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Criminal Law - Eighth Circuit Misapplies Pinkerton by Holding Conspiracy Need Not Be Charged - United States v. Zackery, 494 F.3D 644 (8th Cir. 2007)

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CRIMINAL LAW—EIGHTH CIRCUIT MISAPPLIES *PINKERTON* BY HOLDING CONSPIRACY NEED NOT BE CHARGED—*UNITED STATES V. ZACKERY*, 494 F.3D 644 (8TH CIR. 2007)

The federal conspiracy statute makes it a crime for two or more persons to conspire to commit an offense against the United States or to defraud the United States in any way, shape, or form.[1] Conspiracy itself is a separate offense from the substantive crime envisioned by the agreement.[2] In *Pinkerton v. United States*,[3] the Supreme Court made the landmark ruling that a defendant could be vicariously liable for the substantive crimes of his coconspirators so long as the substantive offenses were committed in furtherance of the conspiracy, fell within the scope of the conspiracy, and were reasonably foreseeable as the natural consequences of the conspiracy.[4] In *United States v. Zackery*,[5] the Eighth Circuit considered whether a defendant could be convicted of a substantive offense under the *Pinkerton* theory of liability if the indictment did not include a charge of conspiracy

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[1] *See* 18 U.S.C. § 371 (2000). The full statute reads:

> 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.

Id; see also Michael Manning, Comment, *A Common Law Crime Analysis of* Pinkerton v. United States*: Sixty Years of Impermissible Judicially-Created Criminal Liability*, 67 MONT. L. REV. 89, 104 (2006) (listing elements for conspiracy conviction). Under 18 U.S.C. § 371, the government must prove: "1) an agreement between two or more persons, the object of which is an offense against the United States or to defraud the United States; 2) the defendant knowingly and willingly joined the conspiracy; and 3) at least one of the co-conspirators committed an overt act in furtherance of the conspiracy." *Id.* (citing United States v. Svoboda, 347 F.3d 471, 476 (2d Cir. 2003)).

[2] Karen Anderson & Megan Bertron, *Federal Criminal Conspiracy*, 33 AM. CRIM. L. REV. 729, 729-30 (1996) (explaining conspiracy as separate offense from substantive crime contemplated). The conspiracy charge and the substantive charge are mutually exclusive, as an acquittal of one charge does not bar a conviction of the other. *Id.*

[3] 328 U.S. 640 (1946).

[4] *Id.* at 647-48 (holding overt act of one partner in conspiracy attributable to all involved in conspiracy).

[5] 494 F.3d 644 (8th Cir. 2007), *petition for cert. filed*, (U.S. Dec. 04, 2007) (No. 07-8034).

itself.[6] The court held that a defendant could be convicted under the *Pinkerton* theory even if the indictment did not include a charge of conspiracy.[7]

On May 28, 2004, the vice president of TelComm Credit Union, Steven Butler, arrived at the bank to open the branch for the day.[8] As Butler attempted to enter the bank through the rear door, two men wearing ski masks approached him.[9] One of the men knocked Butler over, held an object close to his head and stated that he would kill Butler if he did not open the bank's vault.[10] Butler later testified that he thought the object near his head was a pistol.[11]

Butler obeyed the robbers and opened the bank door by entering a code into the computerized security system.[12] Unbeknownst to the robbers, Butler also entered a distress code alerting the police to the break-in.[13] Upon entering the bank, the man with the pistol said, "I ought to cap you," but the other man, later identified as the defendant, Zackery, assured Butler that he would not be hurt.[14] The police arrived soon after and both robbers fled.[15] Officers pursued and arrested Zackery but did not find the other man or recover the firearm.[16]

The United States District Court for the Western District of Missouri subsequently indicted Zackery for attempted robbery and possession of a firearm in furtherance of the robbery.[17] Zackery pled guilty to the at-

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[6] *Id.* at 647 (reviewing appellant's argument that distinct conspiracy offense must be charged before *Pinkerton* liability will stand).

[7] *See id.* at 648 (stating "whether the indictment charged separate conspiracy offense is irrelevant.").

[8] *Id.* at 646 (detailing facts of case).

[9] *Id.* (describing appearance of bank robbers).

[10] 494 F.3d at 646 (detailing confrontation between Butler and bank robbers).

[11] *Id.* (recounting Butler's testimony at trial). Although the attack dazed Butler, he testified that he saw the object by his head through his peripheral vision. *Id.* The district court subsequently found that the object was a firearm. *Id.*

[12] *Id.* (outlining facts of case).

[13] *Id.* (outlining facts of case).

[14] *Id.* (summarizing communications between Butler and bank robbers).

[15] 494 F.3d at 646 (detailing facts of case).

[16] *Id.* (describing police pursuit).

[17] *Id.* at 645-46 (specifying counts one and two of indictment in violation of 18 U.S.C. §§ 2113(a) and (d) and 18 U.S.C. §§ 924(c) and (2)). The attempted robbery statute, in relevant part, provides:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

tempted robbery charge and was later convicted of the firearm possession after a bench trial.[18] While the district court found that Zackery did not actually possess the firearm, it found that it was reasonably foreseeable to Zackery that his accomplice in the bank robbery would have a weapon.[19] The district court, therefore, convicted Zackery of the substantive firearm offense committed by his partner under the *Pinkerton* theory of liability.[20]

> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
> Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a) (2000).

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113(d) (2000).
The firearm possession statute reads:

> 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.

