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 OF *AMICUS CURIAE* DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONER

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF JOHN D. CLINE
600 Stewart Street, Suite 400
Seattle, WA 98101
(360) 320-6435
cline@johndclinelaw.com

Counsel for Amicus Curiae

120530

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Due Process Institute is a nonprofit, bipartisan public interest organization that seeks to ensure procedural fairness in the criminal justice system. Protecting the right of individuals to receive constitutionally adequate notice of which actions are subject to criminal liability is among Due Process Institute's top priorities. Eliminating *Pinkerton*'s judge-made theory of federal criminal liability will mark an important advance toward that goal.

SUMMARY OF ARGUMENT

1. *Pinkerton* was wrongly decided. Its judge-made theory of liability for co-conspirators' crimes cannot be reconciled with the two-centuries-old principle that only Congress can enact federal criminal laws. *Pinkerton* stands in stark contrast with the federal courts' approach to attempt liability, which courts have properly recognized cannot exist except where Congress specifically provides.

2. Judge-made criminal liability denies fair warning of what conduct violates the law. That danger is compounded for *Pinkerton* liability because its predicate is conspiracy, a notoriously "elastic, sprawling and pervasive offense." *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). Moreover, most federal courts do not even require that the indictment allege the conspiracy

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

on which substantive liability is predicated, permitting prosecutors to concoct conspiracies--and the accompanying substantive liability under *Pinkerton*--as the trial develops.

3. The *Pinkerton* theory, rarely used when the Court first created it, has spread like kudzu through the federal criminal system. Federal prosecutors invoke the theory--and district courts give *Pinkerton* instructions--in virtually every case where both a conspiracy and substantive offenses are charged, and even in some cases where no conspiracy is charged. The case produces ongoing, daily injustice in federal courts across the country. Stare decisis provides no basis for maintaining such a manifestly erroneous decision. The Court should overrule *Pinkerton*.

ARGUMENT

I. *PINKERTON* WAS WRONGLY DECIDED.

As the Petition demonstrates, *Pinkerton* was wrongly decided. The decision violates the principle, announced in 1812 and reaffirmed repeatedly over the following two centuries, that judges cannot make federal criminal law; only Congress can do so. *See, e.g., United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). As this Court declared long ago, "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); *see, e.g., Staples v. United States*, 511 U.S. 600, 604 (1994) (federal crimes "are solely creatures of statute") (quotation omitted). *Pinkerton* has no statutory basis

and thus cannot be reconciled with *Hudson*, *Wiltberger*, and their progeny. It should be overruled.

The federal courts' treatment of attempt demonstrates proper respect for the prohibition on judge-made criminal theories and provides a telling contrast with *Pinkerton*. "There is no general federal 'attempt' statute," *United States v. Kuok*, 671 F.3d 931, 941 (9th Cir. 2012) (cleaned up); *see, e.g., United States v. Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014); *United States v. Duka*, 671 F.3d 329, 355 (3d Cir. 2011), just as there is no statute authorizing liability for crimes committed by co-conspirators. Rather than create a general theory of criminal liability for attempt, as the Court did in *Pinkerton* for a co-conspirator's crimes, courts have held repeatedly that the government can prosecute attempts only for those offenses where Congress has specifically authorized that theory. *See, e.g., Hite*, 769 F.3d at 1162; *Duka*, 671 F.3d at 355. As the Sixth Circuit explained, "To attempt a federal crime is not, of itself, a federal crime. Attempt is only actionable when a specific federal criminal statute makes it impermissible to attempt to commit the crime." *United States v. Anderson*, 89 F.3d 1306, 1314 (6th Cir. 1996); *see, e.g., United States v. York*, 578 F.2d 1036, 1038 (5th Cir. 1978). In *Kuok*, for example, the Ninth Circuit rejected the government's effort to read attempt liability into 18 U.S.C. § 2(b) and vacated an attempt conviction for which there was no statutory basis. *See Kuok*, 671 F.3d at 941-42.

The federal courts' approach to attempt, faithful to the principles announced in *Hudson* and *Wiltberger*, contrasts sharply with *Pinkerton*. That

decision failed to abide by the strictures of 18 U.S.C. § 2, which governs liability for crimes the defendant did not personally commit. Instead, the *Pinkerton* Court invented a theory of criminal liability that Congress never enacted. The Court should repudiate that theory and return federal criminal liability to its proper scope.

II. THE VAGUENESS OF FEDERAL CONSPIRACY LAW EXACERBATES *PINKERTON*'S FAILURE TO PROVIDE FAIR WARNING.

Judge-made theories of criminal liability pose grave danger that persons will be subject to criminal charges and punishment without fair warning that their conduct violates the law. That danger is especially great for *Pinkerton* liability, because the *Pinkerton* theory rests on guilt of conspiracy, which itself is a notoriously "elastic, sprawling and pervasive offense." *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring).

The central element of conspiracy is an agreement to commit a crime. For most modern federal conspiracy statutes, that is the *only* element; no overt act need be proven. *See, e.g.,* 18 U.S.C. §§ 1349 (fraud conspiracy), 1956(h) (money laundering conspiracy), 1962(d) (RICO conspiracy); 21 U.S.C. § 846 (drug conspiracy); *Whitfield v. United States*, 543 U.S. 209, 214 (2005); *Salinas v. United States*, 522 U.S. 52, 64 (1997); *United States v. Shabani*, 513 U.S. 10, 17 (1994). Pattern jury instructions emphasize how easily the government can prove the existence of

an agreement. District courts in the Third Circuit, for example, instruct juries that

> [t]he government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The government also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objective, or agreed to all the details, or agreed to what the means were by which the objective would be accomplished. The government is not even required to prove that all the people named in the indictment were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known. What the government must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective.

