merged for sentencing. But storm clouds gathered when the Court began to consider the liability for substantive offenses by Daniel *Pinkerton* in which he was evidently not involved. Then came a cloudburst of strained reasoning that since the government proved the conspiracy by proving that Walter committed an overt act, any further acts Walter performed would seal Daniel's guilt for those substantive offenses as well.³ *Pinkerton*, at 646-647. That created a flood that wiped out the basic tenet that Daniel's culpability for the substantive offenses depended upon a jury finding beyond a reasonable doubt that he performed the essential elements of the crime, *i.e.*, the acts Congress specified as wrongful accompanied by the *scienter* required by the statute.

II. PINKERTON VIOLATES SEPARATION OF POWERS

Application of constitutional protocol would have halted *Pinkerton's* deleterious impact before it engulfed too many of the due process rights enshrined in the Constitution. Congress, the branch authorized to pass laws, passed a law that made conspiracy complete when two or more people intentionally agreed to commit a crime, and one of them acted to further the agreement.

However, Congress never passed a law stating that whatever your conspirator does, in any way, to further

³ Had *Pinkerton* been a modern-day RICO or drug conspiracy, the Court's reasoning would have been scuttled since conspiracy to commit those crimes does not even require commission of an overt act. *See* 18 U.S.C. § 1962(d); 21 U.S.C. § 846.

your agreement in a circumstance in which you might, or perhaps should, reasonably foresee that he might do that, would make you equally guilty of all of his substantive crimes you neither intended to commit nor in which you engaged.

As counsel for Reese has articulated, *Pinkerton*'s threshold Constitutional error is its direct violation of the of separation of powers. Writing laws is the province of Congress, not the Executive branch, and certainly not the Courts.⁴

Courts preside over the criminal process to: (1) apply the law in their oversight of the Executive's efforts to prove its case; and (2) sentence someone if a jury finds that all elements of a charged crime have been proven beyond a reasonable doubt.

Since Congress never enacted a statute authorizing *Pinkerton* liability, the Courts, by creating such liability have usurped Congress' law-making power, and crossed a critical boundary, thereby violating one of the "first principles" of the Constitution. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

While Congress is limited by Article I, § 8 of the Constitution in the subject matter of its legislation, the Constitution does not grant the courts *any* legislative authority.

⁴ As this Court has instructed repeatedly, the role for Article III Courts is restricted. *See, e.g., United States v. Texas*, 599 U.S. 670, 681 (2022). As Madison articulated in Federalist No. 45, citing Montesquieu, "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." *See also Buckley v. Valeo*, 424 U.S. 1, 120-121 (1976).

III. *PINKERTON* VIOLATES DUE PROCESS BY DISTORTING THE *SCIENTER* ELE- MENT OF THE CRIME AND DEPRIVING A DEFENDANT OF A RIGHT TO TRIAL BY JURY

Among the fundamental, enduring, and axiomatic historical principles of criminal jurisprudence is that intoned by Blackstone: “to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will.” 4 William Blackstone, *Commentaries on the Laws of England* 21 (1769).

Naturally, this principle carries modern resonance as reflected in this Court’s opinions:

The government’s duty to prove that the defendant it seeks to convict had a culpable state of mind when committing a proscribed act is as ancient as it is fundamental to our system of justice. At common law, a ‘complete crime’ generally required ‘both a will (or mens rea)’ and an act (or actus reus). 4 W. Blackstone, *Commentaries on the Laws of England* 21 (1769) (Blackstone).

Diaz v. United States, 602 U.S. 526, 543 (2024) (J. Jackson, concurring).

Shortly after *Diaz*, this Court reiterated that “[t]he Due Process Clauses of the Fifth and Fourteenth Amendments ensure that officials may not displace certain rules associated with criminal liability that are ‘so old and venerable,’ ‘so rooted in the traditions and conscience of our people[,] as to be ranked as fundamental.’ *Kahler v. Kansas*, 589 U.S. 271, 279 (2020) (quoting *Leland v. Oregon*, 343 U.S. 790, 798

(1952)).” *City of Grants Pass v. Johnson*, 603 U.S. 520, 144 S. Ct. 2202 (2024).

Perhaps the most sacred of those rules is this Court’s requirement that “criminal convictions . . . rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *United States v. Gaudin*, 515 U.S. 506, 507 (1995).

In *Gaudin*, this Court held that the trial judge’s refusal to let the jury decide the essential element of whether false statements were “material” violated the bedrock principle stated in *Gaudin*. Nevertheless, contrary to that principle, in any case governed by *Pinkerton*, the judge, by altering the element of intent Congress has required, denies the jury its essential role and the defendant his right to due process.