18 U.S.C. § 924(c)(1)(A) (2000).
The aiding and abetting statute reads:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> 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. § 2 (2000).

[18] 494 F.3d at 645 (chronicling procedural history).

[19] *Id.* at 646 (outlining district court's findings for conviction under 18 U.S.C. § 924(c)).

[20] *Id.* (clarifying *Pinkerton* theory of liability as basis for district court's ruling). The Eighth Circuit further explained the district court's holding in light of the *Pinkerton* theory of liability, stating, "[I]t was reasonably foreseeable to Zackery that his accomplice would use a firearm in

Zackery appealed this conviction, arguing that he could not be convicted of the substantive firearm offense under *Pinkerton* because the indictment did not include a charge of conspiracy itself.[21] Holding that a defendant could be convicted under the *Pinkerton* theory of liability even if conspiracy was not charged in the indictment, the Eighth Circuit upheld Zackery's conviction.[22]

In *Pinkerton v. United States,* the Supreme Court made the landmark ruling that a defendant could be vicariously liable for the substantive crimes of his coconspirators so long as the substantive offenses were committed in furtherance of the conspiracy, fell within the scope of the conspiracy, and were reasonably foreseeable as the natural consequences of the conspiracy.[23] Invoking principles of agency and partnership, the Court reasoned that by joining an unlawful scheme, a person inherently designated agents to carry out the performance of the plan.[24] So long as the partner-

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furtherance of their conspiracy to commit a violent crime, attempted robbery." *Id.* The district court, therefore, inferred a conspiracy to commit the robbery although conspiracy itself was not charged in the indictment. *Id.*

[21] *Id.* (stating primary issue on appeal). *See generally* Brief of Defendant-Appellant, United States v. Zackery, 494 F.3d 644, No. 06-1930 (8th Cir. Oct. 2006).

[22] *Id.* at 648 (maintaining "whether the indictment charged a separate conspiracy offense is simply irrelevant.").

[23] Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). The defendants, brothers W. Daniel Pinkerton and Walter G. Pinkerton, were charged with conspiracy to violate the Internal Revenue Code and other substantive offenses committed in furtherance of violating the Code. *Id.* at 641-42. A jury found Walter guilty of the conspiracy charge and nine of the substantive charges, while it found Daniel guilty of the conspiracy charge and six of the substantive charges. *Id.* at 641. Although evidence existed to show that Walter had committed the substantive offenses in furtherance of the conspiracy, no evidence existed to prove that Daniel participated in any of the substantive offenses that sustained his conviction. *Id.* at 645. The trial judge instructed the jury that if it found the two defendants were engaged in an unlawful conspiracy, it could convict each of the defendants on all of the substantive offenses, so long as the offenses were committed pursuant to the unlawful agreement. *Id.* The jury subsequently convicted both brothers. *Id.* at 641. Daniel Pinkerton, relying on United States v. Sall, 116 F.2d 745 (3d Cir. 1940), appealed and argued that his participation in the conspiracy alone was not enough to sustain his conviction of the substantive offenses. *Id.* at 646; *see Sall*, 116 F.2d at 747 (holding evidence of participation in commission of substantive offenses necessary before conviction of such offenses will stand). The *Pinkerton* Court rejected Daniel's argument and overruled *Sall*. *Pinkerton*, 328 U.S. at 646.

[24] *Pinkerton,* 328 U.S. at 646 (reiterating Court's reasoning). The Court relied on the language of Hyde v. United States, 225 U.S. 347 (1912), a case involving a conspiracy to defraud the United States out of its public lands. *Id.* While *Hyde* advanced the principles of agency and partnership in the context of conspiracy, the Court recognized that such relationships would terminate if a coconspirator did some act to rebuke or defeat the objective of the conspiracy. *Id.* (citing *Hyde,* 225 U.S. at 369). The Court concluded that Daniel Pinkerton took no affirmative action to withdraw from the conspiracy and therefore found him subject to the agency principles articulated in *Hyde.* 328 U.S. at 646. *But see* Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on* Pinkerton *Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 96-97 (2006) (analyzing *Pinkerton's* agency justifications for coconspirator vicarious liability). Noferi notes, however,

ship in crime continued, the overt acts of one partner committed in furtherance of the conspiracy were attributable to all partners.[25] Additionally, the Court analogized coconspirator liability to accomplice liability, justifying its holding on causational grounds.[26] According to the Court, each conspirator instigated the commission of substantive offenses simply by joining the conspiracy, as he or she created the context in which the offense could occur.[27] Thus, like accomplices, coconspirators assisted in the commission of the substantive offenses and were therefore equally as punishable as the principal who committed the actual crime.[28]

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that agency law generally requires consent among the parties before they may act on behalf of one another. *Id.* The *Pinkerton* rule does not require such consent, as coconspirators may be liable for acts which they did not sanction. *Id.* The *Pinkerton* Court likely recognized this distinction; according to Noferi, this distinction may have formed the basis for the Court's requirement that the substantive offenses be reasonably foreseeable and within the scope of the conspiracy. *Id.*

[25] *See Pinkerton*, 328 U.S. at 646-47 (citing United States v. Kissel, 218 U.S. 601, 608 (1910)) (articulating applicability of agency and partnership principles to conspiracy offense). The *Kissel* Court, in an opinion by Justice Holmes, analyzed conspiracy as a partnership for criminal purposes, and stated that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *Kissel*, 218 U.S. at 608. *But see* Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying* Pinkerton *Liability to RICO Actions*, 56 MO. L. REV. 931, 938 (1991) (noting Justice Holmes "cited no authority" for this statement). According to Brenner, the rationale for the *Pinkerton* doctrine had to be found elsewhere, as *Kissel* did not address the issue of coconspirator liability at all. *Id.*

[26] *See Pinkerton*, 328 U.S. at 647 (stating, "[t]he rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle."). The federal accomplice liability statute reads: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (2000). Aiding and abetting is a theory of liability implied in every count; therefore, it does not have to be expressly charged in an indictment. *See* United States v. Clark, 980 F.2d 1143, 1146 (8th Cir. 1992) ("Aiding and abetting is an alternative charge in every count, whether implicit or explicit.").