Third Circuit Pattern Criminal Jury Instructions, Instruction 6.18.371C (2021).

Other circuits have similar pattern instructions.[2] The Second Circuit has even approved an instruction that "it is rare that a conspiracy can be proven by direct evidence of an explicit agreement" and "[s]ometimes, the only evidence that is available with respect to the existence of a conspiracy is that of disconnected acts on the part of the alleged individual conspirators." *United States v. Rutigliano*, 790 F.3d 389, 402 (2d Cir. 2015); *cf. Krulewitch*, 336 U.S. at 453 (Jackson, J., concurring) ("As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself."). These instructions underscore the "elastic, sprawling, and pervasive" nature of conspiracy and the resulting difficulty a person of ordinary intelligence has in determining whether his or her conduct violates the conspiracy laws.

Persons thus may lack fair warning both of the scope of the conspiracy statutes and, to an even greater extent, of the judge-made substantive liability that may flow from a conspiracy under *Pinkerton*. But fair notice concerns do not stop there. Most federal courts--all to address the issue except the Ninth Circuit--permit a defendant to be convicted on a *Pinkerton* theory *even when the indictment does not charge a conspiracy*. *See, e.g., United States v. Budd*, 496 F.3d 517, 528 (6th Cir. 2007) ("We find the rule of the majority of circuits more persuasive, and hold that a district court may properly provide a *Pinkerton*

[2] *See, e.g.*, Fifth Circuit Pattern Jury Instructions (Criminal Cases), Instruction 2.15A (2024); Eighth Circuit Model Jury Instructions, Instruction 5.06A-2 (2023).

instruction regarding a substantive offense, even when the defendant is not charged with the offense of conspiracy."); *United States v. Lopez*, 271 F.3d 472, 480-81 (3d Cir. 2001) (same); *see also* Christi Gannon, *Eighth Circuit Misapplies Pinkerton by Holding Conspiracy Need Not Be Charged*, 13 Suffolk J. Trial & Appellate Advocacy 253 (2008) (discussing *United States v. Zackery*, 494 F.3d 644 (8th Cir. 2007)). In most circuits, in other words, the prosecution is permitted to concoct a conspiracy in the course of a trial, with none of the notice to the defendant that an indictment provides, and then use that uncharged conspiracy as a basis for conviction on substantive offenses committed by a co-conspirator, so long as the offense is reasonably foreseeable in furtherance of the uncharged conspiracy.

Even when the indictment charges a conspiracy, it may not provide even basic notice of potential *Pinkerton* liability for substantive counts. The substantive offense does not have to be the charged object of the conspiracy. *See, e.g., United States v. Sleugh*, 827 Fed. Appx. 645, 648 (9th Cir. 2020) (defendant in drug conspiracy properly subject to *Pinkerton* liability for robbery and firearms offenses); *United States v. Gonzales*, 841 F.3d 339, 351-53 (5th Cir. 2016) (same). Nor need the indictment otherwise notify the defendant that he or she can be held liable for substantive crimes someone else committed in furtherance of a conspiracy.

In short, *Pinkerton* permits judge-made, non-statutory liability for a substantive offense the defendant did not commit, based on the act of a co-conspirator in an uncharged conspiracy that can be

proven through "disconnected acts on the part of the alleged individual conspirators." The Court should not perpetuate this travesty.

III. *PINKERTON* PRESENTS A RECURRING PROBLEM THAT THE COURT SHOULD FIX.

Even if the government rarely relied on the *Pinkerton* theory, it would be worth eliminating because it is so clearly wrong. Even one conviction under a theory that Congress never enacted is too many. In fact, however, district courts give *Pinkerton* instructions in virtually every case charging both conspiracy and substantive offenses and--as noted above--even in some cases where no conspiracy is charged. *See, e.g.,* Alex Kreit, *Vicarious Liability and the Constitutional Dimensions of Pinkerton*, 57 Am. U. L. Rev. 585, 598 (2008) (noting increasing popularity of *Pinkerton* theory after initial reluctance to use it); *United States v. Walton*, 2021 U.S. App. LEXIS 24328, at *11 (9th Cir. Aug. 16, 2021) (Watford, J., concurring) (noting the "countless cases in which federal courts have upheld convictions under 18 U.S.C. § 924(c) based on so-called '*Pinkerton* liability'").

These ubiquitous *Pinkerton* instructions give juries an illegitimate third avenue for conviction of substantive offenses, in addition to the grounds Congress has enacted (conviction as a principal and under 18 U.S.C. § 2 for aiding and abetting or willfully causing an offense). In some cases, including this one, a defendant's conviction rests *solely* on *Pinkerton*--solely, that is, on a theory of criminal liability that

judges concocted and Congress has never enacted. *See, e.g., United States v. Sklena*, 692 F.3d 725, 729-30 (7th Cir. 2012) (finding evidence sufficient solely on a *Pinkerton* theory).

As the Petition demonstrates, stare decisis affords no basis for preserving this injustice. *Pinkerton* is indefensible on the merits; it creates no legitimate reliance interests; and it brings discredit to the criminal justice system. The Court should overrule *Pinkerton*.

CONCLUSION

The Court should grant the petition for writ of certiorari and, on consideration of the merits, overrule *Pinkerton*.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Law Office of John D. Cline
600 Stewart Street
Suite 400
Seattle, WA 98101
(360) 320-6435

Counsel for Amicus Curiae

July 2025