In *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000), this Court characterized the principles set forth in *Gaudin* “constitutional protections of surpassing importance,” *Id.* at 476, and resoundingly confirmed that the system could function as intended only if *the jury* was allowed to be the sole decider whether the elements of a crime had been proven.

In a watershed series of cases thereafter, this Court made unmistakably clear that judicial intervention to alter those elements is a usurpation of this foundational principle. *See, e.g., Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Alleyne v. United States*, 570 U.S. 99 (2013).

Stripped to its essence, *Pinkerton* is a judicially-created device that eliminates or at the very least diminishes materially essential elements of an offense, thereby lessening the government’s burden to prove those elements beyond a reasonable doubt. The

scienter element of a crime is established by legislative action and a presumption exists that a defendant must possess the culpable mental state required by the statute before his conduct can be criminalized. *Rehaif v. United States*, 588 U.S. 225, 227-228 (2019).

That legislatively determined *scienter* must be proven beyond a reasonable doubt to differentiate those who commit the acts innocently from those who do not. *Davis v. United States*, 160 U.S. 469, 484 (1895); *Morrisette v. United States*, 342 U.S. 246, 251-252 (1952); *Ruan v. United States*, 597 U.S. 450, 457 (2022) (“as a general matter, our criminal law seeks to punish the ‘vicious will’”) (internal quotation marks omitted), quoting *Morrisette*, 342 U.S. at 246.

Returning to the hypothetical posed earlier, for Athos, his intent will be disregarded; it is meaningless when the elements of the offenses are processed and distorted through *Pinkerton*’s hall of mirrors. The charge given to the jury will unequivocally instruct that Athos can be found guilty of those substantive crimes regardless of his *scienter*. His conviction hinges merely upon the fact that he was Porthos’s conspirator at the time Porthos committed the acts constituting the substantive offense, as long as the offenses had *some* connection to stealing the gold, and as long as Athos met a civil negligence standard of reasonably foreseeing the possibility of their occurrence.

Thus, by judicial fiat, *Pinkerton* not only cancels out the critical intent element of the crime, but it substitutes a standard of negligence that should make Athos liable only for paying civil damages, not

spending time – sometimes life without parole – in prison.⁵

The Third Circuit itself warned of the importation of this kind of culpability in *United States v. Gonzalez*, 918 F.2d 1129 (3d Cir. 1990):

[T]he very term ‘foreseeability’ implies a prediction about uncertain events in terms of probability. . . . We should, however, be wary of importing into criminal law the expansive notions the term foreseeability has acquired from its talismanic use in defining duty for purposes of liability in tort.

Id. at 1136 n.5.

But Courts have not been wary, and due process has suffered.

Defenders of *Pinkerton* might counter that this Court built into its original rule a failsafe device to make sure that use of the doctrine did not truly offend due process. The very last paragraph of the majority opinion in *Pinkerton* reads:

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural

⁵ It is not uncommon for defendants charged with homicide pursuant to 18 U.S.C. § 1959(a)(1) – for which the mandatory sentence is life imprisonment without parole – to be subject to a jury charge that permits conviction based on a *Pinkerton* theory. See, e.g., *United States v. Londonio*, No. 20-2479, 2024 WL 3770712 (2d Cir. Aug. 13, 2024).

consequence of the unlawful agreement. But as we read this record, that is not this case.

328 U.S. at 647-648.

As one scholar has aptly noted, this paragraph is perceived as a “due process limit” on *Pinkerton* liability. See, generally (pp. 603-639), Alex Kreit’s *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 Am. U. L. Rev. 585 (2008).⁶

Yet in practice that admonition has not – and by its own terms does not – placed any brake on the imposition of *Pinkerton* liability. As the District Court observed in *United States v. Hansen*, 256 F. Supp. 2d. 65 (D. Mass. 2003), “it is quite simply illogical to say that *Pinkerton*, which is defined by foreseeability, could somehow be *more* narrowly ‘constrained’ by due process if due process requires nothing more than foreseeability.” *Id.* at -----.