[27] *See Pinkerton*, 328 U.S. at 647 (invoking causation principles). As the Court explained, "[E]ach conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act was done in execution of the enterprise." *Id.*; *see also* Noferi, *supra* note 24, at 96 (analyzing causation as possible theoretical justification for *Pinkerton* doctrine).

[28] *See Pinkerton*, 328 U.S. at 648 (affirming defendant's conviction); *see also* Neal Kumar Katyal, *Danger in Numbers: Why it Makes Sense to Have Harsh Punishments for Conspiracy*, APR LEGAL AFF. 44, 46 (2003) (defending *Pinkerton* on public policy grounds). Katyal advances two primary arguments in favor of the *Pinkerton* doctrine. First, he argues that *Pinkerton* provides for effective law enforcement. *Id.* According to Katyal, "small fish" within a conspiracy are more inclined to become informants when confronted with the threat of vicarious liability; therefore, law enforcement officials will be able to elicit key information without resorting to intrusive and coercive techniques. *Id.* Second, Katyal argues that the *Pinkerton* doctrine deters criminals from participating in conspiracies all together, as the risk of liability makes the conspiracy less appealing. *Id.*; *see also* Matthew A. Pauley, *The* Pinkerton *Doctrine and Murder*, 4 PIERCE L. REV. 1, 8 (2005) (arguing *Pinkerton* is consistent with American jurisprudence). *But see Pinkerton*, 328 U.S. at 648-54 (Rutledge, J., dissenting) (arguing *Pinkerton* doctrine dangerous and without precedent). Justice Rutledge criticized the majority for impermissibly fusing to-

Three years later, in *Nye & Nissen v. United States*,[29] the Supreme Court clarified the *Pinkerton* rule by distinguishing coconspirator liability and accomplice liability as separate theories available to convict individuals of substantive crimes.[30] Emphasizing that *Pinkerton* is narrow in scope, the Court reiterated that a *Pinkerton* conviction will stand only if there is a conspiracy and if there is a reasonable connection between the goals of that conspiracy and the substantive offenses committed.[31] Aiding and abetting, however, "rests on a broader base," and makes an accomplice liable as a principal if he or she encouraged or participated in any criminal act, regardless of whether a conspiracy existed.[32] While the *Pinkerton* doctrine and accomplice liability differ, the *Nye & Nissen* Court established that they are alternate theories of liability which could each be used to convict an indi-

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gether three separate crimes: 1) completed substantive offenses; 2) aiding, abetting, or counseling another to commit the offenses, and 3) conspiracy to commit the offenses. *Id.* at 649. He argued that if these distinctions are disregarded, a person may be convicted twice for the same offense (double jeopardy) or be convicted of one crime based on evidence of another. *Id.* Additionally, Justice Rutledge insisted that the *Pinkerton* doctrine afforded prosecutors too much discretion and feared the "almost unlimited scope of vicarious responsibility for others' acts which follow once agreement is shown . . . ." *Id.* at 650; *see also* Benjamin E. Rosenberg, *Several Problems in Criminal Conspiracy Laws and Some Proposals for Reform*, 43 No. 4 CRIM. L. BULLETIN 1, 7 (2007) (criticizing *Pinkerton* for failing to define scope of conspiracy and for assuming conspiracy will encompass all bad acts committed by coconspirators); Manning, *supra* note 1, at 90-91 (arguing *Pinkerton* impermissibly created federal common law crime).

[29] 336 U.S. 613 (1949).

[30] *See id.* at 618 (finding aiding and abetting an "equally valid theory" as *Pinkerton* doctrine). The defendant, president of Nye & Nissen Corporation, was indicted for conspiracy to defraud the United States and for six other counts relating to fraudulent misrepresentation. *Id.* at 614-15. Although the indictment included a count of conspiracy, the trial judge instructed the jury on an aiding and abetting theory of liability, rather than a *Pinkerton* coconspirator theory of liability. *Id.* at 618. The defendant was convicted and appealed to the Supreme Court, arguing that the conviction was in fact based on the *Pinkerton* theory, and that there was insufficient evidence to prove that his substantive criminal acts were in furtherance of the original conspiracy. *Id.* The Court, emphasizing that aiding and abetting was an "equally valid theory," upheld the defendant's conviction on the grounds that there was sufficient evidence to support a finding that the defendant aided and abetted in the commission of the substantive offenses. *Id.* at 619. The Court further noted that either a *Pinkerton* or aiding and abetting theory of liability was appropriate in this case, concluding that "[t]he fact that a particular case might conceivably be submitted to the jury on either theory is irrelevant." *Id.* at 620.

[31] *See id.* at 620 (reiterating *Pinkerton*'s narrow scope). The Court stated, "The rule of [*Pinkerton*] does service where the conspiracy was one to commit offenses of the character described in the substantive counts." *Id.*

[32] *Id*; *see also* Brenner, *supra* note 25, at 969-73 (analyzing fundamental differences between *Pinkerton* doctrine and accomplice liability). Under *Pinkerton*, an unlawful agreement is necessary before liability may be imposed. *Id.* at 969. A person who joins the conspiracy can therefore be liable for the substantive acts of his coconspirators committed pursuant to the conspiracy even if that person did not partake in the substantive acts himself. *Id.* Under accomplice liability, however, a conspiracy is unnecessary. *Id.* Furthermore, unlike *Pinkerton*, mere association with a crime is not enough; rather, one must intentionally commit an affirmative act for the purpose of furthering the substantive offense to be convicted as an aider or abettor. *Id.* at 970.

vidual of substantive offenses he did not directly commit.[33]

Since *Pinkerton* and *Nye & Nissen*, federal courts have routinely used coconspirator liability to convict defendants of a variety of substantive offenses.[34] Within the past twenty years, however, circuits have split over a fundamental issue underlying the applicability of the *Pinkerton* doctrine: whether or not the original indictment must include a charge of conspiracy itself.[35] The Ninth Circuit has expressly declined to allow a *Pinkerton* conviction in the absence of a conspiracy charge.[36] Others, however, have held that conspiracy need not be charged in order for the *Pinkerton* doctrine to apply.[37] Circuits supporting this principle allow juries to infer the existence of an unlawful agreement even if the indictment does not formally charge conspiracy itself.[38]

In *United States v. Zackery*, the Eighth Circuit considered whether a defendant could be convicted of using a firearm in furtherance of a violent crime under a *Pinkerton* theory of liability if conspiracy was not

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[33] *Nye & Nissen*, 336 U.S. at 620; *see also* United States v. Meester, 762 F.2d 867, 878 (11th Cir. 1985) (reiterating *Pinkerton* and aiding and abetting as alternative theories available to prove one committed substantive offenses). The *Meester* court stated, "[a] defendant charged with conspiracy and the substantive offense 'normally will be responsible for the substantive crime under the *Pinkerton* theory and also may be responsible for the substantive crime under an aiding and abetting theory.'" *Id.* (quoting United States v. Monaco, 702 F.2d 860, 881 (11th Cir. 1983)); *see also* Brenner, *supra* note 25, at 972 (explaining *Pinkerton* liability and accomplice liability as "merely different ways of finding that an individual committed certain substantive offenses.") (internal quotations omitted).

[34] *See, e.g.*, United States v. Silvestri, 409 F.3d 1311, 1335 (11th Cir. 2005) (finding defendant guilty of money laundering); United States v. Boyd, 222 F.3d 47, 51 (2d Cir. 2000) (finding defendant guilty of mail and wire fraud); United States v. Flores-Rivera, 56 F.3d 319, 324 (1st Cir. 1995) (finding defendant guilty of assault on federal agent); Paul Silvio Berra, Jr., Comment, *Co-Conspirator Liability Under 18 U.S.C. § 924(C): Is It Possible to Escape?*, 1996 WIS. L. REV. 603, 606 (1996) (analyzing prevalence of *Pinkerton* liability in firearm cases); Manning, *supra* note 1, at 97-102 (analyzing *Pinkerton* liability as most regularly applied to drug and firearm crimes).

[35] *See* United States v. Zackery, 494 F.3d 644, 647 (2007) (explaining circuit split).

[36] *See* United States v. Nakai, 413 F.3d 1019, 1023 (9th Cir. 2005) (ruling "[i]t is error to use a *Pinkerton* instruction in a case in which the indictment does not allege a conspiracy."). The *Nakai* court reasoned that unlike an aiding and abetting charge, a conspiracy charge is not implicit in any indictment; thus, the sanctioning of a *Pinkerton* instruction would essentially hold the defendant liable for the consequences of a crime with which he had not been charged. *Id.*

[37] *See* United States v. Lopez, 271 F.3d 472, 480 (3d Cir. 2001) ("We have little difficulty following our sister circuit courts of appeals in determining that a conspiracy need not be charged in order for *Pinkerton*'s doctrine to apply."); United States v. Chairez, 33 F.3d 823, 827 (7th Cir. 1994) ("[T]he absence of a conspiracy charge does not preclude the district court from applying a *Pinkerton* theory . . . ").

[38] *See Lopez*, 271 F.3d at 480 ("It is not required that a conspiracy be charged in the indictment . . . as long as the evidence at trial establishes beyond a reasonable doubt that a conspiracy existed . . . "); *Chairez*, 33 F.3d at 827 ("[T]he absence of a conspiracy charge does not preclude the district court from applying a *Pinkerton* theory . . . if the evidence so suggests.").

charged in the indictment.[39] In deciding the issue, the court first turned to the underlying tenets of *Pinkerton* itself, insisting that the *Pinkerton* decision rested upon evidentiary principles of joint criminal liability and not on whether a conspiracy itself was charged.[40] Having construed *Pinkerton* in this fashion, the Eighth Circuit then turned to its precedent decision, *United States v. Thirion*.[41] While the defendant in *Thirion* could not be convicted of a conspiracy offense due to the terms of a foreign country's extradition treaty, the Eighth Circuit nevertheless upheld the defendant's conviction of the substantive offenses under a *Pinkerton* theory of liability by directly equating coconspirator liability with aiding and abetting liability.[42] According to the court, a defendant could be convicted under a theory of aiding and abetting even though it was not charged in the indictment, as aiding and abetting did not create a separate offense but simply made those who aided and abetted punishable as principals.[43] The Eighth Circuit found this

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[39] 494 F.3d 644, 646 (8th Cir. 2007), *petition for cert. filed*, (U.S. Dec. 04, 2007) (No. 07-8034) (outlining Zackery's primary argument on appeal). The court acknowledged that this was a matter of first impression for the Eighth Circuit; however, it also noted that in all of its previous decisions affirming *Pinkerton* convictions, the underlying indictments did in fact charge a separate conspiracy offense. *Id.* at 647 (citing, *e.g.*, United States v. Hayes, 391 F.3d 958, 963 (8th Cir. 2004) (upholding *Pinkerton* jury instruction in light of conspiracy charge against defendant)).