Foreseeability, to be sure, is not a term commonly or explicitly associated with criminal *scienter*. But while the Court in *Hansen* sensed that “something more than mere foreseeability is at work,” and the constraints implied by the *Pinkerton* Court were something “deeper and more visceral,” the law has

⁶ Read strictly, perhaps this language was an attempt by the majority to put much stricter limits on the conspiratorial liability that later courts have attached to this ruling. If an act is done strictly in furtherance of the object crime of the conspiracy, it is clearly within the scope of the unlawful project, and would be a ramification of the agreement plainly foreseen by the original conspirators. If the quote was a cautionary comment by the *Pinkerton* majority, however, it has certainly not been followed in the spirit of limitation by later courts, which have used the doctrine to attach criminal liability to one conspirator for conduct virtually anything another performs.

simply not developed “clear and cogent standards to assess the outer due process limits of *Pinkerton*.” *Id.*

Circuit Courts have regularly struggled with applying these limits⁷ for one reason: no sensible methodology exists. Two cases from state courts illustrate the pitfalls of *Pinkerton* dramatically.

In *Commonwealth v. Wayne*, 553 Pa. 614 (Pa. 1998), the Pennsylvania Supreme Court confronted a circumstance in which a defendant was a member of a conspiracy in which another conspirator committed first degree murder. Without mentioning *Pinkerton*, the Court adopted most of it, leaving out the requirement of reasonable foreseeability. *Id.* at 624. This compounded distortion of *Pinkerton* remains the rule in Pennsylvania today. But while *Wayne*’s formulation damages due process more than the original *Pinkerton*, *Wayne* inadvertently discloses the flaw in the entire *Pinkerton* scheme.

Four years earlier, the same Court ruled in *Commonwealth v. Huffman*, 536 Pa. 196 (Pa. 1994), that to convict an *accomplice* of first degree murder the government had to prove that he shared the specific intent to kill that the shooter possessed. Charging otherwise would have been “quite simply, a patently erroneous statement of the law.” *Id.* at 199. Proof of specific intent to kill was necessary for *any* person convicted of first-degree murder and an instruction allowing less relieved the government of its burden to prove a critical element beyond a reasonable doubt. *Id.* at 200:

⁷ See, e.g., *United States v. Johnson*, 886 F.2d 1120, 1123 (9th Cir. 1989); *United States v. Chorman*, 910 F.2d. 102, 112 (4th Cir. 1990); *United States v. Alvarez*, 755 F.2d 830, 850-851 (11th Cir. 1985).

As the Court in *Huffman* explained,

Under the contested instruction the jury needed to find only that the appellant had conspired to commit or assisted in a burglary with the actual murderer in order to find him guilty. Permitting such a faulty verdict to stand would be to tolerate a miscarriage of justice. The Commonwealth must prove all of the elements of a crime beyond a reasonable doubt.

Id. at 201.

The Court in *Wayne* then applied the same reasoning in conspiratorial liability, recognizing the necessity of proving specific intent to kill on part of the non-shooter conspirator. *Id.* at 630. However, *Wayne* did not extend this reasoning to crimes other than first-degree murder.

While *Wayne's* reasoning is inescapable, its limited application is inexplicable. Many criminal laws make specific intent the requisite *scienter*, but application of *Pinkerton* to any such statute will, in effect, relieve the government of its burden to prove this element just as it does in the case of first-degree murder. The Court in *Wayne* should have realized that its insight should, logically, lead it to scrap *Pinkerton* liability entirely, and not just with respect to one crime—leaving the rest of the offenses in the Crimes Code subject to the worst possible version of that doctrine.

Ironically, in the hypothetical, Athos, still to be punished for the ladder theft, would actually bemoan the fact that D'Artagnan lived since he will be sentenced for the aggravated assault Porthos committed while he would escape additional punishment if D'Artagnan had died.

While the Pennsylvania Court at least recognized the grave error in *Pinkerton*, albeit in too limited a fashion, the Connecticut Supreme Court, in *State v. Coward*, 292 Conn. 296 (Conn. 2009), openly recognized the due process problem the instruction presents and chose to ignore it. , In *Coward*, the Court hinted at the underlying thought process that generated *Pinkerton* in the first place:

The rationale for the doctrine is to deter collective criminal agreement and to protect the public from its inherent dangers by holding conspirators responsible for the natural and probable--not just the intended--results of their conspiracy. . . . this Court previously has recognized that [c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise. . . . In other words, one natural and probable result of a criminal conspiracy is the commission of originally unintended crimes.

Id. at 308.

Thus, the Court in *Coward* recognized that, as in *Pinkerton*, its imposition of vicarious liability reflected a judicial assertion of its authority “as a matter of state policy,” *id.* at 399, to extend criminal liability where it concluded the legislature had failed to do so, separation of powers notwithstanding.

In determining where best to use this “policy” the Court in *Coward* applied it in cases that could not be sustained otherwise, that is, cases “in which the

defendant did not have the level of intent required by the substantive offense with which he was charged.” *Id.*

Thus, to remove obstacles to conviction, the jury would be asked only if the defendant reasonable foresaw the act and not whether he “could or did *intend* for that particular crime to be committed.” *Id.* at 309 (emphasis in original).