[40] *Id.* at 647 (stating, "[i]n our view, the narrow question before us is all but answered by the Supreme Court's opinions in *Pinkerton*."). In support of its argument that *Pinkerton* was based upon evidentiary principles of joint criminal liability rather than whether a conspiracy offense was pleaded, the court referenced another Eighth Circuit opinion cited in the *Pinkerton* decision, *Baker v. United States*. *Id.* at 648 (citing Baker v. United States, 115 F.2d 533, 540 (8th Cir. 1940)). In *Baker*, the Eighth Circuit, upholding a defendant's conviction for fraud, stated, "[t]he evidence conclusively shows that [the defendant] was a party to the scheme and even though a conspiracy is not charged, yet when such a scheme is clearly participated in by more than one individual, it constitutes in and of itself a conspiracy." *Baker*, 115 F.2d at 540. Thus, according to the Eighth Circuit, *Pinkerton* liability turns solely on whether sufficient evidence exists to convict a defendant of additional substantive offenses; whether the indictment charged a separate conspiracy offense is "simply irrelevant" to the analysis. *Zackery*, 494 F.3d at 648.

[41] 494 F.3d at 648 (citing United States v. Thirion, 813 F.2d 146 (8th Cir. 1987)). In *Thirion*, the defendants were charged with mail fraud, inducing interstate travel to defraud, wire fraud, and conspiracy. 813 F.2d at 149. However, one of the defendants fled to Monaco before the indictment was issued. *Id.* at 150. Monaco and the United States thereafter entered into an extradition treaty and Monaco agreed to extradite the defendant on all charges against him except on the conspiracy count. *Id.* The Eighth Circuit, noting that the defendant technically could not be convicted of conspiracy, nevertheless concluded that the jury could hear a *Pinkerton* instruction and convict the defendant of the substantive offenses under a theory of coconspirator liability. *Id.* at 151-52.

[42] 494 F.3d at 648 (quoting *Thirion*, 813 F. 2d at 151) (finding justifications for implied aiding and abetting theory in every indictment "equally applicable to co-conspirator liability.").

[43] *Id.* The court did note, however, that Congress has recognized conspiracy to be a separate statutory crime but has not done so with aiding and abetting. *Id.* The court dismissed this point, stating that coconspirator liability did not have its origins in the federal conspiracy statute but rather in the common law. *Id. Pinkerton* liability, therefore, like aiding and abetting liability, did not create a separate offense but merely provided an alternative theory by which the government

reasoning "equally applicable to coconspirator liability," and therefore held that a defendant could be convicted under a coconspirator theory of liability even if conspiracy was not charged in the indictment.[44]

The dissenting opinion, however, disagreed with the majority's application of the *Pinkerton* doctrine where the defendant had not been found guilty of a separately charged conspiracy.[45] While acknowledging that the Eighth Circuit had never squarely addressed the specific issue, the dissent noted that all of the circuit's previous cases affirming *Pinkerton* convictions contained a separate charge of conspiracy in the indictments.[46] Additionally, the dissent challenged the majority's reliance on *Thirion* as misplaced and argued that *Thirion* only stood for the proposition that the *Pinkerton* theory of liability, like the aiding and abetting theory, did not need to be charged in the indictment.[47] According to the dissent, *Thirion*

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could prove joint criminal liability for substantive offenses. *Id.* at 649.

[44] *Id.* at 648 (quoting *Thirion*, 813 F.2d at 151). The court also noted that its conclusion was consistent with the general rule that evidence may be admitted under the coconspirator exception to the hearsay rule "even in the absence of a conspiracy charge so long as there is independent evidence of concert of action." *Id.* (quoting United States v. Richardson, 477 F.2d 1280, 1283 (8th Cir. 1973)).

[45] *See* 494 F.3d at 650 (Shepherd, J., dissenting) (arguing *Pinkerton* doctrine inapplicable).