By that standard, the hurdle for the prosecution is a mere bump in the road since “the only mental states that are relevant with respect to *Pinkerton* liability are that of the defendant in relation to the conspiracy itself, and that of the co-conspirator in relation to the offense charged.” *Id.* at -----. This rendering both accurately and alarmingly depicts how *Pinkerton* works, due process notwithstanding.

Certainly, if someone is a member of a conspiracy, that is relevant to whether they joined in the intent to commit the substantive crime of a confederate. But such membership is not and cannot be conclusive proof of that element if intent is to remain a viable element of criminal liability, and if the legislature is to remain the sole arbiter of the elements of criminal offenses.

IV. *PINKERTON* VIOLATES DUE PROCESS BY EFFECTIVELY ELIMINATING THE ELEMENT OF CAUSATION

Beyond *scienter*, *Pinkerton* also assumes the any given defendant’s entry into a conspiracy is *ipso facto* proof of causation, further lessening the burden of proof *even below* that required of ordinary negligence, *i.e.*, *proximate* cause as a result of the defendant’s actions (or failure to fulfill a duty).

The effective elimination of causation also contravenes the principles set forth in *Apprendi*. Under the Model Penal Code § 2.03, for Athos to cause the theft of the ladder and the assault on D’Artagnan (intentional acts), his entry into the conspiracy must be a “but for” in the chain of causation leading to those results and otherwise satisfy other causal elements in the statute. *See* § 2.03(1)(a-b).

Moreover, since “the actual result” was not “within [Athos’s] purpose or the contemplation[,]” causation is not proven unless a different person than the one who was contemplated was injured or the “actual result designed or contemplated” did occur and was “not too remote or accidental in its occurrence” to bear on the defendant’s liability. § 2.03 (2)(a-b).

Yet, since the MPC does not adopt *Pinkerton*, § 2.06, the MPC’s definition of causation means that Athos must have *intended* the theft and assault or *contemplated*⁸ them, not simply have reasonably foresee them as a possible feature of the conspiracy.

Via *Pinkerton*, the government’s burden is consequently diminished again. A The prosecution will argue that Athos’s agreement to the burglary, given the dangerous nature of their scheme, made it a simple proposition that the ladder would likely have been taken, and D’Artgnan would be harmed.

⁸ Dictionary.com defines contemplation as “full or deep consideration” or “purpose or intention.” *Contemplation*, Dictionary.com, <https://www.dictionary.com/browse/contemplation> (last visited Sept. 10, 2025). Miriam Webster defines “contemplate” as: “to view or consider with continued attention” or “to view as likely or probable or as an end or intention.” *Contemplation*, Merriam-Webster Dictionary, <https://www.merriamwebster.com/dictionary/contemplation> (last visited Sep. 10, 2025).

Once again, the legislative language⁹ is not controlling, the jury is deprived of its Constitutional role, and the defendant's due process right is violated.

V. *PINKERTON* RENDERS THE LAWS APPLIED THROUGH IT UNCONSTITUTIONALLY VAGUE

An additional manner in which *Pinkerton* has damaged the principles of due process is its elimination of fair notice. As Justice Gorsuch has written, “[p]erhaps the most basic of due process’s customary protections is the demand of fair notice.” *Sessions v. Dimaya*, 584 U.S. 148, 177 (2018) (Gorsuch, J., concurring).

This proposition is unquestioned and as old as this nation itself. See *United States v. Harris*, 347 U.S. 612, 617 (1954); *United States v. Johnson*, 576 U.S. 591, 595-596 (2015); *Peroco v. United States*, 598 U.S. 319, 336 (2023) (Gorsuch, J., concurring).

In the hypothetical, Athos was on notice that ladder theft and assault required him to intend to break the

⁹ Legislatures historically have proven capable of drafting legislation that imposes vicarious liability, even when the crime is not initially contemplated as part of the intended criminal conduct. Felony murder statutes accomplish that objective. In Pennsylvania, for example, if an individual is a principle or an accomplice in the commission of one of seven serious felonies, and a killing occurs in furtherance of the commission of that felony or in an attempt to escape from it, both killer and accomplice are minimally guilty of felony murder. Title 18 Pa.C.S. § 2502(b). This proceeds on the theory that this form of murder does not require specific intent to kill but supplies the necessary element of malice by virtue of the defendant’s willful participation in the dangerous enterprise of the underlying felony. Striking the *Pinkerton* doctrine will not impact the legislature’s choice in this regard.

law. But no statute warned him that if he entered a conspiracy with a completely different object, and his compatriot Porthos stole something Athos did not know Porthos was going to steal, or assaulted someone Athos never saw, he would be guilty of those crimes not by the straightforward *scienter* element the legislature wrote, but by a fuzzy, incomplete negligence standard the Court divined on its own. *Pinkerton* thereby renders criminal statutes to which it is applied unconstitutionally vague as applied.¹⁰

VI. *PINKERTON* IS DISTORTING THE RIGHTS TO CONFRONTATION

Predictably, the impact of *Pinkerton* and its rationale have metastasized. In addition to the adverse impact of its application to essentially any federal criminal case in which a prosecutor requests an instruction on *Pinkerton* liability, developments in the Circuit Courts indicate that yet another Constitutional protection is being undermined by this doctrine.

The Federal Rules of Evidence, like most comparable rules in state jurisdictions, provide that a defendant forfeits a hearsay objection if he “wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness, and did so intending that result.” Fed. R. Evid. 804(b)(6).

The Rule is derived from the principle that by rendering the witness unavailable, a defendant waives

¹⁰ As Professor Laurent Sacharoff has pointed out, the canvas of conspiracy is itself a difficult concept to explain and that, upon reflection, “we discover that our instructions to juries, and our rule of conspiracy law on appeal, create a concept both ambiguous and vague.” Laurent Sacharoff, *Conspiracy As Contract*, 50 U. Cal. Davis L.R. 405, 408 (2016)

his right of confrontation with respect to the declarant, depriving the trial process of the “ultimate goal” the Confrontation Clause has historically sought: having the accused’s ability to cross-examine guarantee the “reliability of the evidence.” *Crawford v. Washington*, 541 US.36, 43-49 (2004).

Yet *Pinkerton* has been extended to threaten the protections afforded by this wholly separate Constitutional right. In *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2009), the Court applied *Pinkerton* to Rule 804(b)(6), holding that, in addition to *engaging* in an act against a witness or *acquiescing* in an act performed by another, a conspirator would waive their right to cross examine a witness if, by a “preponderance of the evidence[,]” the government showed that the wrongful procurement, done by another, was in furtherance of the conspiracy and reasonably foreseeable. *Id.* at 820.

Thus *Pinkerton* has been employed in that context to override the proper meaning of “acquiesce” as an act of assent to, agreement in, consent to or to tacit submission in another’s act,¹¹ requiring a knowing, affirmative acknowledgement of the act, even if one does not participate in its commission.

The justification for this otherwise unsupportable expansion of the Rule was similar to the “judicial legislation” idea the Court in *Coward* advocated. The Court in *Cherry* substituted its perception of public policy in place of the legislature’s, maintaining that “failure to consider *Pinkerton* conspiratorial responsibility affords too much weight to Confrontation Clause values in balancing those values against the

¹¹ *Acquiesce*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/acquiesce> (last visited Sep. 10, 2025).

importance of preventing witness tampering.” *Id.* at 820. Thus the Sixth Amendment’s requirements, and the Rule’s language, were superseded by the courts’ perceived need to address the “grave evil[s] that the well-established waiver-by-misconduct rule aims to prevent.” *Id.*

This reasoning has been adopted by other Courts.¹² And while the version of the Rule today differs from the language to which *Cherry* referenced, *Cherry* exemplifies how *Pinkerton* has been, and can continue to be, utilized to bypass Constitutional protections and statutory language. That should no longer be permitted, and it is respectfully submitted that *Pinkerton* should be overruled, and this case provides an appropriate vehicle to accomplish that correction.

CONCLUSION

Since *Pinkerton*’s pronouncement in 1946, it has done much to undermine basic due process protections which defendants are entitled to receive. It usurps the role of legislators, relieves the government of its rightful burden of proof and denies the jury its central role in the system by permitting conviction based on standards of *scienter* and causation that more closely resembles an abridged form of negligence liability. It amounts to a surreptitious shortcut to conviction. The faith of Americans in the justness of our system calls for this shortcut to be eliminated.

¹² Federal: *United States v. Dinkins*, 691 F.3d. 358, 386 (4th Cir. 2012); *United States v. Carson*, 455 F.3d. 336, 364 (D.C. Cir. 2006); *United States v. Cazares*, 788 F.3d 956,975 (9th. Cir. 2015). State: *Buchanan v. Mississippi*, 316 So.3d 619 (Miss. 2021); *People v. Davis*, 109 NE 3d 281 (Ill. App. 2018).

For this and all of the reasons set forth herein, the Court should accept this case for review and overrule the *Pinkerton* doctrine.

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September 22, 2025