[46] *Id.* at 650 (Shepherd, J., dissenting) (citing United States v. Pierce, 479 F.3d 546, 549-50 (8th Cir. 2007); United States v. Mathison, 157 F.3d 541, 551 (8th Cir. 1998); United States v. Davis, 154 F.3d 772, 782 (8th Cir. 1998) (overruled on other grounds); United States v. Comeaux, 955 F.2d 586, 591 (8th Cir. 1992); United States v. Lucas, 932 F.2d 1210, 1220 (8th Cir. 1991); United States v. Johnson, 906 F.2d 1285, 1289 (8th Cir. 1990); United States v. Golter, 880 F.2d 91, 92 (8th Cir. 1989); United States v. Lombardo, 859 F.2d 1328, 1329 (8th Cir. 1988); United States v. DeLuna, 763 F.2d 897, 918 (8th Cir. 1985) (overruled on other grounds)). Additionally, Justice Shepherd referenced two Eighth Circuit opinions and argued that they stood for the proposition that absent a conspiracy charge, the *Pinkerton* doctrine is inapplicable. *Zackery*, 494 F.3d at 650 (Shepherd, J., dissenting) (citing United States v. Hayes, 391 F.3d 958, 963 (8th Cir. 2004) ("In light of the conspiracy charge against Hayes, the District Court was warranted in giving [a *Pinkerton* coconspirator] instruction . . . ."); United States v. Richmond, 700 F.2d 1183, 1191 (8th Cir. 1983) ("In accordance with well established conspiracy law, the trial court instructed the jury that if they found a defendant guilty of conspiracy they could also find that defendant guilty of a substantive crime which was committed by his coconspirators pursuant to the conspiracy at the time the defendant was a member of the conspiracy.").

[47] *See Zackery*, 494 F.3d at 652-53 (Shepherd, J., dissenting) ("While I agree that aiding and abetting liability is an alternative theory in every indictment, coconspirator liability under *Pinkerton* is not."). According to Justice Shepherd, *Thirion* stood for the proposition that the government's *theory* of liability need not be charged in the original indictment; it did not hold that conspiracy itself need not be charged. *Id.* at 652 (emphasis added). Thus, *Thirion's* analogy to aiding and abetting only applied to whether the *theory* of liability had to be stated in original indictment, and not to the issue of conspiracy itself. *Id.* (emphasis added). Justice Shepherd also criticized the majority's reliance on two other circuit cases affirming *Pinkerton* convictions absent an underlying charge of conspiracy. *Id.* at 651. He pointed out that the Seventh Circuit opinion, United States v. Chairez, 33 F.3d 823 (7th Cir. 1994), relied solely upon United States v. Macey, 8 F.3d 462 (7th Cir. 1993), a case involving a conviction of mail fraud. *Zackery*, 494 F.3d at 651 (Shepherd, J., dissenting). In doing so, Justice Shepherd argued, "[b]ecause mail fraud includes a scheme to defraud as an element, it is not surprising that members of the scheme

actually supported the notion that conspiracy must be charged before *Pinkerton* liability may be imposed, and merely indicated that the *Pinkerton* theory itself need not be charged in the original indictment.[48] Finally, the dissent criticized the majority opinion for disregarding the principles articulated in *Pinkerton* and *Nye & Nissen,* and argued that the majority "broaden[ed] the scope of the theory beyond that contemplated by the Supreme Court."[49] In light of these principles, the dissent concluded that the defendant's conviction should be reversed, as his guilt "could not be premised upon his being found guilty of an uncharged conspiracy."[50]

In *United States v. Zackery*, the Eighth Circuit incorrectly applied the *Pinkerton* theory of liability absent an underlying charge and conviction of conspiracy.[51] The *Pinkerton* doctrine created coconspirator vicarious liability; therefore, as conspiracy is a distinct and separate offense, it follows that a specific finding of guilt on the conspiracy charge precedes any conviction under the vicarious liability standard.[52] Indeed, the very reasoning underlying the *Pinkerton* opinion reflected the Court's concern with the dangerous nature of the conspiracy offense itself.[53] As the Supreme Court

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are criminally liable for the foreseeable mail fraud committed by other members." *Id.* Thus, according to Justice Shepherd, cases that involve convictions of mail fraud are distinguishable, as they implicitly charge conspiracy by delegating one element of the offense to include a scheme to defraud. *Id.*

[48] 494 F.3d at 652 (Shepherd, J., dissenting) (clarifying holding of *Thirion*). In *Thirion,* the Eighth Circuit upheld the district court's vicarious coconspirator jury instruction, which specifically stated that the jury must find the defendant was a coconspirator "as charged" in the indictment in order to find the defendant guilty under the *Pinkerton* theory. *Id.* (citing United States v. Thirion, 813 F.2d 146, 152 n.6 (8th Cir. 1987)). According to Justice Shepherd, *Thirion* actually supported the proposition that a conspiracy must first be charged before a *Pinkerton* instruction could take place. 494 F.3d at 652.

[49] 494 F.3d at 652 (Shepherd, J., dissenting). Justice Shepherd pointed out that the *Nye & Nissen* Court specifically interpreted *Pinkerton* liability as "narrow in its scope," and argued that its application is only available under narrow circumstances. *Id.* (citing Nye & Nissen v. United States, 336 U.S. 613, 620 (1949)).

[50] *Id.* at 653 (Shepherd, J., dissenting). Justice Shepherd pointed out that the government chose, "unsuccessfully, to prove that Zackery aided and abetted" in the possession of a firearm, rather than to charge him with conspiracy to commit bank robbery. *Id.* Thus, according to Justice Shepherd, the government should be precluded from invoking a *Pinkerton* theory of liability, because the indictment "provided no notice that [the defendant's] guilt could be premised upon his being found guilty of an uncharged conspiracy." *Id.*

[51] *See id.* at 648 (holding "whether the indictment charged a separate conspiracy offense is simply irrelevant.").

[52] *See* Brief of Defendant-Appellant, *supra* note 21, at 6 ("As Mr. Zackery was not charged with conspiracy, he may not be convicted upon a theory of conspiracy.").

[53] *See* Pinkerton v. United States, 328 U.S. 640, 644 n.3 (1946) (recognizing gravity of conspiracy offense). According to the Court:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes

indicated in *Nye & Nissen, Pinkerton* is "narrow in its scope," and will only apply if a conspiracy exists and if there is a reasonable connection between the goals of that conspiracy and the substantive offenses committed.[54] By upholding a conviction under a *Pinkerton* theory of liability absent an underlying charge of conspiracy, the Eighth Circuit erroneously broadened the doctrine's application beyond that envisioned by the Supreme Court.[55]

Additionally, the Eighth Circuit improperly relied on its prior decision, *United States v. Thirion*, as *Thirion* itself runs afoul to the principles articulated in *Nye & Nissen*.[56] In *Thirion,* the court directly analogized coconspirator liability with aiding and abetting liability and found that because an aiding and abetting theory of liability may be implicit in any indictment, a *Pinkerton* coconspirator theory of liability may be implicit as well.[57] By doing so, the *Thirion* court ignored the fundamental differences between aiding and abetting and coconspirator liability as articulated by the Supreme Court.[58] In *Nye & Nissen*, the Court expressly stated that aiding

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> quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

Id. (citing United States v. Rabinowich, 238 U.S. 78, 88 (1915)). The Court therefore recognized that the dangers of conspiracy are not confined simply to the substantive crimes committed in furtherance of the agreement, but extend to the very act of forming the agreement itself. *Id.* In light of these concerns, the *Pinkerton* Court may have articulated its rule with the hope of deterring future conspiracy involvement. *See* Noferi, *supra* note 24, at 102-03 (articulating ways *Pinkerton* liability may deter criminal conspiracy). According to Noferi, the *Pinkerton* doctrine may cause would-be criminals to second guess their involvement before joining a conspiracy and encourage conspirators to cooperate with the government in the hope of evading extensive criminal liability for the substantive crimes of their associates. *Id.*

[54] *See* Nye & Nissen v. United States, 336 U.S. 613, 620 (1949) ("The rule of [*Pinkerton*] does service where the conspiracy was one to commit offenses of the character described in the substantive accounts."). In contrast, aiding and abetting makes a defendant liable as a principle when he knowingly assists in a criminal act "whether or not there is a conspiracy." *Id.*

[55] *See* 494 F.3d at 653 (Shepherd, J., dissenting) ("As instructed by the Supreme Court, [*Pinkerton*] is available under narrow circumstances."). According to Justice Shepherd, *Pinkerton*'s application, absent the essential conspiracy conviction, ran contrary to the original intentions of the *Pinkerton* and *Nye & Nissen* Courts. *Id.* at 652.

[56] *See id.* at 648 (quoting reasoning in *Thirion*); *see also supra* text accompanying notes 30-33 (setting forth main principles of *Nye & Nissen*).

[57] *See* United States v. Thirion, 813 F.2d 146, 152 (8th Cir. 1987) (stating rationale behind aiding and abetting "equally applicable to coconspirator liability."). In drawing this conclusion, the court cited *Pinkerton*'s assertion that coconspirator liability is founded on the same principle as one who aids and abets the commission of a crime. *Id.* at 151. From this declaration, the *Thirion* court concluded that "the individual substantive counts need not make reference to coconspirator liability in order for the jury to be so instructed." *Id.* at 152.

[58] *See Nye & Nissen*, 336 U.S. at 620 (1949) (distinguishing *Pinkerton's* "narrow" scope from aiding and abetting's "broader base.").

and abetting "rests on a broader base" than coconspirator liability; specifically, the Court maintained that an aiding and abetting instruction may be submitted to a jury regardless of whether or not a conspiracy existed, but that a *Pinkerton* instruction would only stand in light of a conspiracy charge.[59] Thus, the *Nye & Nissen* Court rejected the contention that a conspiracy charge is implicit in any indictment as an alternative to aiding and abetting.[60]

In upholding a *Pinkerton* conviction absent an underlying charge and conviction of conspiracy, the Eighth Circuit has dangerously expanded the scope of prosecutorial discretion at the expense of defendants' rights to due process.[61] The original *Pinkerton* decision increased the likelihood for conspiracy prosecutions, as the government need only prove the existence of a conspiracy to secure convictions on other substantive charges.[62] The

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[59] *Id*; *see also supra* note 33 and accompanying text (highlighting major differences between aiding and abetting liability and coconspirator liability).

[60] *See* 336 U.S. at 618 (finding requirements for verdict under *Pinkerton* theory not met). According to the *Nye & Nissen* Court, a conviction under a *Pinkerton* theory of liability requires proof that the defendant joined a conspiracy and that the substantive offenses committed were in furtherance of the conspiracy and were part of it. *Id.* The Court acknowledged that these requirements were not met and therefore a conviction under *Pinkerton* was not warranted. *Id.* However, the Court reasoned that the case was submitted on an "equally valid theory" of aiding and abetting. *Id.* Thus, the Court refused to imply a *Pinkerton* theory of liability in the indictment but acknowledged the implicit charge of aiding and abetting. *Id* at 618-19.

[61] *See* Pinkerton v. United States, 328 U.S. 640, 648-54 (1946) (Rutledge, J., dissenting) (arguing *Pinkerton* sets dangerous precedent). Justice Rutledge's dissent in the original *Pinkerton* opinion called attention to the potential dangers of abuse involved in conspiracy law and criticized the wide latitude the new precedent would afford to prosecutors. *Id.* at 650. Specifically, he feared the "looseness with which the [conspiracy] charge may be proved, [and] the almost unlimited scope of vicarious responsibility for others' acts which follow once an agreement is shown . . . ." *Id.* Justice Rutledge reiterated that it is the duty of the Court to exercise "supervisory power" over the methods of federal criminal prosecutions and to prevent prosecutorial discretion from expanding "into new, wider, and more dubious areas of choice." *Id*; *see also* Noferi, *supra* note 24, at 147 (arguing for additional due process limitations on *Pinkerton* vicarious liability).

[62] *See* Pauley, *supra* note 28, at 6 (explaining "vituperative criticism" sparked by *Pinkerton* decision). As the President of the National Association of Criminal Defense Lawyers stated,

> [T]he Pinkerton doctrine permits the government to hold a defendant criminally responsible for all reasonably foreseeable acts of co-conspirators regardless of actual knowledge, intent, or participation. Thus, if the government cannot prove a defendant guilty on various substantive charges, it need only convince a jury of the defendant's guilt of conspiracy to secure convictions on the otherwise unsupportable substantive charges.

Id. (citing Letter from Jeff Weiner, President, Nat'l Ass'n of Criminal Def. Lawyers (Feb. 1991)); *see also Nye & Nissen*, 336 U.S. at 626 (Frankfurter, J., dissenting) (noting increased tendency for prosecutors to indict for conspiracy). Justice Frankfurter worried about the possible abuse of defendants' rights in light of the *Pinkerton* doctrine and cautioned, "[T]he concept of conspiracy is not an invitation to circumvent the safeguards in the prosecution of crime . . . ." *Id.*

Eighth Circuit's holding only broadened this discretion, as it essentially eliminated the government's burden to properly charge the defendant and left the defendant to guess as to the charges against him.[63] Further, by finding that a *Pinkerton* theory may be implicit in any indictment, the Eighth Circuit lessened the government's burden of proof from an aiding and abetting theory—which requires proof that the defendant knowingly aided in the commission of the offense—to a *Pinkerton* theory, which only requires proof that the offense was reasonably foreseeable to the defendant and committed in furtherance of the conspiracy.[64] Doing so unjustly prejudices a defendant and makes him liable for the consequences of a crime for which he has not been charged.[65]

In *United States v. Zackery,* the Eighth Circuit considered whether a defendant could be convicted of a substantive offense under the *Pinkerton* theory of liability if the indictment did not include a charge of conspiracy itself. In upholding a *Pinkerton* conviction absent an underlying charge and conviction of conspiracy, the court erroneously broadened the doc-

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[63] *See* Brief of Defendant-Appellant, *supra* note 21, at 6 ("The 'inference' of a conspiracy is not enough to supply the required Constitutional notice to the defendant."). Zackery argued that an indictment absent a conspiracy charge "did not minimally inform him that he could be convicted under a conspiracy liability theory." 494 F.3d at 649. The court disagreed, finding the allegation that Zackery violated the firearm statute when he and another man brandished a gun in furtherance of the robbery "was enough to alert the defense to the prospect of a *Pinkerton* theory." *Id.* (quoting United States v. Edmond, 924 F.2d 261, 269 (D.C. Cir. 1991)). The court further stated, "[a]n indictment need not plead the government's theory of liability." *Id. But see id.* at 652 (Shepherd, J., dissenting) (agreeing theory of liability need not be charged in indictment but arguing foundation for theory must be).

[64] *See* Pinkerton v. United States, 328 U.S. 640, 647-48 (1946) (reiterating scope of *Pinkerton* doctrine). A *Pinkerton* conviction simply requires that a coconspirator commit a substantive offense in furtherance of the conspiracy, that the offense is within the scope of the conspiracy, and that it is reasonably foreseeable as a natural consequence of the conspiracy. *Id.* A conviction under the federal aiding and abetting statute, however, requires that a defendant "willfully caus[e] an act to be done which if directly performed by him or another would be an offense against the United States . . . " 18 U.S.C. § 2(b) (2000). Thus, in securing a conviction for firearm possession under a *Pinkerton* theory of liability, the government would only have to prove that the actions of Zackery's partner were reasonably foreseeable to him, rather than prove that Zackery willfully and intentionally assisted his partner in the commission of the crime. *See* Brief of Defendant-Appellant, *supra* note 21, at 6 ("The crucial and fundamental difference . . . [between aiding and abetting and conspiracy] is to change the mental element from 'knowing' to 'reasonably foreseeable' and eliminate the required showing of 'intent.'").

[65] United States v. Nakai, 413 F.3d 1019, 1023 (9th Cir. 2005) (holding it is error to use *Pinkerton* instruction when indictment does not allege conspiracy); *see also Zackery,* 494 F.3d at 653 (Shepherd, J., dissenting) (arguing government cannot proceed under *Pinkerton* theory absent charge of conspiracy). Justice Shepherd pointed out that the government chose, unsuccessfully, to prove that Zackery aided and abetted in the possession of a firearm rather than to charge him with conspiracy to commit bank robbery. *Id.* Thus, according to Justice Shepherd, the government is precluded from invoking a *Pinkerton* theory of liability, as the indictment "provided no notice that [the defendant's] guilt could be premised upon his being found guilty of an uncharged conspiracy." *Id.*

trine's application beyond that envisioned by the Supreme Court in *Pinkerton* and *Nye & Nissen*. In doing so, the Eighth Circuit substantially increased the scope of prosecutorial discretion and the likelihood for abuse at the expense of defendants' rights to due process.

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